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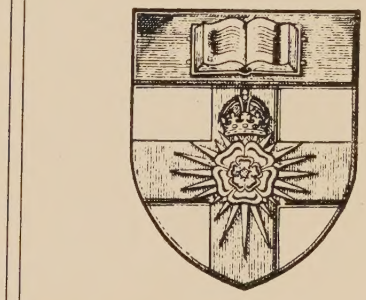

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1918-1919

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LAW REPORTS

REPRINT

1918-1919

ENGLAND: BUTTERWORTH & CO. (PUBLISHERS), LTD.
LONDON: 88 KINGSWAY, W.C.2

AFRICA: BUTTERWORTH & CO. (AFRICA) LTD.
DURBAN: 33/35 BEACH GROVE

AUSTRALIA: BUTTERWORTH & CO. (AUSTRALIA) LTD.
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NEW ZEALAND: BUTTERWORTH & CO. (NEW ZEALAND) LTD.
WELLINGTON: 49/51 BALLANCE STREET
AUCKLAND: 35 HIGH STREET

U.S.A.: BUTTERWORTH INC.
WASHINGTON, D.C.: 7235 WISCONSIN AVENUE, 14

THE ALL ENGLAND LAW REPORTS REPRINT

Being a selection from the
LAW TIMES REPORTS
1843—1935

REVISED AND ANNOTATED

1918-1919

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LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.
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[1918-19] All E.R. Rep.

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1961

Made and printed in Great Britain by
William Clowes and Sons, Limited, London and Beccles

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BANBURY *v.* BANK OF MONTREAL

D [House of Lords (Lord Finlay, L.C., Lord Atkinson, Lord Shaw, Lord Parker of Waddington and Lord Wrenbury), March 7, 8, 12, 14, 15, June 25, 1918]

[Reported [1918] A.C. 626; 87 L.J.K.B. 1158; 119 L.T. 446; 34 T.L.R. 518]

Court of Appeal—Jurisdiction—Entry of judgment for defendant appellant—No
E *sufficient evidence to sustain verdict for plaintiff—Point not taken by defendant at trial—R.S.C., Ord. 58, r. 4.*

The omission of a defendant at a trial to ask the judge to non-suit the plaintiff or direct a verdict for the defendant on the ground that there is no evidence proper and sufficient to sustain a verdict for the plaintiff does not deprive the Court of Appeal of jurisdiction, not only to set aside a verdict found for the
F plaintiff, but in addition to enter judgment for the defendant if the Court of Appeal is of opinion that they have all the facts before them and there is no reason to think that further evidence of importance can be produced at another trial, and that the evidence given at the trial is such that the presiding judge should, if asked by the defendant's counsel, have either non-suited the plaintiff or directed a verdict for the defendant. R.S.C., Ord. 58, r. 4, was designed to
G enable the Court of Appeal to do complete justice between the parties and that court should exercise this power when they have all the available evidence before them and there is no chance of a new trial bringing to light further material facts.

So **held** by Lord Atkinson, Lord Parker of Waddington and Lord Wrenbury, Lord Finlay, L.C., and Lord Shaw dissenting.

H *House of Lords—Appeal to—Consideration of point not raised in court below.*

The privilege of raising in the House of Lords points not raised in the court below is a matter of grace, not right.

Misrepresentation—Innocent misrepresentation—Statement of opinion—Application of Statute of Frauds Amendment (Lord Tenterden's) Act, 1828, s. 6.

Section 6 of the Statute of Frauds Amendment (Lord Tenterden's) Act, 1828
I (see 4 Halsbury's Statutes (2nd Edn.) 660), which provides that: "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [it] unless such representation or assurance be made in writing, signed by the party to be charged therewith", applies only to a case where a fraudulent misrepresentation is proved and not to one of innocent misrepresentation (e.g.,

in stating an opinion) giving rise to an action for negligence and/or breach of duty. The word "person" in the section includes a corporation. A

Per LORD FINLAY: Section 6 appears to me on its plain meaning to be confined to actions brought on misrepresentations as such, and not to bar redress for failure to perform any contractual or other duty. The words "by reason of" do not extend the scope of the enactment to an action based on breach of a duty to take reasonable care. B

Bank—Negligence—Advice to customer regarding investments.

Per LORD FINLAY, L.C.: There is no general obligation on a banker to advise his customer regarding investments, but if he undertakes to advise he must exercise reasonable care and skill in giving the advice and will be liable if he acts negligently, even though the advice is gratuitous. This applies to a branch manager regarding business immediately under his care as manager. C

Per LORD PARKER OF WADDINGTON: The scope of the manager's authority would be coincident with the scope of the bank's business.

Statute—Construction—Ambiguous words—Consideration of object of statute, circumstances in which passed, and abuses intended to be remedied.

Per LORD ATKINSON and LORD PARKER OF WADDINGTON: To ascertain the true effect of words of a statute which are capable of more than one meaning regard must be had to the circumstances in which they were used by the legislature, to the abuses which the statute containing them was intended to remedy, and to the object appearing from the statute which the legislature had in using the words. D

Judge—Powers—Withdrawal of issue from jury—No request to do so by defendant. E

The judge at a trial has jurisdiction to withdraw an issue from the jury although counsel for the defendant has not asked him to do so.

Per LORD SHAW: I cannot bring myself to believe that a judge presiding at a trial before a jury is bound to leave to them an issue when, in his opinion, there is not, in point of law, any evidence to justify them, as reasonable men, in finding in favour of the party on whom the burden of proof of that issue lies, simply because the opposing party or his counsel has not asked him to withdraw that issue from them. F

Notes. Distinguished: *Woods* v. *Martins Bank, Ltd.*, [1958] 3 All E.R. 166. Referred to: *Hearn* v. *Southern Rail. Co.* (1925), 41 T.L.R. 305; *Jones* v. *Great Western Rail. Co.* (1930), 47 T.L.R. 39; *Croker* v. *Croker*, [1932] All E.R.Rep. 622; *Mechanical and General Inventions Co., Ltd. and Lehwers* v. *Austin and the Austin Motor Co., Ltd.*, [1935] All E.R.Rep. 22. G

As to powers of Court of Appeal on hearing of an appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 468; as to innocent misrepresentation, see ibid., vol. 26, p. 847; as to banking business generally, see ibid., vol. 2, p. 166 et seq.; and as to the construction of statutes, see 31 HALSBURY'S LAWS (2nd Edn.), 470 et seq. For cases see DIGEST (Practice) 779, 35 DIGEST 39; 3 DIGEST (Repl.) 175 et seq., 42 DIGEST 609 et seq. H

Cases referred to:

(1) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 26 Digest (Repl.) 31, *187.*

(2) *Lyde* v. *Barnard* (1836), 1 M. & W. 101; 1 Gale, 388; Tyr. & Gr. 250; 5 L.J.Ex. 117; 150 E.R. 363; 26 Digest (Repl.) 31, *190.* I

(3) *Haslock* v. *Fergusson* (1837), 7 Ad. & El. 86; 2 Nev. & P.K.B. 269; 6 L.J.K.B. 247; 1 Jur. 689; 112 E.R. 403; 26 Digest (Repl.) 32, *192.*

(4) *Graham & Sons* v. *Huddersfield Corpn.* (1895), 12 T.L.R. 36, C.A.; Digest (Practice) 593, *2339.*

(5) *Jones* v. *Provincial Insurance Co.* (1857), 3 C.B.N.S. 65; 26 L.J.C.P. 272; 30 L.T.O.S. 102; 3 Jur.N.S. 1004; 5 W.R. 885; 140 E.R. 662; 29 Digest 357, *2878.*

(6) *MacDougall* v. *Knight* (1890), 25 Q.B.D. 1; 59 L.J.Q.B. 517; 63 L.T. 43; 54 J.P. 788; 38 W.R. 553; 6 T.L.R. 276, C.A.; Digest (Practice) 89, *754.*

(7) *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A.C. 68, 76; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500, H.L.; Digest (Practice) 596, 2369.

(8) *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A.C. 135; 69 L.J.Q.B. 409; 82 L.T. 205; 16 T.L.R. 232; 5 Com. Cas. 198, H.L.; 3 Digest (Repl.) 394, *475.*

(9) *Ryder* v. *Wombwell* (1868), L.R. 4 Exch. 32; 38 L.J.Ex. 8; 19 L.T. 491; 17 W.R. 167, Ex.Ch.; 22 Digest (Repl.) 25, *61.*

(10) *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193, 197; 47 L.J.Q.B. 303; 37 L.T. 679; 42 J.P. 420; 26 W.R. 175, H.L.; Digest (Practice) 596, *2374.*

(11) *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; 39 L.T. 365; 43 J.P. 68; 27 W.R. 191, H.L.; 22 Digest (Repl.) 23, *48.*

(12) *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342, C.A.; Digest (Practice) 784, *3472.*

(13) *Millar* v. *Toulmin* (1886), 17 Q.B.D. 603; 55 L.J.Q.B. 445, C.A.; reversed sub nom. *Toulmin* v. *Millar* (1887), 12 App. Cas. 746; 57 L.J.Q.B. 301; 58 L.T. 96, H.L.; Digest (Practice) 783, *3462.*

(14) *Allcock* v. *Hall*, [1891] 1 Q.B. 444; 60 L.J.Q.B. 416; 64 L.T. 309; 39 W.R. 443; 7 T.L.R. 260, C.A.; Digest (Practice) 599, *2398.*

(15) *Jewell* v. *Parr* (1853), 13 C.B. 909; 1 C.L.R. 454; 22 L.J.C.P. 253; 17 Jur. 975; 138 E.R. 1460; 22 Digest (Repl.) 26, *69.*

(16) *Bray* v. *Ford*, [1896] A.C. 44; 65 L.J.Q.B. 213; 73 L.T. 609; 12 T.L.R. 119, H.L.; Digest (Practice) 593, *2347.*

(17) *Metropolitan Rail. Co.* v. *Wright* (1886), 11 App. Cas. 152; 55 L.J.Q.B. 401; 54 L.T. 658; 34 W.R. 746; 2 T.L.R. 553, H.L.; Digest (Practice) 599, *2391.*

(18) *Tasmania* (*Ship Owners and Freight Owners*) v. *Smith, etc., City of Corinth* (*Owners*), *The Tasmania* (1890), 15 App. Cas. 223; 63 L.T. 1; 6 Asp.M.L.C. 517, H.L.; Digest (Practice) 780, *3441.*

(19) *Misa* v. *Currie* (1876), 1 App. Cas. 554; Digest (Practice) 779, *3435.*

(20) *Connecticut Fire Insurance Co.* v. *Kavanagh*, [1892] A.C. 473; 67 L.T. 508; 61 L.J.P.C. 50; 57 J.P. 21; 8 T.L.R. 752, P.C.; Digest (Practice) 781, *3451.*

(21) *Sutherland* v. *Thomson*, [1906] A.C. 51, H.L.

(22) *Coggs* v. *Bernard* (1703), 1 Salk. 26; 1 Com. 133; Holt, K.B. 13; 2 Ld. Raym. 909; 3 Salk. 11; 91 E.R. 25; 36 Digest (Repl.) 32, *144.*

(23) *Heydon's Case* (1584), 3 Co. Rep. 7 a; 76 E.R. 637; 42 Digest 614, *143.*

(24) *Hawkins* v. *Gathercole* (1855), 6 De G.M. & G. 1; 3 Eq. Rep. 348; 24 L.J.Ch. 332; 24 L.T.O.S. 281; 19 J.P. 115; 1 Jur.N.S. 481; 3 W.R. 194; 43 E.R. 1129, L.JJ.; 42 Digest 636, *394.*

(25) *Stradling* v. *Morgan* (1560), 1 Plowd. 201; 75 E.R. 308; 42 Digest 634, *376.*

(26) *Garnett* v. *Bradley* (1878), 3 App. Cas. 944; 48 L.J.Q.B. 186; 39 L.T. 261; 43 J.P. 20; 26 W.R. 698, H.L.; 42 Digest 770, *1968.*

(27) *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354; 52 L.J.Q.B. 505; 48 L.T. 681; 47 J.P. 405; 31 W.R. 677, H.L.; 42 Digest 638, *412.*

(28) *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents*, [1898] A.C. 571; 67 L.J.Ch. 628; 79 L.T. 195; 47 W.R. 195; 47 W.R. 152; 14 T.L.R. 527; sub nom. *Re Eastman Photographic Material Co., Ltd.'s Application*, 15 R.P.C. 476, H.L.; 42 Digest 642, *464.*

(29) *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; 52 L.J.Q.B. 737; 49 L.T. 303; 47 J.P. 821; 31 W.R. 820, H.L.; 12 Digest (Repl.) 182, *1245.*

(30) *Swann* v. *Phillips* (1838), 8 Ad. & El. 457; 3 Nev. & P.K.B. 447; 1 Will. Woll. & H. 374; 112 E.R. 912; sub nom. *Swann* v. *Phillips*, *Cherrington* v. *Phillips*, 7 L.J.Q.B. 200; sub nom. *Swarne* v. *Philips*, 2 Jur. 494; 26 Digest (Repl.) 32, *194.*

(31) *Tatton* v. *Wade* (1856), 18 C.B. 371; 4 W.R. 548; 139 E.R. 1413; sub nom.

Wade v. *Tatton*, 25 L.J.C.P. 240; 2 Jur.N.S. 491, Ex. Ch.; 26 Digest (Repl.) 33, *200.* A

(32) *Devaux* v. *Steinkeller* (1839), 6 Bing.N.C. 84; 8 Dowl. 33; 8 Scott, 202; 9 L.J.C.P. 30; 3 Jur. 1053; 133 E.R. 33; 26 Digest (Repl.) 32, *191.*

(33) *Craig* v. *Watson* (1845), 8 Beav. 427; 50 E.R. 167; 42 Digest 104, *979.*

(34) *Williams* v. *Mason* (1873), 28 L.T. 232; 37 J.P. 264; 21 W.R. 386; 26 Digest (Repl.) 33, *201.* B

(35) *Swift* v. *Jewsbury* (1874), L.R. 9 Q.B. 301; 43 L.J.Q.B. 56; 30 L.T. 31; 22 W.R. 319, Ex. Ch.; 26 Digest (Repl.) 33, *202.*

(36) *Hosegood* v. *Bull* (1876), 36 L.T. 617; 41 J.P. 88; 3 Digest (Repl.) 170, *266.*

(37) *Pearson* v. *Seligman* (1883), 48 L.T. 842; 31 W.R. 730, C.A.; 26 Digest (Repl.) 32, *193.*

(38) *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q.B.D. 512; 59 L.J.Q.B. 565; 63 L.T. 601; 39 W.R. 99; 6 T.L.R. 450; 2 Meg. 292, C.A.; 26 Digest (Repl.) 32, *196.* C

(39) *Hirst* v. *West Riding Union Banking Co., Ltd.*, [1901] 2 K.B. 560; 70 L.J.K.B. 828; 85 L.T. 3; 49 W.R. 715; 17 T.L.R. 629; 45 Sol. Jo. 614, C.A.; 26 Digest (Repl.) 33, *203.*

(40) *Clydesdale Bank, Ltd.* v. *Paton*, [1896] A.C. 381; 65 L.J.P.C. 73; 74 L.T. 738, H.L.; 3 Digest (Repl.) 171, *268.* D

Also referred to in argument:

Low v. *Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 40 W.R. 50; 7 T.L.R. 582, C.A.; 35 Digest 33, *254.*

Le Lievre v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 41 W.R. 468; 37 Sol. Jo. 267; 4 R. 274; sub nom. *Dennes* v. *Gould*, 9 T.L.R. 243, C.A.; 35 Digest 28, *187.* E

Great Central Rail. Co. v. *Hewlett*, [1916] 2 A.C. 511; 85 L.J.K.B. 1705; 115 L.T. 349; 80 J.P. 365; 32 T.L.R. 707; 60 Sol. Jo. 678; 14 L.G.R. 1015, H.L.; 26 Digest (Repl.) 474, *1621.*

De La Bere v. *Pearson, Ltd.*, [1908] 1 K.B. 280; 77 L.J.K.B. 380; 98 L.T. 71; 24 T.L.R. 120, C.A.; 12 Digest (Repl.) 60, *325.* F

Prince v. *Oriental Bank Corpn.* (1878), 3 App. Cas. 325; 47 L.J.P.C. 42; 38 L.T. 41; 26 W.R. 543, P.C.; 3 Digest (Repl.) 184, *330.*

Bank of the Republic v. *Millard*, 10 Wall. 152.

Giblin v. *McMullen* (1868), L.R. 2 P.C. 317; 5 Moo.P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 17 W.R. 445; 16 E.R. 578, P.C.; 3 Digest (Repl.) 287, *864.* G

Whitehead v. *Greetham* (1825), M'Cle. & Yo. 205; 2 Bing. 464; 10 Moore, C.P. 183; 148 E.R. 384; Ex. Ch.; 12 Digest (Repl.) 210, *1506.*

Hammock v. *White* (1862), 11 C.B.N.S. 588; 31 L.J.C.P. 129; 5 L.T. 676; 8 Jur.N.S. 796; 10 W.R. 230; 142 E.R. 926; 36 Digest (Repl.) 143, *754.*

Shiells v. *Blackburne* (1789), 1 Hy. Bl. 158; 126 E.R. 94; 12 Digest (Repl.) 250, *1943.* H

Bank of New Zealand v. *Simpson*, [1900] A.C. 182; 69 L.J.P.C. 22; 82 L.T. 102; 48 W.R. 591; 16 T.L.R. 211, P.C.; 7 Digest 334, *18.*

Decision of Court of Appeal, [1917] 1 K.B. 409, affirmed.

Appeal by the plaintiff in the action from a decision of the Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington and Scrutton, L.JJ.), reported [1917] 1 K.B. 409, setting aside a judgment and verdict in favour of the plaintiff at the trial of the action before Darling, J., and a special jury. I

The facts appear in their Lordships' opinions.

G. J. Talbot, K.C., Douglas Hogg, K.C., and *S. L. Porter* for the appellant.

P. O. Lawrence, K.C., and *Raeburn* for the respondents.

The House took time for consideration.

June 25, 1918. The following opinions were read.

LORD FINLAY, L.C.—This action is brought by the appellant against the respondents to recover damages, first, for negligent advice alleged to have been given to the appellant by the manager at Victoria (B.C.) of the respondents' branch there in reliance of which the appellant invested and lost 125,000 dollars, and, second, for applying moneys belonging to the appellant without authority in payment of a certain mortgage. The case was tried before DARLING, J., with a special jury. A number of questions were left to the jury by the learned judge, and upon their answers he gave judgment for the appellant for £25,000, the equivalent of 125,000 dollars. His judgment was set aside by the Court of Appeal, who directed that judgment should be entered for the respondent bank. The decision of the Court of Appeal proceeded upon two grounds—namely, that Lord Tenderden's Act [the Statute of Frauds Amendment Act, 1828] barred any action for negligence in advising, and that there was no evidence which could in point of law support the appellant's case on either head of claim. I shall deal with these points in the order in which I have mentioned them.

The defence under Lord Tenderden's Act was added by amendment, and, after argument before DARLING, J., was overruled by him. He was reversed by the Court of Appeal. I think DARLING, J.'s judgment on this point was right. The provision in Lord Tenderden's Act upon which the Court of Appeal relied by s. 6, which enacts that:

> "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [it], unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The action was brought on the allegations that the respondents, as bankers, advised their customers as to Canadian investments; that the appellant was a customer; that the respondent bank, through their local manager at Victoria, advised the appellant that 125,000 dollars might be prudently lent to the Westholme Lumber Co.; that the appellant, in reliance on this advice, made the loan; that the advice was negligent; and that the money was wholly lost. In my opinion, an action of this nature does not fall within s. 6 of Lord Tenterden's Act at all. The action is for the breach of the duty which it is alleged the bank had undertaken of advising the appellant, and not for misrepresentation. The mischief which s. 6 was passed to remedy is well known. As a matter of legal history it is common knowledge that that section was introduced to prevent the evasion of the provision of the Statute of Frauds requiring that a guarantee to be enforceable should be in writing. It was decided in 1789 in *Pasley* v. *Freeman* (1) that an action would lie upon a false and fraudulent representation by which the plaintiff received damage. After this decision it became a common practice, where there was no guarantee in writing, to use the words which but for the Statute of Frauds would have been alleged to amount to a guarantee as evidence of a false and fraudulent representation as to the credit of the third person. We have Lord Tenterden's own authority for the statement that s. 6 was introduced in order to check this abuse. I may refer to what was said in *Lyde* v. *Barnard* (2) by GURNEY, B., 1 M. & W. at pp. 103, 104; by ALDERSON, B., ibid. at p. 107; by PARKE, B., ibid. at pp. 114 and 115; and by LORD ABINGER, C.B., ibid. at pp. 117 and 118. All of these learned judges, speaking at a time when Lord Tenderden's Act was still recent (it had been passed in 1828, only eight years before), took the view which I have above stated as to the object of the enactment. It has never before the present decision of the Court of Appeal been treated as relating to a case in which the action was based, not upon misrepresentation, but upon breach of duty arising ex contractu or quasi ex contractu. It is, of course, always possible that the words of a statute may go beyond the object with which it was passed, and it was said in the Court of Appeal in the present case that the words

of the statute are wider than its object as explained in *Lyde* v. *Barnard* (2). I cannot agree. Section 6 appears to me upon its plain meaning to be confined to actions brought upon misrepresentations as such, and not to bar redress for failure to perform any contractual or other duty. A very great many cases have been decided upon the statute, and in not one of them has the view which commended itself to the Court of Appeal been suggested as possible. It was alleged by the respondents that the section applies to actions to charge anyone not only "upon," but also "by reason of" representations, and it was alleged that the words "by reason of" involved the extension of the scope of the enactment to such cases as the present. These words appear to me to have no such effect. The present action is not brought either "upon" or "by reason of" any misrepresentation. It is based upon the alleged existence of a duty to take reasonable care in advising the plaintiff, and is neither "upon" nor "by reason of" any misrepresentation.

The most significant feature in the long list of authorities cited to your Lordships in this case is that the section is uniformly treated as applying to actions for fraudulent misrepresentation only. *Haslock* v. *Fergusson* (3) is no exception. That was an action for money had and received. It was alleged that the defendant had made fraudulent representations as to the credit of a purchaser, who thereby obtained the goods on credit, sold them, and paid over the proceeds to the defendant, to whom she was indebted. It was claimed that the proceeds of the goods received by the defendant might be treated as money had and received to the use of the plaintiff, as he had been induced to deliver the goods by the fraud of the defendant. The case rested entirely upon the alleged fraudulent representation, and as it was not in writing it was held, and rightly held, that the action failed.

The new departure made by the decision of the Court of Appeal in the present case as to the construction of the law of s. 6 of Lord Tenterden's Act would lead to results of a somewhat startling nature. A merchant may employ, at a salary, a traveller to make inquiries about the standing and credit of possible customers, and to report to him thereon. The traveller negligently, without inquiry, or on insufficient inquiry, reports orally that a particular person may safely be trusted, and his employer acts upon his information and sustains loss thereby. In the view of the Court of Appeal the employer would have no remedy because the report falls within the terms of s. 6 of Lord Tenterden's Act. The same thing might apply in the case of an action against a solicitor for negligence in the discharge of his duty as such. Such a construction of the Act is a complete novelty. During the ninety years which have elapsed since it was passed it has always been applied only to actions upon representations as such, not to actions in which the gist of the action is breach of duty. This action appears to me not to fall within s. 6 at all, and, in my opinion, the judgment of the Court of Appeal on this point must be reversed.

[His Lordship referred to the decision of the Court of Appeal that judgment should be entered for the respondent bank on the ground that there was no evidence in support of the appellant's case against the bank, and said that, in his opinion, the case was properly left to the jury, and the decision of the Court of Appeal entering judgment for the respondents was erroneous.]

There is, however, another question of great importance with reference to the conduct of cases tried with juries, and that is whether this point was open to the respondents on appeal, having regard to the conduct of the trial. The only point of law taken at the trial before Darling, J., was that the action was barred by Lord Tenterden's Act. It was not submitted that there was no evidence in point of law of Mr. Galletly's authority, or of the advice having been given in the course of his employment, and Darling, J., pointedly called attention to this in his summing up. Indeed, Sir John Simon, who appeared for the bank at the trial, in the course of a discussion at the end of the plaintiff's case on July 20, 1916, said before Darling, J.: "If your Lordship will kindly take the pleadings as they now stand—in the first place I ask your Lordship to observe that the statement of claim is framed in two ways—so far as the first way is concerned, alleging that there has been reliance upon the assurance of Mr. Galletly as representing the bank as to

A the credit and standing of this Westholme Lumber Co. That, no doubt, is a plea which, as it stands on the evidence, subject to one point, may have to go to the jury." SIR JOHN SIMON then went on to make a submission as to the Leisor mortgage, adding that his submission had nothing to do with the claim for negligence and breach of duty while acting as bankers and advisers for the plaintiff, and a further submission as to Lord Tenterden's Act, which he claimed to be fatal to B the case made for negligence in advising. The one point on which he made reservation, while admitting that the claim for negligence in advising might have to go to the jury, is obviously the point as to Lord Tenterden's Act, so that not merely was there an entire omission to raise the point now sought to be made, but there was an admission that, subject to the question of Lord Tenterden's Act, the question of negligence might have to go to the jury. Your Lordships have to C deal not merely with the failure to raise the point now made, but with the express admission to which I have just called attention.

But, in truth, the conduct of a case speaks as clearly as words. The question is not one of any technicality, but of consistency between the line taken at the trial and that in the Court of Appeal. The position of the respondents upon this point seems to be as hopeless as that of a defendant who at a trial, in the belief it might D help him to get a verdict, stated that he did not raise any objection in point of law to the sufficiency of the evidence and wished to take the opinion of the jury and then tried to argue in the Court of Appeal that he should have judgment as the evidence was not sufficient in law. The course of practice has always been regarded as well settled that points of law alleged to entitle the party raising them to verdict or judgment must be made at the trial, and that if they are not then made they cannot E be raised afterwards. This practice is illustrated by what took place on the first trial of this case before the Lord Chief Justice, when the counsel for the bank submitted that there was no evidence of negligence, and this was reserved for argument, and by the observation of the Lord Chief Justice which I have above quoted, that what had taken place put the bank in a position to take the opinion of the Court of Appeal upon the point. The rule was applied in *Graham & Sons* v. F *Huddersfield Corpn.* (4). That was a case in which an action had been brought by a contractor against the corporation to recover payment for sewerage works. The action was tried before MATHEW, J., and a special jury. The plaintiff had not received any certificate under the contract, but the jury gave a verdict for the plaintiff on the issue of an alleged parol contract with the health committee on behalf of the corporation. After the verdict counsel for the corporation submitted G to MATHEW, J., that judgment should be entered for them on the grounds that the contract was not under seal, and, therefore, not binding on the corporation, and that under s. 200 of the Public Health Act, 1875, the committee had no power to bind the corporation by any such contract. MATHEW, J., refused the application on the ground that the point had not been taken before the verdict. The corporation appealed to the Court of Appeal, and the case was heard there by LORD ESHER, H M.R., LOPES and KAY, L.JJ. LORD ESHER said (12 T.L.R. at p. 37):

> ". . . that the objection that the defendants had taken their point too late must prevail. Whether they could have waived the point before they came into court it was not necessary to determine. But they had waived the point in court during the trial by allowing the case to proceed till the verdict on the I basis that the only issue was whether there had been a promise in fact to pay for this work. In his opinion it was not open to them to take the point now, and the application must be dismissed."

LOPES and KAYE, L.JJ., concurred on the ground that the point had been waived and that it would be too late to raise it after verdict. LORD ESHER and MATHEW, J., were judges of the highest authority on such matters, and the decision is, in my opinion, clearly right and in conformity with settled practice. There may be cases in which, by consent of counsel on both sides, express or implied, a different practice may be pursued, especially nowadays in the Commercial Court, but, apart

from consent, the law is clear. I may add that in the present case it is plain that the course taken by counsel for the Bank of Montreal was taken deliberately as being in their opinion the most politic. I may mention also in this connection *Jones* v. *Provincial Insurance Co.* (5), where the court refused to allow to be argued points of law which had not been taken at the trial.

The following cases, though not turning upon the same point, also illustrate the principle which lies behind the rule of practice now in question. In *MacDougall* v. *Knight* (6) LORD HALSBURY, L.C., after setting out what HUDDLESTON, B., at the trial had stated as to the questions which he proposed to leave to the jury, said (14 App. Cas. at p. 199):

> "Now I think it was the duty of those who are suggesting that other questions ought to have been asked and other issues raised to have intervened at this point, and to have requested HUDDLESTON, B., definitely and distinctly to put the questions that they now insist ought to have been submitted to the jury. But nothing of the sort was done. The parties took their chance of what the jury would do, and I think nothing could be more mischievous than to allow litigants to raise new questions when, under such circumstances, the jury have decided against them. If such a course were permitted no end could possibly be found for litigation."

In *Nevill* v. *Fine Art and General Insurance Co.* (7) LORD HALSBURY used similar language with regard to complaints of non-direction by the judge or his not leaving a question to the jury when the point had not been raised. *Seaton* v. *Burnand* (8) may also be referred to upon this point. The respondents cited cases in which it has been laid down that it is the duty of the judge to rule if there is no evidence. These cases have no bearing upon the present question. In *Ryder* v. *Wombwell* (9), in *Metropolitan Rail. Co.* v. *Jackson* (10), and in *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (11), which were the cases relied on by the respondents, the objection was raised at the trial as appears on the face of the reports. The decisions relate to the duty of the judge when the point is taken as it had been in these cases, and do not touch the question whether it can be raised for the first time when the trial is over.

It is, of course, within the power of the presiding judge at the trial, if it occurs to him that there is a point of law which is being overlooked by the counsel in the case, to call their attention to it, and if after argument he thinks that it concludes the case, so to decide. This is a power which should be exercised sparingly, as the judge would no doubt think it right to abstain from interfering with the conduct of the case by experienced counsel in the manner which they considered most in the interests of their clients. It would be exercised when it is apparent that owing to inexperience or some accident a point material to be considered has escaped the notice of counsel. When a point had been so raised on the initiation of the judge at the trial it would, of course, be open on appeal. At the trial further evidence may be called to remedy the supposed defect. It is a novel proposition that when the trial is over a court of appeal may be invited by the counsel on one side or the other to enter judgment on a point which they deliberately did not put forward at the trial. It was suggested by the respondents that in such a case it would be the duty of the appellate court to ascertain whether the defect might have been cured by further evidence and only in this case to refuse to entertain the objection. This would be most inconvenient and, indeed, impracticable. The introduction of such a practice might encourage unscrupulous litigants to abstain from raising a point at the trial because they thought this would improve their chances with the jury, and then to bring it forward in the Court of Appeal in the hope that the other side might fail in satisfying the Court of Appeal that evidence might have been available to meet the point if it had been taken at the trial. It is at the trial that such points of evidence should be dealt with. It is then that further evidence to remedy the suggested flaw may be tendered if it exists, and an adjournment may be obtained for the purpose. That is

the time to test the existence of further evidence. For this reason the law of practice has provided that such a point cannot be raised on a motion for a new trial if it had not been taken, and this applies a fortiori to an attempt to get judgment entered. The rule is intended to secure the fair conduct of jury trials. Any relaxation, such as the respondents contended for, would throw upon the Court of Appeal the duty of entering upon a very difficult and in many cases impossible inquiry as to what evidence there might have been. I should add that it is, in my opinion, far from clear that further evidence as to the practice of bankers as to advising could not have been obtained.

This point is not, in my opinion, affected by the rules under the Judicature Act. Several rules have been referred to on behalf of the respondents. Order 39, r. 6, provides that a new trial shall not be granted because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned. This has no bearing on the point now under discussion. It is the duty of the judge to put the proper questions to the jury, and this rule merely provides that if there was an omission to do so on a point to which his attention had not been called a new trial should not be granted for that reason unless there had been thereby occasioned some substantial wrong or miscarriage. Order 40, r. 10, was also cited, but it also appears to me to be irrelevant. It was, however, contended that Ord. 58, r. 4, carried the matter further. Among other provisions that rule contains the following:

> "The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require."

The effect of this part of the rule is simply that when the Court of Appeal is dealing with an application for a new trial, it may, instead of ordering a new trial, direct judgment to be entered if, in the opinion of the court, there is no evidence in support of the case of the plaintiff or defendant as the case may be. This rule does not touch the question of the effect of omission to take the point at the trial. It merely provides that, to save expense, instead of granting a new trial, if it is clear that the judge upon the new trial would be bound in point of law to enter judgment for the plaintiff or defendant, as the case may be, the Court of Appeal may do so itself, but there are no words to show that the necessity of having raised this point at the trial is dispensed with. The respondents failed to procure any authority for this proposition. In *Quilter* v. *Mapleson* (12), where the action was to enforce forfeiture of a lease for breach of a covenant, the appeal against judgment for the plaintiff did not come on for hearing until s. 14 of the Conveyancing Act, 1881, providing for relief in such cases, had come into operation. The Court of Appeal held that they could give relief under it, in virtue of Ord. 58, r. 4. The point could not have been taken at the trial as the statute had not then come into operation. This case obviously does not affect the question whether a point which was open at the trial can be taken for the first time in the Court of Appeal under this rule. In *Millar* v. *Toulmin* (13) it does not appear from the report that there had been any omission to take the point at the trial. The observations made in the Court of Appeal in that case upon Ord 58, r. 4, therefore, are not relevant to the present case, and their authority has been shaken by what was said by LORD HALSBURY, L.C., in the House of Lords when the judgment of the Court of Appeal was reversed. In *Allcock* v. *Hall* (14) Ord. 58, r. 4, was also considered, and under it judgment was entered for the defendant. Here, again, it does not appear that there had been an omission to take the point at the trial, and the judgment does not deal with the effect of such a failure.

It must be remembered that in a jury case the verdict was in early days final, subject only to the ancient writ of attaint against the jury which has been obsolete for many centuries (see BLACKSTONE'S COMMENTARIES, Bk. 3, chap. 25), while matters appearing on the record might form the subject of a motion to arrest

judgment or to enter judgment non obstante veredicto. In the seventeenth century the practice of granting new trials came into vogue. But no one was allowed to apply for a new trial on a point of law unless he had taken it at the trial. An application for a new trial on the ground that the verdict was against the weight of the evidence was, of course, a different matter altogether, and on the hearing of a rule for a new trial upon this ground it is now open to the Court of Appeal to enter judgment on the ground that there was no evidence, always subject to the consideration that the point must have been taken at the trial, as there is nothing in the rule to supersede the existing law upon the subject. I should add that there is a vital distinction between the cases in which judgment may be entered on the ground that there was no evidence and those in which a new trial may be ordered on the ground that the verdict was against the weight of evidence. Judgment can be entered only if there was in point of law no evidence fit to be left to the jury. If there was any evidence, however plain it may appear on the probabilities of the case or the balance of evidence that the jury went wrong, a new trial only can be ordered. This distinction is not impaired in the slightest degree by the rule, now well established, that a verdict will not be disturbed unless it be one which the jury could not reasonably find. Judgment can never be entered on the ground that the verdict was against evidence. The respondents urged that this point was not taken by the plaintiff in the Court of Appeal when the bank asked for a new trial, or for judgment on points of law taken at the trial. The shorthand notes of the argument in the Court of Appeal show that while no preliminary objection was made by the plaintiff's counsel, yet when he came to deal with each ground of appeal he in terms called the attention of the court to the fact that the point had not been taken at the trial. It is true that he did not expressly say that for that reason he objected to the court's going into the question, and the counsel for the bank suggested that he referred to the fact merely as detracting from the weight to be attached to the argument. But I think that when on each such ground the plaintiff pointedly drew the attention of the court to the fact that the matter had not been raised at the trial, it threw upon the court the duty of considering whether the point was open to the bank on appeal, and it is impossible to say that the conduct of the plaintiff's counsel in the Court of Appeal amounted to a waiver of the objection which we are now considering.

The Canadian Bank Act, 1906 (Revised Statutes of Canada, c. 29), was referred to by the respondents. I do not think that this Act contains anything which for the present purpose is material. The Master of the Rolls said in the Court of Appeal that the bank, according to the law of Canada, cannot advise as to investment, but there is nothing in the Act to support this view. Section 76 (d) empowers the bank to "engage and carry on business generally as appertains to the business of banking." This leaves open the question whether advising upon certain occasions may form part of the business of banking. A number of sections in the Act were read to your Lordships, among others ss. 79, 80, 89, and 146, but none of them has any real bearing upon the case now before your Lordships.

[His Lordship dealt with a point which does not call for report and continued:] There remains the question of damages, and on this point I think that the judgment for £25,000 was not warranted by the finding of the jury. They found damages for "£25,000 and all securities to be returned to the defendant bank." The jury had no power to give a verdict of this kind. The appellant held the securities, and the jury ought to have estimated their value and allowed it, if any, in reduction of damages. Unfortunately, the learned judge had been compelled to leave before the jury returned, and, indeed, there was in fact no verdict given in court, as for this the presence of the judge is essential, and there was no opportunity for clearing up the meaning of this finding by further questions to be put to the jury or of affording assistance to them by further directions from the Bench. It is now suggested by the appellant that all that the finding meant was that the securities were worthless, and that the finding did not mean to award that the securities should be given up to the bank, the whole £25,000 being given

as damages. But as the finding stands, I do not think it can be said that this is its meaning. I think also that there ought to have been a fuller summing-up as to the law on the question of damages, such as was given by the Lord Chief Justice on the first trial. The result is that there must be a new trial on the question of damages in the absence of an agreement between the parties. I think that in this case the damages might be ascertained without re-trying the case as a whole. The damages are in respect of the negligent advice to advance the 125,000 dollars, not in respect of a number of representations, in which case it would have been necessary that it should be ascertained in respect of which of the representations the damages were to be given. Assuming a verdict for the plaintiff, the damages would be the money advanced under the negligent advice, subject to a deduction of the value of the securities held by the plaintiff, and the only inquiry necessary would be as to the value of these securities as to deduction. In my opinion, the appeal ought to succeed subject to a new trial or inquiry as to the amount of the damages. It appears to me that the order of the Court of Appeal entering judgment for the defendant was erroneous on the law and the merits, and that it proceeded upon grounds not open upon the appeal. If it stands it may have an unfortunate effect upon the conduct of jury trials.

LORD ATKINSON.—I regret I am unable to concur in the judgment which has just been delivered by the Lord Chancellor. In this case the Court of Appeal by the order appealed from has directed that the judgment entered for the appellant, the plaintiff in the action out of which this appeal has arisen, should be set aside and judgment be entered for the defendants in the action, the respondents in this appeal. The learned lords justices based their judgment on two grounds: (i) that there was no evidence before the jury proper for their consideration upon which they, as reasonable men, could find that the respondents had authorised their local manager at Victoria, one Galletly, to advise the appellant on the subject of his investments in Canada, or that the respondents owed any duty to the appellant to advise him carefully or at all, on that subject; and (ii) that Lord Tenterden's Act applied to innocent representation, such as Galletly was alleged to have made, as to the nature of the investment upon which the plaintiff did, in fact, invest his money.

I agree with the Court of Appeal as to the first ground on which they based their judgment. I cannot agree with them as to the second. On the contrary, I think, for reasons I shall give presently, that Lord Tenterden's Act only applies to fraudulent representations, not to an innocent representation such as Galletly is alleged to have made.

It is admitted that at the trial before DARLING, J., out of which this appeal alone arises, counsel on behalf of respondents did not ask the presiding judge to direct a verdict for the defendants, the bank, on any ground whatever; and what occurred at a previous abortive trial this appeal has nothing to do with. A preliminary point has been raised on behalf of the appellant before your Lordships, and pressed most persistently, that by reason of this omission the Court of Appeal, notwithstanding the provisions of Ord. 58, r. 4, of the Rules and Orders of the Supreme Court of 1883, had no jurisdiction to make the order which has in fact been made by it. The contention amounted to this, that the making of this requisition to the judge presiding at the trial is a condition precedent which must be performed before judgment can be given for a defendant by the Court of Appeal, however absolute and complete may be the absence of all evidence to sustain the verdict found by a jury in a plaintiff's favour. The Court of Appeal have not dealt with this preliminary point, apparently because, though mooted in argument, it was not really pressed before them. It is, however, a very important point, and should, I think, be ruled upon by this House. It is, therefore, necessary, in my view, to consider what is the duty of a judge presiding at a trial before a jury in cases in which no evidence has been given upon which, in his opinion, they could as reasonable men find a verdict for the plaintiff in an action. WILLES, J.,

and LORDS CAIRNS, PENZANCE, COLERIDGE, and BLACKBURN, among others, have, I think, each stated in no ambiguous language what that duty is. In *Ryder* v. *Wombwell* (9), which was an action brought against a minor for the price of goods alleged to be necessaries supplied to him, WILLES, J., in delivering the judgment of the Court of Exchequer Chamber composed of himself, BYLES, BLACKBURN, MONTAGUE SMITH, and LUSH, JJ., is reported to have said (L.R. 4 Exch. at p. 38) that

> "Such a question [i.e., whether the goods were necessaries or not] is one of mixed law and fact. In so far as it is a question of fact, it must be determined by the jury, subject, no doubt, to the control of the court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law—namely, whether there is any evidence on which a jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case, but it is now settled that the question for the judge (subject, of course, to review) is, as stated by MAULE, J., in *Jewell* v. *Parr* (15) (19 C.B. at p. 916), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established."

It is quite true that in that case the judge at the trial had, it is stated, refused to nonsuit, so that he apparently had been asked to do so, and had reserved to the defendant liberty to move to enter a non-suit if the court should be of opinion that there was no evidence to go before the jury that either of the articles supplied was a necessary. I do not find, however, that this most learned, painstaking, and accurate judge, in laying down the general principle, suggests in any way that it should be qualified by a proviso to the effect that a verdict is not to be directed against the person on whom the burden of proof lies, unless his opponent by himself or his appointed advocate asks at the trial that it should be so directed.

In *Metropolitan Rail. Co.* v. *Jackson* (10), in which the action was brought against the defendant company for the injury caused to the plaintiff by the alleged negligent act of one of the company's servants in closing the door of the carriage in which the plaintiff was travelling at such a time and in such a manner as to injure the plaintiff's thumb, it is stated (3 App. Cas. at p. 194) that the learned judge at the trial ruled that there was evidence of negligence to go to the jury. I do not know that it can be inferred from this statement that he was asked to rule the contrary. The jury found a verdict for the plaintiff. A rule was obtained to set aside this verdict and enter a non-suit or a verdict for the defendants, on the ground that there was no evidence of negligence proper to be submitted to the jury. There had been a great division of judicial opinion in the courts below, and LORD CAIRNS is reported to have expressed himself thus. He said (ibid. at p. 197):

> "The case as to negligence having been left to the jury, the jury found a verdict for the respondent with £50 damages. There was not at your Lordships' Bar any serious controversy as to the principles applicable to a case of this description. The judge has a certain duty to discharge and the jury have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether from the facts submitted to them negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case

A from the jury upon the ground that in his opinion negligence ought not to be inferred, and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of fact whatever."

B But this is precisely what would happen, if the appellant's contention be sound, in every case in which the presiding judge ought to have non-suited the plaintiff or directed a verdict for the defendant if asked so to do, but abstained from doing it because he was not asked. LORD BLACKBURN quotes with approval the passage I have quoted from the judgment of WILLES, J., in *Ryder* v. *Wombwell* (9), and concurs with LORD CAIRNS.

C In *Dublin, Wicklow, and Wexford Rail.* v. *Slattery* (11) an action was brought by a widow whose husband had been killed by the alleged negligence and mismanagement by the appellants of their railway. At the close of the plaintiff's case the counsel for the railway company submitted to the presiding judge (PALLAS, C.B.) that there was no evidence of negligence on the part of the defendants, the company, to be left to the jury, and that even on the plaintiff's evidence there was contributory negligence shown, and that the deceased was a trespasser, and asked D the Chief Baron to non-suit the plaintiff, which the learned judge refused to do. LORD HATHERLEY said (3 App. Cas. at p. 1168):

"I will, in the first place, state my concurrence with BARRY, J.'s opinion in the court below, viz., 'When once a plaintiff has adduced such evidence as, if uncontradicted, would justify and sustain a verdict, no amount of contra-
E dictory evidence will justify the withdrawal of the case from the jury.' But I also concur in the opinion expressed by PALLAS, C.B., that 'when there is proved, as part of the plaintiff's case, or proved in the defendant's case and admitted by the plaintiff, an act of the plaintiff which per se amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the
F jury.' "

It is to be observed that the proposition is not that the defendant is entitled to have the case withdrawn from the jury if he should ask that to be done. There is no such qualification. LORD PENZANCE says (ibid. at p. 1175):

"There are no doubt cases in which there is either no reasonable evidence of the want of due and reasonable care in the defendant's conduct, or if such
G want exists, of its connection with the accident in the relation of cause and effect. And in such cases it is the recognised and unquestioned duty of the judge to withdraw the case from the jury upon the simple ground that there is no evidence in support of the issue fit for them to take into consideration."

LORD COLERIDGE says (ibid. at p. 1194):

H "Now it is admitted that in order to justify a case being submitted to a jury there must be evidence of negligence on the part of the defendants, and also that the negligence in fact caused the injury complained of. . . . It is also clear that if the undisputed evidence or the admissions in the case, negative the latter proposition, the judge must withdraw the case from the jury, because the plaintiff has not satisfied the onus which lies on him."

I LORD BLACKBURN, after pointing out that the jury are not bound to believe the whole or any part of a witness's evidence, says (ibid. at p. 1201):

"And (according to what the state of the evidence is) he [i.e., the judge] should either direct the jurors that if they believe the witnesses, there is reasonable evidence on which they may properly find facts and draw inferences, such that they may find for the party against whom the onus lies; or that, even though they believe the whole of what is sworn to, there is no evidence on which they can properly find the question for that party on whom the onus of proof lies, and, therefore, to direct them to find against that party. . . . To

justify a direction to find a verdict the onus must be one way, and no reasonable evidence to rebut it." A

Though a requisition was apparently made in this case, as I have already pointed out, the rule laid down is stated in general terms in each of these judgments, and no reference is made to the necessity of a requisition to impose upon the presiding judge the duty referred to. It is, no doubt, true that in practice a judge does B not generally withdraw a question from the jury unless asked to do so. There is, I think, an obvious reason for that. It is this: if it should turn out that he was wrong in so withdrawing it he might inflict great cost upon the litigant in whose favour he withdraws it, though the latter might possibly have got from the jury a finding in his favour. But the question whether he has jurisdiction to withdraw the issue from the jury, though not asked to do so, is quite another matter, and C the above cited authorities are, I think, much more in favour of the existence of such a jurisdiction than of its non-existence. I confess I cannot bring myself to believe that a judge presiding at a trial before a jury is bound to leave to them an issue when, in his opinion, there is not, in point of law, any evidence to justify them, as reasonable men, in finding in favour of the party upon whom the burden of proof of that issue lies, simply because the opposing party or his counsel has D not asked him to withdraw that issue from them. The omission to make such a requisition cannot, in my view, relieve the judge from ruling upon the question of law, which by reason of the absence of such evidence is by the conduct of the case raised for his decision. In the abstract, therefore, I incline to the opinion that a requisition to a judge to enter a non-suit or direct a verdict for a defendant is not a condition precedent which must be fulfilled in order to entitle him to do E either. But then comes in the question of the alleged binding effect of the course of the trial.

The well-known passage from Lord Halsbury's judgment in *Macdougall* v. *Knight* (6) (14 App. Cas. at p. 199) to the effect that when parties take their chance of what a jury will do, nothing could be more mischievous than to allow litigants to raise new questions when under such circumstances the jury have decided F against them, was much relied upon for the appellant, but those observations, the wisdom and justice of which cannot be questioned, were made in reference to a contention urged on behalf of a litigant that questions other than those put to the jury by the judge at the trial should have been put, though those appearing for that litigant never asked to have them put. That is entirely different from the present case. There the judge could at once have remedied the defect, if it was G a defect, if his attention had been called to it. Here the judge could not remedy the defect, the absence of all evidence upon which the jury could properly find for the plaintiff. *Seaton* v. *Burnand* (8) is to the same effect. Cases such as these, or cases where what is complained of is misdirection or non-direction by the judge presiding at a trial, do not, in my view, touch cases such as the present, for the simple reason that in them the objection, if made, could at once be met and the H alleged defect cured, while in the present case, all the evidence possibly procurable having been given, the defect could not be cured. It seems hardly just or right that a verdict which never should have been found should be allowed to stand simply because the judge was not asked to prevent its being found.

I now turn to Ord. 58 and rr. 1 and 4. The first rule provides that an appeal shall be a re-hearing; the second that the Court of Appeal shall, on the hearing I of appeals, have power to receive further evidence on question of fact, but that upon appeals from a judgment after trial or hearing of any cause upon the merits such evidence is to be admitted by leave on special grounds. The rule further provides that the Court of Appeal shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made. But the rule does not stop there. It goes on to provide that that court shall in addition have power to make "such further or other order as the case may require." These later words must have some meaning assigned to them. They evidently

extend to the making of an order which the court appealed from could not have made. In the case of trials by juries the court was, at the time these rules and orders were made, the Divisional Court. It is now, under Finlay's Act [Supreme Court of Judicature Act, 1890], the court of nisi prius in which the trial takes place. The powers conferred upon a Divisional Court are, by these orders, much more restricted than those conferred upon the Court of Appeal. By Ord. 40, r. 10, it is provided that on motions for judgment or upon application for a new trial, the Divisional Court can draw inference of fact, but only such inferences of fact as are not inconsistent with the findings of the jury. In addition it is provided by Ord. 39, r. 6, as amended in 1913, that a new trial may be granted by the Court of Appeal on the ground of misdirection or the improper admission or rejection of evidence, or because the verdict of a jury was not taken upon a question which the judge at the trial was not asked to leave to them if that court should be of opinion that some substantial wrong or miscarriage has been thereby occasioned. The question as to what amounts to "substantial wrong or miscarriage" within this rule has been considered in *Bray* v. *Ford* (16) and several other cases, but, at all events, the rule comes in conflict to some extent with the doctrine that parties are absolutely bound by the course of the trial, since it provides that in the cases mentioned a new trial may be granted because the verdict of the jury was not taken upon a question which the judge was not asked to leave to them.

The construction and reach of Ord. 58, r. 4, has been considered in several cases. It is necessary to examine a few of them in detail. In *Quilter* v. *Mapleson* (12), which was an action brought by virtue of a condition of re-entry on breach of a covenant to insure contained in a lease, the defendant claimed relief under s. 4 of the Law of Property Amendment Act, 1859 [repealed by Conveyancing Act, 1881]. The plaintiff recovered judgment on July 14, 1881. On Aug. 4, 1881, the defendant appealed. A stay of execution was granted and renewed so that the plaintiff never recovered possession. On Jan. 1, 1882, the Conveyancing Act, 1881, came into operation, after which the appeal was heard. The Court of Appeal held, first, that this last-named statute was retrospective in its operation, and, second, that, even if the order of the court below was right as the law stood at the time it was made, the Court of Appeal was, by the words "to make such further or other order as the case may require" empowered to grant to tenant the relief to which he was entitled according to the law as it stood on the hearing of the appeal. Jessel, M.R., Lindley and Bowen, L.JJ., delivered judgments which appear to me to be absolutely convincing to the effect that the Ord. 58, r. 4, was designed to enable the Court of Appeal to do complete justice between the parties litigant, even though it should involve the making of an order which neither the judge at the trial nor the Divisional Court had jurisdiction or power to make.

In *Millar* v. *Toulmin* (13) the jury found a verdict for the defendant. The Divisional Court made an order for a new trial on the ground of misdirection and of the verdict being against the weight of evidence. The Court of Appeal, composed of Lord Esher, M.R., Bowen, L.J., and Fry, L.J., held that as, in their opinion, they had all the facts before them, they had power, instead of merely making an order for a new trial, to order that judgment should be entered for the plaintiff, though no requisition had been made by the plaintiff's counsel at the end of the defendant's case to the judge at the trial to direct a verdict for the plaintiff. Lord Esher, in giving judgment, said (17 Q.B.D. at p. 605):

> "In the present case I am of opinion that we have all the facts before us, and that no further evidence could be given which could alter the result, and therefore, instead of directing a new trial, we ought to enter judgment for the plaintiff. If there is any question as to amount it can be settled by the master."

Bowen, L.J., said (ibid.):

> "I am of the same opinion. I think that the verdict was against the weight of evidence and must be set aside, and I think that we have all the facts

before us. I agree with the Master of the Rolls that under Ord. 58, r. 4, the court has power to relieve against all miscarriages of justice, and can direct judgment to be entered if satisfied that no jury could properly come to a different conclusion." A

FRY, L.J., said (ibid.): "I also think the verdict was against the weight of evidence." The question then arises, what is our duty? Have we power not only to set aside the verdict, but also to enter judgment the other way? The difference between Ord. 40, r. 10, and Ord. 58, r. 4, is very great, and the latter rule, which applies to the Court of Appeal, gives larger powers than the former. The reason appears to be that the Court of Appeal has power to hear fresh evidence, and, therefore, ought not to be "bound by the findings of the jury in drawing inferences of fact." As all these learned judges thought the verdict was against the weight of evidence and should be set aside, what conclusion must they have come to with reference to that evidence? They must, according to the decision in *Metropolitan Rail. Co.* v. *Wright* (17), have come to the conclusion that "the verdict was one which a jury, viewing the whole of the evidence, reasonably could not properly find." What conclusion should a judge come to before he can direct a verdict to be entered for a defendant? Why that there is no evidence to go before the jury upon which they could as reasonable men find a verdict for the plaintiff. No doubt in cases where the verdict is set aside as against the weight of evidence there will be evidence on both sides, but now that the scintilla doctrine has been abandoned the tasks of the court in the two classes of cases closely approach each other. It is, no doubt, true that when *Millar* v. *Toulmin* (13) came on appeal to this House it was held that there was no misdirection by the learned judge at the trial, and that the verdict of the jury was not against the weight of evidence, and judgment of the Court of Appeal was reversed. LORD HALSBURY alone of the noble Lords who heard the appeal expressed doubt whether Ord. 58, r. 4, conferred upon the Court of Appeal jurisdiction to make the order they had made, finding, as he said, in effect a verdict for themselves, and actually assessing damages. The other noble Lords abstained from expressing any opinion upon this point. It is obvious that LORD HALSBURY'S criticisms are inapplicable to a case where a verdict might properly have been directed for the defendant had such a direction been asked for, and the only defect was that it was not asked for. B C D E F

In *Allcock* v. *Hall* (14) the jurisdiction of the Court of Appeal under Ord. 58, r. 4, again came up for consideration. The action was tried before HAWKINS, J., and a special jury. The evidence was conflicting. The jury found a special verdict in favour of the plaintiff on the main issue between the parties. The learned judge reserved judgment. On an application for a new trial on the ground that the verdict was against the weight of evidence, the Court of Appeal, applying the principle laid down in *Metropolitan Rail. Co.* v. *Wright* (17), set aside the verdict, holding that it was utterly irreconcilable with the evidence in the case when reasonably considered. They also decided that when applications under the Supreme Court of Judicature Act, 1890, though not technically appeals, come before the Court of Appeal, that court could exercise all the power possessed by it under Ord. 58, r. 4, and, following *Millar* v. *Toulmin* (13), and being satisfied that nothing would be gained by ordering a new trial, they entered judgment for the defendant. LINDLEY, L.J., delivered the leading judgment, and, after the other judgments had been delivered, made this important statement ([1891] 1 Q.B. at p. 449): G H I

"I wish to add that we have consulted our colleagues in the other branch of the court, who have carefully considered the point and agree on our decision."

This case must, therefore, be regarded as one of very high authority indeed. In the face of this decision it is, in my view, now impossible to hold that, if the Court of Appeal should, in any given case, be of opinion, first, that they have all the facts before them, and that there is no reason to think that further evidence of importance could be produced at another trial, and, second, should be also of

A opinion that the evidence given at the trial was such that the presiding judge should, if asked by the defendant's counsel, have either non-suited the plaintiff or directed a verdict for the defendant, that that court has no power under Ord. 58, r. 4, not only to set aside a verdict found for the plaintiff, but in addition enter judgment for the defendant. If the court can do this, as these cases decide it can, where there is conflicting evidence in a case, but an overwhelming balance of it on B one side, it would be strange indeed if the same court should not have power to do it where there is no evidence proper and sufficient to sustain a verdict found for a plaintiff simply because the counsel for the defendant at the trial omitted to ask that this should be done. To hold so would appear to me to make this doctrine, that parties are to be bound by the course of the trial, an instrument of great injustice.

C In *The Tasmania* (18) the court below held that the ship the *City of Corinth* with which the *Tasmania* collided was alone to blame. The Court of Appeal took the same view. In the latter court the point was for the first time raised that the evidence showed that the *Tasmania* was also to blame. Lord Herschell deals with the point thus (15 App. Cas. at p. 225):

D

> "I think that a point such as this not taken at the trial and presented to the Court of Appeal for the first time ought to be most jealously scrutinised. The conduct of a cause at the trial is governed, and the questions asked of the witnesses are directed to the point there suggested. . . . It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied E beyond doubt, first, that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial, and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been offered them when in the witness-box."

The rules here laid down, admirable and just in a case to which they apply, have F no application whatever to a case like the present, where all the defendants ask for is to get the opportunity to show that the verdict found against them has no proper evidence to support it, and object to be shut out from doing this by the omission of a technical formality. In my opinion, therefore, the omission of the defendants' counsel at the trial to address to the judge the requisition I have mentioned did not, having regard to the provisions of Ord. 58, r. 4, deprive the Court G of Appeal of jurisdiction to make the order they have made based upon the first ground.

The privilege of raising in your Lordships' House points not raised in the court below is a matter of grace, not of right. *Misa* v. *Currie* (19), *Connecticut Fire Insurance Co.* v. *Kavanagh* (20), and *Sutherland* v. *Thomson* (21), lay down the principles which should guide the House in the exercise of its discretion in this H matter. In the present case I think the appellant was properly allowed to raise this point, even on the assumption that it was not raised in the Court of Appeal.

[His Lordship then considered the substantive case, reviewing the evidence at length, and continued:] I am, therefore, of opinion that there was not before the jury any evidence proper for their consideration upon which they could as reasonable men find, as they have found, (i) that Galletly was clothed with I authority to give, on behalf of the respondents, advice to the appellant as to his investments; or (ii) that the respondents owed any duty to the appellant to advise him upon the matter of his investment carefully or at all. Having come to that conclusion it is not necessary for me to decide whether, if such a duty as is last mentioned had existed, there was any evidence before the jury to sustain a finding that the bank were, through their agent, guilty of a breach of it amounting to gross negligence, but the inclination of my opinion is that there was no such evidence before them. I have already expressed my view as to the other issues raised in the pleadings, and I am of opinion, on the whole case, that if the learned

judge had at the trial been asked, on the grounds I have mentioned, to direct a verdict for the defendant, the bank, he should have done so. Counsel for the respondents contended that the principle of *Coggs* v. *Bernard* (22) never could apply to the mere giving gratuitously of advice. No doubt, in most, if not all, of the authorities mentioned in the notes to that case in 1 SMITH'S LEADING CASES, 172, 188 et seq., something amounting to agency existed between the person for whom the gratuitous service was performed and the person who rendered it; but in the case of persons who possess or purport to possess skill and knowledge in some art or profession, such, for instance, as doctors or lawyers, I do not think it can be said that the giving of advice is not an act done for the patient or client advised, as the case may be. It is well established that if a doctor proceeded to treat a patient gratuitously even in a case where the patient was insensible at the time and incapable of employing him to do so, the doctor would be bound to exercise all the professional skill and knowledge he possessed or professed to possess, and would be guilty of gross negligence if he omitted to do so. I think prescribing medicines or a course of dietary for a patient would come within the same rule, and I do not well see any difference between a doctor telling a patient he has heart disease, for instance, and prescribing a remedy, and merely telling him he has heart disease without prescribing a remedy. In both cases he must do something on the body of the patient. Neither do I think it can be said that a solicitor who merely advises a client as to his legal rights but does not undertake to conduct his cause can well be said not to do something for the client. In other words, I do not, as at present advised, think that the acts done, or to be done, can be confined, at all events in the case of skilled persons, to physical as distinguished from mental acts. Owing to the view I take on the other issues in the case it is not necessary for me to express a definite opinion on this point, and I abstain from doing so.

Lord Tenterden's Act is entitled "an Act for rendering a written memorandum necessary to the validity of certain promises and engagements." Section 1 deals with actions of debt or upon the case grounded on any simple contract, and enacts that no acknowledgment or promise shall be sufficient unless made in writing signed by the party chargeable, but leaves untouched the effect of the payment of any principal or interest. Section 3 deals with the endorsement of memoranda of payments on promissory notes, bills of exchange, &c.; and s. 6, which is evidently modelled on s. 4 of the Statute of Frauds, enacts:

> "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon [it], unless such representation or assurance be made in writing, signed by the party to be charged therewith."

I assume for the purpose of the construction of this section that the findings of the jury as to Galletly's authority and as to the advice given by him to the appellant are correct; that the representation made by Galletly amounted to a representation or assurance concerning or relating to the credit, ability, and trade of the Lumber company, and was given for the intent and purpose that that company might obtain money from the appellant. It admitted that any representations made by Galletly were made innocently. The question then is: Does this section of Lord Tenterden's Act apply to innocent representation? No doubt, the words of the section are general. On its face it applies to every representation, innocent or fraudulent; but one cannot construe these words, general in character though they be, without having regard to the circumstances in reference to which they were used, and to the object appearing from the statute which the legislature had in view in using them.

LORD COKE, in the well-known passage in *Heydon's Case* (23) (3 Co. Rep. at p. 7b), lays it down that to get at the scope and object of an Act one should consider

(i) what the law was before it was passed; (ii) what was the mischief or defect for which the law had not provided; (iii) what remedy Parliament has appointed; (iv) the reason for the remedy. In *Hawkins* v. *Gathercole* (24) TURNER, L.J., said (6 De G.M. & G.) at p. 20: "in construing Acts of Parliament the words which are used are not alone to be regarded." He then quotes with approval and adopts a passage from the judgment in *Stradling* v. *Morgan* (25) (1 Plowd, at pp. 204, 205). This statement of the law was by TURNER, L.J., stated to be the best he knew of. It has been approved of by LORD HATHERLEY in *Garnett* v. *Bradley* (26) (3 App. Cas. at p. 950), by LORD SELBORNE in *Bradlaugh* v. *Clarke* (27) (8 App. Cas. at p. 362), and by LORD HALSBURY in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents* (28) ([1898] A.C. at p. 575). The passage from PLOWDEN is so applicable to the present case, and, approved of as it has been, is so authoritative, that one may be excused for quoting it at length. It runs thus:

> "The judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the interest was particular."

After referring to several instances it proceeds:

> "from which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they had adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign [i.e., extraneous] circumstances, so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

There cannot be any possible doubt as to what was the cause and necessity of the passing of Lord Tenterden's Act. It was the evasion of s. 4 of the Statute of Frauds by the decisions in those actions for deceit of which *Pasley* v. *Freeman* (1) was the first.

In these actions the parties were made liable, not for innocent representations and assurances at all, but for false and fraudulent representations and assurances of a third party's solvency made by parol with intent to deceive and acted upon by those to whom they were made. In *Lyde* v. *Barnard* (2) ALDERSON, B., is reported to have said (1 M. & W. at p. 107):

> "That the decisions in that class of cases commencing with *Palsey* v. *Freeman* (1) had raised well-proved complaint in the Profession as having in fact virtually repealed the Statute of Frauds, by which a guarantee was required to be in writing, and that the object Lord Tenterden had in view was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle; for a guarantee increases the ability of a third person who is about to be trusted by adding to the value of the personal responsibility that of the person making the guarantee. And, in like manner as the false and fraudulent representation as to the third person's ability equally adds in the opinion of the person trusting to it to the value of the third person's responsibility: it ought justly to have, and it has in law, the effect of pledging also the personal responsibility of the fraudulent representer of the facts. The fraud in substance amounts to an implied guarantee of the third person's solvency. I think, therefore, we should take this as the key to the true construction of Lord Tenterden's Act."

PARKE, B., expressed himself to practically the same effect (ibid. at p. 114), and LORD ABINGER, C.B., says (ibid. at p. 117): A

"The obvious policy of this statute [i.e., Statute of Frauds] is to prevent that fraud and perjury which was found by experience, or was thought probable, to arise from trusting to evidence of less authority than that of a written document for fixing upon a defendant the responsibility for the debt, default, or miscarriage for which another was primarily liable. . . . This statute seems to have successfully accomplished its object till a mode was discovered of evading it by shaping the demand, not upon a special promise which the statute supposes, but upon a tort or wrong done to the plaintiff by some false or fraudulent representation of the defendant, to induce him to contract with another person. The first case of this kind was *Pasley* v. *Freeman* (1). . . . It was to remedy the inconvenience resulting from the frequency of these actions that Lord Tenterden introduced the [Statute of Frauds Amendment Act, 1828], s. 6." B C

The learned judges who heard this case were equally divided upon the question whether or not the representation relied upon referred to Lord Edward Thynne's personal responsibility and credit or merely to the condition and extent of his property, but they were all agreed as to the proper construction of Lord Tenterden's Act. That statute was in truth an Evidence Act in the same sense that s. 4 and s. 17 of the Statute of Frauds are evidence enactments. LORD BLACKBURN in *Maddison* v. *Alderson* (29) is reported to have said (8 App. Cas. at p. 488): D

"I think it is now finally settled that the true construction of the Statute of Frauds, both the fourth and the seventeenth sections, is not render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." E

In my opinion, the object of Lord Tenterden's Act was somewhat similar—namely, to secure that in all actions for deceit, such as *Pasley* v. *Freeman* (1), the false and fraudulent representation relied upon should be proved by a written document signed by the party to be charged and in no other way. No new statute was required at the time the Act was passed to deal with innocent representations. This statute was, I think, designed to deal with false and fraudulent representations and those alone, and, being of that opinion, I think that, despite the generality of the words "any representation or assurance," I am, acting on the principle of interpretation of statute laid down in *Stradling* v. *Morgan* (25) (Plowd. at p. 204), bound to construe the Act so as to carry out the intention of the legislature which passed it, and to hold that it only applies to the representation and assurances of that character and to those alone. In *Lyde* v. *Barnard* (2) LORD ABINGER gives his reasons for coming to the conclusion that the word "upon" in the phrase "upon or by reason of" occurring in Lord Tenterden's Act was introduced by mistake. F G

On the whole, therefore, I am of opinion that this appeal fails and should be dismissed with costs here and below. I think this verdict cannot be allowed to stand. Issues were left to the jury upon which there was no evidence, the case of the defendant was never properly put before them, and the damages were assessed upon an entirely erroneous basis, and were possibly awarded in respect of causes of action not proved to exist. H

LORD SHAW (read by LORD FINLAY, L.C.).—I have had the great privilege and advantage of perusing and re-perusing the judgment by the noble and learned Lord Chancellor which he has just delivered. In the light of it and of the other judgments in the case I have anxiously considered the serious step which this House is asked to take in affirming the judgment of the Court of Appeal and in making a pronouncement on the merits of this case in contradiction to the verdict of the jury upon it. I am humbly of opinion that the judgment of my noble and learned friend on the Woolsack is correct. I agree with it and with every part of it. I may be allowed, however, to add a statement of the position of the case from my own point of view; but, after the fullness and care with which the I

narrative of facts, the statements of procedure, and the propositions of law have been set out by the Lord Chancellor, my exposition will naturally be brief.

I am, indeed, induced to do this, as unfortunately I cannot but fear that, if the judgment of the Court of Appeal stands, the place and value of jury trial as a recognised part of the judicial machinery in civil causes in England may have been seriously impaired, and that not by Parliamentary action, but by the interposition by the judiciary into our legal proceedings of doctrines which appear to me to be novel, and which I cannot, for the reasons also set forth by the Lord Chancellor, reckon to be sound. It is true that the empanelling of the jury would remain, but, standing the judgment of the Court of Appeal, the finality which in general attaches to a jury's verdict would be rendered unsure, and it would become, instead of practically conclusive in the general sense, merely an incident in a more or less protracted litigation, both before and after the jury has sat. I think that such results have been pointed to and condemned by judges of the highest eminence, and notably in this House by LORD HALSBURY. Whether to my advantage or disadvantage, I am able to look at the situation with regard to legal procedure from a point of view probably more detached than the English practitioner. In Scotland jury trial as a means of obtaining a verdict upon fact is also an established institution, but the procedure prior to the remit of a case to a jury is materially different from that in England. The statements of parties are articulately set forth on the record, and the pleas in law proponed by each party are also articulately set forth. Before the determination is come to as to whether a jury shall try the case, issues are adjusted for the trial. And it is at that stage that the exact legal bearing of the case is determined. The relevancy of the statements of either party to go to probation is adjudicated upon, and the adjustment of the issues for the trial is the latest appropriate stage when the issues of law come to be determined. If I were to illustrate the procedure from the present case, the entirety of the discussion with which your Lordships were favoured by the Bar on the subjects of what was the business of the bank under its charter and what was the duty of the bank in regard to the matter of advising about investments, and, lastly, what was the possible authority that can be delegated in view of such duty and business to one of the agents of the bank, all that would have been threshed out at the preliminary stage to which I have referred. If the action were legally excluded, as in substance it would appear to be by the judgment of some of your Lordships, by reason of the business, the duty and the delegated authority of the bank not covering a transaction of the kind alleged, that would have been affirmed and the action would have been dismissed. But if not affirmed, the non-affirmation would depend upon this—that each of these questions was a question depending upon facts to be elicited on the line of the averments, and issues would have been adjusted for the trial of the case. Before the jury the parties would have been confined to the scope of their own averments, and the issue thus obtained on specific and definite lines would have been final in fact. Of course, if it was unsupported by any reasonable evidence, a new trial would have been granted. As to law it would also have been final except in two cases—first, the improper admission of evidence by the judge, and, secondly, a misdirection of the jury by the judge. But in both of these cases exception must be taken at the time, and in the presence of the jury and noted. If that be not done, and it is one of the most anxious duties that counsel have to discharge, the verdict is a final verdict, and no court of law will entertain such exceptions afterwards. While the system in England is different, in my humble opinion, its essentials are the same, and at the heart of these essentials, so far as points of law are concerned, lies this proposition, that it is neither competent nor proper for courts of law after the trial and entering up of the verdict to entertain them. The duty of counsel, in my opinion, includes in England at one stage, namely, the trial stage, the duty which in Scotland, for obvious and satisfactory reasons, occurs at two stages, namely, both those of the relevancy and of the trial; that duty is to make clear before the judge charges the jury what are the propositions in law

which are desired from the former, and what are the propositions in fact which are desired from the latter. As I read the procedure in England, and in this I am greatly fortified by the opinion of the Lord Chancellor, this has been in substance the universal practice of English law courts, and, in my opinion, there is every ground in reason and principle for compelling adhesion to it.

So clear to my mind are these propositions that I am somewhat surprised that there is any authority upon them as authority is generally confined to seriously disputed propositions. Such authorities as there are, however, confirm in the highest quarters the view just expressed. I refer to the judgment of WILLIAMS, J., in *Jones* v. *Provincial Insurance Co.* (5). That learned judge, delivering the judgment of the court, referred to the course taken at the trial rendering it unnecessary to pronounce an opinion upon certain points argued, and stated broadly: "the defendants, therefore, cannot now be heard to argue any such points not raised at the trial." The Lord Chancellor has referred at some length to *Graham & Sons* v. *Huddersfield Corpn.* (4), and the judgment of LORD ESHER, M.R., who said (12 T.L.R. at p. 37):

> "That the objection that the defendants had taken their point too late must prevail . . . they had waived their point in court during the trial by allowing the case to proceed till verdict on the basis that the only issue was whether there had been a promise in fact to pay for this work."

In his opinion "it is not open to them to take the point now." In this the lords justices concurred. The point was important—namely, that the contract relied on was not under seal and not binding; and, secondly, that by a certain section of the Public Health Act no committee could enter into such a contract and bind a corporation. These things were legally vital. There is some analogy to that in the present case, in which after the verdict of the jury delivered and entered up, points are raised which are also mentioned to be legally vital—as to the scope of the bank's business, duty, and the like, and the competency of any bank agent to bind his employers. Yet these things were not permitted to be introduced as the subject of decision for the purpose of upsetting the verdict, prior to which they were not taken.

In *Macdougall* v. *Knight* (6) LORD HALSBURY made these observations, which I think are appropriate to the present case (14 App. Cas. at p. 199):

> "I think it was the duty of those who are suggesting that other questions ought to have been asked and other issues raised to have intervened [in the course of the trial] and to have requested HUDDLESTON, B., definitely and distinctly to put the questions that they now insist ought to have been submitted to the jury. But nothing of the sort was done. The parties took their chance of what the jury would do, and I think nothing could be more mischievous than to allow litigants to raise new questions when, under such circumstances, the jury have decided against them. If such a course were permitted no end could possibly be found for litigation."

In *Nevill* v. *Fine Art and General Insurance Co.* (7) the same great judge said ([1897] A.C. at p. 76):

> "Where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it no court would ever have granted you a new trial, for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect."

And in *Seaton* v. *Burnand* (8) LORD HALSBURY said ([1900] A.C. at p. 143):

> "The learned judge with great care and deliberation formulated questions and submitted them to counsel, and gave counsel time and opportunity of considering whether any other questions ought to be asked; and, after taking time for consideration, the learned counsel for the defendant stated that there

A was no other question which they wished the jury to be asked, nor did they wish to vary the form of the questions that were proposed to be asked. Under such circumstances, it would really be putting a premium upon the loosest possible mode of conducting business to suggest that questions could be again formulated by counsel and then submitted to another jury."

B I do not further attempt to enunciate the principle thus amply fortified by authority, but I now proceed to call attention to the fact that the learned judge at the trial, DARLING, J., seems, in my judgment, to have most properly relied upon this being the state of the law. It would further appear to me that the counsel representing the bank also accepted that situation. To permit the bank now to go back upon that humbly appears to me to upset correct legal procedure, to be unsound in law, and to be fraught with dangerous consequences. While most C unwilling to add to the survey of the facts made by the noble and learned Lord Chancellor, I may be permitted to refer to the leading particular of this case illustrative of the general principle to which I have referred. It is also fair to DARLING, J., that I should do so. I allude to the manner in which the question of Mr. Galletly's authority on behalf of the bank to advise the appellant as to investments was treated. That gathers within itself or has a most important bearing D upon many of the questions mooted and some of them unfolded in the debate in this House. Could the letter from the general manager to the local manager bear the construction put upon it? Had the general manager himself any such authority? Could the bank in view of its charter and the scope of its business give or be assumed to give any such authority? How was this question dealt with at the trial? It was treated as an issue dependent on the particular circum- E stances, and was put to the jury as a question of fact. This was so done in the presence, to the knowledge, and in my opinion with the entire assent of counsel for the bank itself. The question put was:

> "Had Mr. Galletly authority as manager of a branch of defendant's bank to advise the plaintiff to invest 125,000 dollars on mortgage to the Westholme Lumber Co.?"

F In putting this to the jury the learned judge described the contentions of parties upon it. And I should say pointedly that the evidence upon the issue was all admitted without objection, or exception, or reservation in law. Having stated the rival views on the point, DARLING, J., said, and in my opinion, looking to the conduct of the case before him, most reasonably and properly said:

G

> "Now, gentlemen, that is for you to decide; it is not for me to decide. All I can tell you is that there is evidence that I feel justified in leaving a question about. If the learned counsel thought there was no evidence he would have submitted to me that I ought not to leave the question to you. That has not been submitted, and, therefore, I leave that question to you."

H What more could be demanded of a judge in such circumstances I am quite at a loss to see. The course in this particular was, in my opinion, in accordance with practice, precedent, and good sense. One further occasion arose before the trial judge parted with the case, upon which any legal issues then competent to the bank could have been, according to English practice, submitted—namely, on the motion to enter up the verdict. The course taken on that occasion was equally significant of the bank's legal attitude. Two submissions, and two alone, were I put forward by counsel then appearing for the bank. These were: (i) That (upon a matter to which I shall presently allude) the verdict for £25,000 was incompetent, as having attached to it a condition as to handing over certain securities to the bank, and that such a conditional verdict could not be a ground of judgment against the respondents; and (ii) the point under Lord Tenterden's Act. I do not dwell upon that, concurring as I do with all your Lordships that the judgment of the Court of Appeal on that topic is erroneous in law and that the point is bad.

No other points were taken. It, therefore, appears to me demonstrated that this case, upon its facts, falls within the principles to which I have already referred,

and that to allow other points to be taken either in the Court of Appeal or in this House would be violation of those principles. In these circumstances the verdict would stand in its entirety; but for the point as to the conditional form of the verdict of damages. One can see how it arose. Counsel for the appellant treated the securities in the hands of his client as substantially worthless, and offered to hand them back. The judge did not explain the impossibility of a conditional instead of an appropriate and final verdict to the jury, and unfortunately when the jury returned to court he was unable to be in his place to do what possibly might have saved much anxiety to all concerned—namely, to ask the jury to retire and to put their verdict in an unobjectionable form. I agree, accordingly, that the case, failing arrangement of parties, must be re-tried on the question of the proper assessment of damage.

Further, in no view could I have agreed with the course taken by the Court of Appeal that this was a case to which Ord. 58, r. 4, truly applies. The case, in my opinion, in any event would have had to be re-tried upon such issues as the court could have indicated to be proper. But I cannot view this case as one in which either the Court of Appeal or this House is able to affirm that it has before it all the material necessary and possibly available in order to enable it to determine the cause. Unless that be so, I am of opinion that the rule referred to should not be put into operation. I desire to add two observations. The existence of the rule and the very fact that a court can, in certain circumstances, exercise such a power and supersede a new trial by its own judgment, give force to the submission that in all respects, whether as regards admission of evidence or the tabling of any submissions upon points of law at the trial, that trial shall be conducted in the strictest compliance with those canons of propriety and practice to which I have alluded. To allow these to be neglected at the trial and to allow new points afterwards to be brought forward and thereupon—upon that new matter either in whole or in part—to give a judgment in a sense entirely contrary to the jury's verdict, appears to me to be in a special sense contrary to those principles and accompanied by those dangers to which I have alluded. For it appears to me to be manifest that this is—in a cause appropriated for trial by judge and jury—to make a decision, on the one hand, upon issues of fact never laid before the jury, and, on the other hand, upon issues of law never laid before the judge. I cannot see my way to assent to an argument, rather hinted at than actually submitted, that if appellate courts differ from the results properly arrived at by the appropriate tribunal upon the law and facts before it, it would be wrong to give effect to those results. On the contrary, in my view, it would be wrong to substitute one's own opinion and to usurp the function and duty cast in other quarters. Before I close I desire to say that I think too little, very much too little, account was taken in the court below of the evidence of the appellant. He was carefully and searchingly examined and cross-examined, and he was believed. I also think that too little account was taken of the actual position of the bank at the time when these representations were made by its local agent. They were large creditors of a customer, their indebtedness and insecurity had reached such a point that they instructed their sanguine representative to stop every penny of further advance, and their desire for cover was the subject of anxious communication between the head and the local office. In the circumstances I lay no blame upon their learned counsel for not making the point at the trial that the bank's authority did not extend to what was done. It appears to me that the bank adopted the creditable as well as the judicious course in facing the issue of fact whether careless representations were made. In these circumstances I can hardly agree that it lies with courts of law to reach a result by means which the bank itself did not seek. This also confirms the general conclusion upon procedure with which I have ventured to trouble the House.

LORD PARKER OF WADDINGTON (read by LORD WRENBURY).—In the action in which this appeal arises the appellant sought to make the respondent bank

A liable in damages for the negligence of Mr. Galletly, one of their local managers, in advising the appellant to invest £25,000 on a mortgage of land in Canada. It is, I think, obvious that if it be part of the bank's business to advise their customers with regard to Canadian investments the bank would be liable for any negligence of their branch manager in transacting this class of business on the bank's behalf. Primâ facie, the person held out by the bank as the manager of B one of their branches would have authority to transact all the bank's business in connection with that branch, and no limitation of such authority as between him and the bank would affect a person dealing with the bank without notice of the limitation. The statement of claim shows a correct appreciation of this position. It, in effect, alleges that it is part of the bank's business to advise their customers as to Canadian investments; that the appellant was a customer of the bank, and C that the bank through their manager advised him to make the investment in question; that he made the investment relying on such advice; that the advice was negligently given; and that by reason of such negligence the appellant lost his money. On this statement of claim the appellant had to prove in limine that it was part of the business of the bank to advise their customers with regard to Canadian investments. If he established this, he need not D trouble further as to the authority of the manager. The scope of such authority would be coincident with the scope of the bank's business. If such business included advice as to investments, the manager would have a general authority to advise on investments on the bank's behalf. In the course of the trial, counsel for the appellant admitted that the manager had no general authority to advise, in other words that it was not within the scope of the bank's business E to advise on investments at large. I take this to include Canadian investments; otherwise there would be no point in the admission. It does not appear why the admission was made. It may have been because the powers of the bank were by statute confined to carrying on a banking business, and it would be difficult to establish that advising on investments was part of the business of banking. However this may be, the contention ultimately put forward on the F appellant's behalf was that under the special circumstances of this particular case the manager had authority to advise the particular investment which he did in fact advise. . . . The real question must, therefore, be whether the special circumstances of the case made it part of the bank's business to advise on this particular investment. If it did the manager's general authority was amply sufficient to bind the bank. If it did not no special authority could, even if proved, be of any G avail. The judge at the trial, without objection by the respondent bank, left it to the jury to say whether Mr. Galletly, as manager of a branch of the defendant bank, had authority to advise the plaintiff to lend his money on the mortgage in question. I take this question to mean that the jury were to say, not whether Mr. Galletly had any special authority beyond his authority as branch manager, but whether his general authority as branch manager extended to advising the H appellant to make this particular investment; in other words, it asked whether the special circumstances of the case made it part of the bank's business to give the advice which Mr. Galletly gave on their behalf. The jury answered the question in the affirmative. On appeal, by way of motion for a new trial or other relief, the court held that there was no evidence upon which the jury, acting as reasonable men, could come to the conclusion that Mr. Galletly had the authority I referred to in the question put to them, and, acting upon the powers conferred on them by the R.S.C., Ord. 58, directed judgment to be entered for the respondent bank.

I am clearly of opinion that the Court of Appeal were right in holding as they did. [HIS LORDSHIP considered the evidence.] The above considerations would be sufficient to dispose of the main question which arises on this appeal but for a preliminary point taken and pressed by counsel for the appellant. It was contended that inasmuch as the matter was left to the jury without objection on behalf of the respondent bank, it was not open to the Court of Appeal to inquire whether

there was evidence which could justify the jury as reasonable men in finding as they did. This contention does not appear to have been raised in the Court of Appeal. The fact that the respondent bank had not objected to the matter being left to the jury was no doubt mentioned, but rather as showing that there must have been evidence for the jury to consider than as excluding the jurisdiction of the court. It would perhaps be enough to say that the point, not having been taken in the Court of Appeal, must be treated as waived, and it is not open before your Lordships' House. But, in my opinion, the point, if taken in the Court of Appeal, must have been overruled. There are, no doubt, cases in which the Court of Appeal have refused to allow points of law not taken in the court of first instance to be raised on appeal. But these cases go, not to jurisdiction, but to discretion. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the jury. In such cases it would be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal. In the present case there is no such element of unfairness or injustice. It is not suggested that had the point been taken below any further evidence could have been adduced or any further or different question been left to the jury. Why, then, should not the Court of Appeal have felt itself at liberty to do complete justice between the parties on the evidence before them? I can see no reason at all. It was suggested that, having regard to the nature of the point of law in this particular case, the old nisi prius procedure was of some materiality, and showed that the point, if taken at all, must be taken at the trial. I cannot agree. The difference between there being no evidence to go to the jury and the jury's verdict being against the weight of evidence was, no doubt, of more importance then than it is now. It may be that the former point had to be taken by asking a direction from the trial judge, but clearly the latter point could not be taken at the trial. It could only be raised on motion for a new trial. It must, therefore, have always been open in the court which had jurisdiction to grant a new trial. That court is now the Court of Appeal. But the Court of Appeal have certain further powers under the R.S.C., Ord. 58. Instead of granting a new trial they can, in a proper case, direct judgment to be entered for the defendant. They ought, in my opinion, to exercise this power whenever such a course will, in their opinion, do complete justice between the parties—for example, when they have all the available evidence before them, and there is no chance of a new trial bringing to light other material facts. It appears to me that this is precisely that case: see *Millar* v. *Toulmin* (13).

Though strictly speaking it is unnecessary, I agree that it is desirable to express an opinion on the proper construction of s. 6 of Lord Tenterden's Act. The cases which have been cited on this point are numerous, and I shall not deal with them in detail. We know Lord Tenterden's object in asking the legislature to pass the Act which bears his name. The advantages intended to be secured by s. 4 of the Statute of Frauds had, in his opinion, to some extent been destroyed by the readiness of juries not only to find that alleged oral representations as to the credit of another had in fact been made, but that such representations had been made fraudulently, so as to give rise to an action of deceit. I agree that Lord Tenterden's object would be irrelevant if the words of s. 6 of the Act were clear and unambiguous, but this is far from being the case. The section provides: "No action shall be brought whereby to charge any person upon or by reason of any representation," as to the credit, &c., of any other person, unless such representation be in writing, signed by the person to be charged therewith. In one sense, no doubt, it may be said that an action is brought to charge a person upon or by reason of a representation whenever the representation is a necessary link in the chain of evidence which establishes the cause of action. Thus, an action for breach of warranty of the soundness of a horse may be said to be brought upon or by reason of a representation that the horse was sound, though it would be more natural to say that the action was brought on the warranty. On the other hand, it must be remembered that the only representation which itself gives rise to a cause of

action on the part of a person injured thereby is a fraudulent representation. An innocent representation, except possibly as raising an estoppel or implication of contract, has in itself no legal effect at all. It being possible, therefore, to give the words of the section a wider or a narrower meaning, it is quite in accordance with sound principles of construction to examine into the abuses which the Act was intended to remedy, and such examination is all in favour of the narrower meaning. Moreover, s. 6 of the Act, if construed as the appellant contends it ought to be construed, might involve very serious consequences. It is in the ordinary course of business constantly part of the duty of a solicitor to examine into and advise upon the pecuniary position of a person with whom his client is about to deal. It would be a serious matter if the solicitor could escape liability for negligence in the performance of this duty by giving his advice orally or under the signature of his managing clerk rather than under his own signature. Indeed, the fact that the writing required by Lord Tenterden's Act cannot be signed by an agent is an additional argument in favour of the narrower interpretation of the words of the section. Lastly, until the present case no attempt appears to have been made to construe the section to include actions for negligence. It is true that in *Haslock* v. *Fergusson* (3) and in *Swann* v. *Phillips* (30) the section was held applicable to actions of assumpsit, but if these cases be examined it will be found (i) that the representation sought to be proved was fraudulent; and (ii) that the plaintiff might have brought an action for fraud though he elected to proceed in assumpsit. Whether rightly or wrongly decided, these cases have no bearing on the present question, for it is common ground that Mr. Galletly acted honestly throughout. In my opinion, Lord Tenterden's Act does not apply to an action for breach of a duty to take care. I may add that the word "person" as used in s. 6, in my opinion, includes a corporation.

[HIS LORDSHIP dealt with matters of fact which do not call for report, and concluded:] I agree that the appeal must be dismissed with costs.

LORD WRENBURY.—This is not an action for fraud. It is an action for negligence and breach of duty. The defendants are a corporation. The alleged negligence and breach of duty are those of an agent. These considerations limit to a large extent the field which must be covered to arrive at a decision of the case.

I take first the question of Lord Tenterden's Act, and proceed to inquire whether s. 6 of that Act applies in an action brought, not for fraud, but for negligence and breach of duty in a matter in which, for the purpose of the inquiry, I assume that a representation was made or given concerning the character, conduct, credit, ability, trade or dealings of another person to the intent, &c., in the words of the section. The Statute of Frauds having required that in any case covered by s. 4 of that Act an action should not be brought unless the agreement upon which it was brought, or some memorandum thereof, should be in writing, signed by the party to be charged or some person by him lawfully authorised, *Pasley* v. *Freeman* (1) upheld the device which had been discovered for evading that Act by founding the action not upon a special promise which the statute supposes but upon tort or wrong done to the plaintiff by a fraudulent representation of the defendant. *Pasley* v. *Freeman* (1) is the authority upon the common law action of deceit. In this state of things Lord Tenterden's Act was passed. In *Tatton* v. *Wade* (31) POLLOCK, C.B., said that Lord Tenterden had told him that his motive in procuring the passing of the Act was that he was struck with the fact that, numerous as were actions for false representation as to character and credit of third persons, the plaintiff almost invariably succeeded, which induced him to think that there was some latent injustice which required a remedy. In *Lyde* v. *Barnard* (2) ALDERSON, B., (1 M. & W. at p. 107), and LORD ABINGER, C.B. (ibid. at p. 117), stated, in somewhat similar terms, what in their view was the object of the statute.

Counsel for the appellant has most conveniently brought to the attention of the House, in order of date, the decisions, so far as he can trace them, upon Lord Tenterden's Act. For convenience of reference hereafter, and for the purpose of

my observations upon them, I state them here in order of date. They are as follows: (i) *Lyde* v. *Barnard* (2) (1836); (ii) *Haslock* v. *Fergusson* (3) (1837); (iii) *Swann* v. *Phillips* (30) (1838); (iv) *Devaux* v. *Steinkeller* (32) (1839); (v) *Craig* v. *Watson* (33) (1845); (vi) *Tatton* v. *Wade* (31) (1856); (vii) *Williams* v. *Mason* (34) (1873); (viii) *Swift* v. *Jewsbury* (35) (1874); (ix) *Hosegood* v. *Ball* (36) (1876); (x) *Pearson* v. *Seligman* (37) (1883); (xi) *Bishop* v. *Balkis Consolidated Co.* (38) (1890); (xii) *Hirst* v. *West Riding Union Banking Co., Ltd.* (39) (1901). All of them were cases of fraud. Not all were actions of deceit upon the case. *Haslock* v. *Fergusson* (3) was assumpsit for money had and received. *Clydesdale Bank, Ltd.* v. *Paton* (40) was upon the Scottish Mercantile Law Amendment Act, 1856, s. 6, which was in terms similar to those of Lord Tenterden's Act, but with the modification that the writing may be signed "by some person duly authorised by him," words which are not found in Lord Tenterden's Act. In *Swift* v. *Jewsbury* (35) COLERIDGE, C.J., states that the subject of s. 6 of Lord Tenterden's Act is the charging of a person for an act of fraud, and, BRAMWELL, B., that

> "the effect of the statute is that a man should not be liable for a fraudulent representation as to another person's means unless he puts it down in writing and acknowledges his responsibility for it by his own signature."

These being the authorities, the question to be answered is: Does s. 6 of Lord Tenterden's Act apply to an innocent misrepresentation? In my opinion, it does not. The words of the section are, "to charge any person upon or by reason of any representation," &c. The words "charge any person upon any representation" point, I think, plainly to an action for deceit. To maintain such an action there must be fraud and there must be damage. If these two are satisfied nothing more is required. Fraud is the cause of action. The charge is made upon the tort committed by the fraudulent misrepresentation. The same is not true of an innocent representation. An innocent representation per se constitutes no cause of action. If there existed a duty, an action lies for negligence and breach of duty, and in that action the fact that there was misrepresentation, although innocent, is material. But an action cannot be maintained upon an innocent representation simpliciter. It is maintained upon the breach of duty. The innocent misrepresentation is not the cause of action, but evidence of the negligence which is the cause of action. The words "charge upon any representation" refer, I think, only to a case in which fraud is alleged. There are, however, the words "by reason of." The words do not, I think, bring within the provisions of the section a class of case not covered by the word "upon." They cover only, I think, similar cases —e.g., a case in which the defendant did not make the representation, but it was so made that he was liable in respect of it, e.g., that it was made by a third party who may have been his agent. Another reason which leads me to the same conclusion is that Lord Tenterden's Act, which certainly was made in view of the Statute of Frauds, omits the words "or some other person thereunto by him lawfully authorised." Under Lord Tenterden's Act the writing must be "signed by the party to be charged therewith." The signature of an agent will not suffice. The reason, I take it, is that a man shall not be charged with fraud unless his own signature is attached to the document which evidences the fraud. For these reasons I hold that in this action, which is not an action for fraud, but an action for negligence or breach of duty, the appellants are right in their contention that Lord Tenterden's Act does not apply. I am unable to agree upon this point with the judgments in the Court of Appeal. I may add that if I had been of opinion that in other respects the Act did apply I should further have been of opinion that the defendants who are a corporation are a "person" within that word in the section. The word "person" is three times used. If it does not include a corporation in the one place of user, it will not include it in another. If "person" does not include a corporation the result would be that a representation as to the credit of a corporation would not be within the section. This cannot be the

meaning. The decision in *Hirst* v. *West Riding Union Banking Co., Ltd.* (39) upon this point was, I think, right.

Being of this opinion as to Lord Tenterden's Act, it becomes necessary to go on to consider the next point, and that is whether Galletly had authority? The appellant has argued that, inasmuch as the point of law that there was no evidence of authority was not taken at the trial, the respondents could not raise in a Court of Appeal a question of law not raised in the court of first instance. It would require a great deal to persuade me that a Court of Appeal is bound to adjudicate wrongly because it had not occurred to either judge or counsel to raise a point of law in the court below. The way the appellant seeks to put it is that the Court of Appeal is not in such case asked to decide wrongly, but only to say that the point is one which it is not competent for them to decide at all because it was not argued below. The result, however, is the same. The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because a point of law has been overlooked below. It may well be that in some circumstances the Court of Appeal could not justly allow the point of law to be raised. For instance, it may be that if the point had been raised in the court of first instance, the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no doubt say that it would not be fair to allow it to be raised. But this is a totally different thing from saying that it cannot be raised.

In the present case, what has happened is this. The point of law is whether there was any evidence to go to the jury on the question of authority. The judge was not asked to rule that there was no evidence. The appellant says it cannot be raised now. In the Court of Appeal, however, that point of law was raised and argued and was decided by the court. In other words, there was waiver of the right (if it existed) to exclude it from decision. I have read and agree with the judgment of LORD ATKINSON upon this point, and I am of opinion that the question was open in the Court of Appeal and is open in this House. The point then is this. To the question: "Had Mr. Galletly authority as a manager of a branch of defendant bank to advise the plaintiff, &c.," the jury have answered: "Yes." The respondents say there was no evidence to support that finding. The Court of Appeal have held that there was no evidence. In my opinion, that is right. [HIS LORDSHIP considered the evidence.] I am of opinion that there was no evidence of authority, and that the Court of Appeal were right in holding that judgment ought to be entered for the defendants.

In these circumstances no further question arises for decision. I may add, however, that in no case could the judgment, in my opinion, have been allowed to stand. The verdict "£25,000 and the securities to be returned to the bank" was an impossible verdict. If it were not, the judgment for recovery of £25,000 dropping altogether anything about the return of the securities, was a judgment not according to the verdict. There was misdirection in telling the jury that the evidence that the bank was itself interested in the matter was evidence in support of the issue of authority, whereas the direction should have been that it was evidence against it. But it is unnecessary to go further. In my judgment, the order made by the Court of Appeal was right—this appeal fails and must be dismissed with costs.

Appeal dimissed.

Solicitors: *William Sturges & Co.*; *Bischoff, Coxe, Bompas & Bischoff.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

A

LONDON JOINT STOCK BANK, LTD. *v.* MACMILLAN AND ANOTHER

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Shaw and Lord Parmoor), April 12, 15, 16, 18, 19, June 21, 1918]

B

[Reported [1918] A.C. 777; 88 L.J.K.B. 55; 119 L.T. 387; 34 T.L.R. 509; 62 Sol. Jo. 650]

Bank—Duty of customer—Signature on incomplete cheque—No words inserted denoting amount—Figures incompletely stated—Cheque completed fraudulently by employee—Right of bank to debit customer's account—Estoppel.

C

The relation between banker and customer is that of debtor and creditor. A banker is under an obligation to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is a mandate to the banker to pay the payee an amount according to the tenor of the cheque. The customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud or forgery of the body of the cheque, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty. The fact that the interposition of the commission of a crime was necessary to bring about the loss does not prevent the loss being the natural consequence of the customer's negligence. A banker from whom the customer seeks to recover the amount of a cheque the body of which, the cheque having been signed by the customer, has been falsified by a third person who has cashed the cheque, can rely in defence on the negligence of the customer if he has failed to exercise proper care in drawing the cheque, or on the plea that, as the negligence of the customer enabled the third person to insert in the cheque the amount which the banker paid, the customer is estopped from disputing the authority of the banker to pay that sum. In either case the negligence relied on must be in or immediately connected with the transaction, i.e., in the manner in which the cheque is drawn. It would be no defence to the banker if, e.g., the forgery or falsification had been that of a clerk whom the customer had taken into his employment without sufficient inquiry as to his character.

D

E

F

A partner in a firm which was the customer of a bank signed a bearer cheque which was put before him by a clerk employed by the firm and which at that time had no sum of money specified in the space provided for indicating in words the amount for which the cheque was drawn, while the space provided for figures contained the figures "2 0. 0.", placed there by the clerk, there being a space left between the "2" and the sign "£" printed on the cheque. The clerk made out the cheque to "Ourselves", inserted the words "One hundred and twenty pounds" in the space provided for the amount of the cheque in words, and placed a "1" and a "0" on either side of the "2". He then took the cheque to the bank and cashed it, receiving £120 which the bank debited to the firm's account. In an action by the firm for a declaration that the bank were not entitled to do so,

G

H

Held: the drawer of the cheque was in breach of his duty to the bank, and the action failed.

I

Young v. *Grote* (1) (1827), 4 Bing. 253, approved and applied.

Freeman v. *Cooke* (2) (1848), 2 Exch. 654, applied.

Scholfield v. *Earl of Londesborough* (3), [1894] 2 Q.B. 660, and *Colonial Bank of Australasia, Ltd.* v. *Marshall* (4), [1906] A.C. 559, distinguished.

Bank—Duty of customer—Negligent drawing of cheque—Evidence—View of cheque—Evidence as to course of dealings.

Bank—Cheque—Signature in blank—Cheque filled up by agent—Principal bound by instrument as filled up.

Per LORD FINLAY, L.C.: (i) The question whether there was negligence as between banker and customer is a question of fact in each particular case, and can be decided only on a view of the cheque as issued by the drawer, with the help of any evidence available as to the course of dealings between the parties or otherwise. (ii) If a customer signs a cheque in blank and leaves it to a clerk or other person to fill up, he is bound by the instrument as filled up by the agent. The principle is thoroughly established, and it seems to me to apply to the facts of the present case.

Notes. Considered: *Auchteroni & Co.* v. *Midland Bank, Ltd.*, [1928] All E.R.Rep. 627; *Greenwood* v. *Martin's Bank, Ltd.* (1931), 47 T.L.R. 607; *Slingsby* v. *District Bank, Ltd.*, [1931] All E.R.Rep. 14; *Mercantile Bank of India, Ltd.* v. *Central Bank of India, Ltd.*, [1938] 1 All E.R. 52; *Welch* v. *Bank of England*, [1955] 1 All E.R. 811. Referred to: *Transvaal and Delagoa Bay Investment Co.* v. *Atkinson*, [1944] 1 All E.R. 579; *Heskell* v. *Continental Express, Ltd.*, [1950] 1 All E.R. 1033.

As to forged or altered cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 204–209; and for cases see 3 DIGEST (Repl.) 253–258. As to estoppel by conduct, see 15 HALSBURY'S LAWS (3rd Edn.) 235–243; and for cases see 21 DIGEST 328 et seq.

Cases referred to:

(1) *Young* v. *Grote* (1827), 4 Bing. 253; 12 Moore, C.P. 484; 5 L.J.O.S.C.P. 165; 130 E.R. 764; 3 Digest (Repl.) 255, *714*.

(2) *Freeman* v. *Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest 287, *1019*.

(3) *Scholfield* v. *Earl of Londesborough*, [1894] 2 Q.B. 660; 63 L.J.Q.B. 649; 71 L.T. 86; 10 T.L.R. 518; 38 Sol. Jo. 618; 10 R. 376; affirmed [1895] 1 Q.B. 536; 64 L.J.Q.B. 293; 72 L.T. 46; 43 W.R. 331; 11 T.L.R. 149, C.A.; affirmed [1896] A.C. 514; 65 L.J.Q.B. 593; 75 L.T. 254; 45 W.R. 124; 12 T.L.R. 604; 40 Sol. Jo. 700, H.L.; 6 Digest 504, *3209*.

(4) *Colonial Bank of Australasia, Ltd.* v. *Marshall*, [1906] A.C. 559; 75 L.J.P.C. 76; 95 L.T. 310; 22 T.L.R. 746, P.C.; 3 Digest (Repl.) 256, *717*.

(5) *Hall* v. *Fuller* (1826), 5 B. & C. 750; 8 Dow. & Ry.K.B. 464; 4 L.J.O.S.K.B. 297; 108 E.R. 279; 3 Digest (Repl.) 256, *719*.

(6) *Union Credit Bank, Ltd.* v. *Mersey Docks and Harbour Board*, *Same* v. *Mersey Docks and Harbour Board and North and South Wales Bank, Ltd.*, [1899] 2 Q.B. 205; 68 L.J.Q.B. 842; 81 L.T. 44; 4 Com. Cas. 227; 3 Digest (Repl.) 83, *189*.

(7) *Re North British Australasian Co., Ltd., Ex parte Swan* (1860), 7 C.B.N.S. 400; 30 L.J.C.P. 113; 141 E.R. 871; subsequent proceedings sub nom. *Swan* v. *North British Australasian Co., Ltd.* (1862), 7 H. & N. 603; 31 L.J.Ex. 425; 8 Jur.N.S. 940; 10 W.R. 841; on appeal (1863), 2 H. & C. 175; 2 New Rep. 521; 32 L.J.Ex. 273; 10 Jur.N.S. 102; 11 W.R. 862; 159 E.R. 73, Ex. Ch.; 9 Digest (Repl.) 220, *1405*.

(8) *Ingham* v. *Primrose* (1859), 7 C.B.N.S. 82; 28 L.J.C.P. 294; 5 Jur.N.S. 710; 141 E.R. 745; 6 Digest 369, *2436*.

(9) *Robarts* v. *Tucker* (1851), 16 Q.B. 560; 20 L.J.Q.B. 270; 15 Jur. 987; 117 E.R. 994, Ex. Ch.; 3 Digest (Repl.) 257, *724*.

(10) *Barker* v. *Sterne* (1854), 9 Exch. 684; 23 L.J.Ex. 201; 23 L.T.O.S. 95; 2 W.R. 418; 2 C.L.R. 1020; 156 E.R. 293; 6 Digest 48, *352*.

(11) *Orr and Barber* v. *Union Bank of Scotland* (1854), 1 Macq. 513; 24 L.T.O.S. 1; 2 C.L.R. 1566, H.L.; 3 Digest (Repl.) 282, *846*.

(12) *British Linen Co.* v. *Caledonian Insurance Co.* (1861), 4 Macq. 107; 4 L.T. 162; 7 Jur.N.S. 587; 9 W.R. 581, H.L.; 3 Digest (Repl.) 254, *705*.

(13) *Halifax Union* v. *Wheelwright* (1875), L.R. 10 Exch. 183; 44 L.J.Ex. 121; 32 L.T. 802; 39 J.P. 823; 23 W.R. 704; 3 Digest (Repl.) 255, *715*.

(14) *Bank of Ireland (Governor & Co.)* v. *Evans' Charities Trustees* (1855), 5 H.L.Cas. 389; 3 C.L.R. 1066; 25 L.T.O.S. 272; 3 W.R. 573; 10 E.R. 950, H.L.; 21 Digest 400, *1605*.

(15) *Coles* v. *Bank of England* (1839), 10 Ad. & El. 437; 2 Per. & Dav. 521; 9 L.J.Q.B. 36; 4 Jur. 266; 113 E.R. 166; 3 Digest (Repl.) 133, *30*.

(16) *Arnold* v. *Cheque Bank*, *Arnold* v. *City Bank* (1876), 1 C.P.D. 578; 45 L.J.Q.B. 562; 34 L.T. 729; 40 J.P. 711; 24 W.R. 759; 3 Digest (Repl.) 260, *738*.

(17) *Baxendale* v. *Bennett* (1878), 3 Q.B.D. 525; 47 L.J.Q.B. 624; 40 L.T. 23; 43 J.P. 204; 26 W.R. 899, C.A.; 21 Digest 401, *1609*.

(18) *Staple of England (Mayor, etc., of Merchants of the)* v. *Bank of England (Governor & Co.)* (1887), 21 Q.B.D. 160; 57 L.J.Q.B. 418; 52 J.P. 580; 36 W.R. 880; 4 T.L.R. 46, C.A.; 3 Digest (Repl.) 132, *27*.

(19) *Lewes Sanitary Steam Laundry Co., Ltd.* v. *Barclay & Co., Ltd.* (1906), 95 L.T. 444; 22 T.L.R. 737; 11 Com. Cas. 255; 3 Digest (Repl.) 254, *708*.

(20) *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, [1909] 2 K.B. 1010; 78 L.J.K.B. 964; 100 L.T. 516; 25 T.L.R. 402; 53 Sol. Jo. 377; 14 Com. Cas. 116; 16 Mans. 234; 3 Digest (Repl.) 254, *709*.

(21) *Bank of England* v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; sub nom. *Vagliano* v. *Bank of England*, 39 W.R. 657; 7 T.L.R. 333; 55 J.P. 676, H.L.; 3 Digest (Repl.) 260, *739*.

(22) *Société Générale* v. *Metropolitan Bank, Ltd.* (1873), 27 L.T. 849; 21 W.R. 335; 3 Digest (Repl.) 259, *735*.

(23) *Adelphi Bank* v. *Edwards* (1882), 26 Sol. Jo. 360; on appeal, C.A.; unreported; cited in [1896] A.C. at p. 540; 3 Digest (Repl.) 260, *736*.

(24) *Foley* v. *Hill* (1848), 2 H.L.Cas. 28; 9 E.R. 1002, H.L.; 3 Digest (Repl.) 177, *289*.

(25) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest 290, *1032*.

(26) *Smith* v. *Prosser*, [1907] 2 K.B. 735; 77 L.J.K.B. 71; 97 L.T. 155; 23 T.L.R. 597; 51 Sol. Jo. 551, C.A.; 21 Digest 400, *1602*.

(27) *Brocklesby* v. *Temperance Building Society*, [1895] A.C. 173; 64 L.J.Ch. 433; 72 L.T. 477; 59 J.P. 676; 43 W.R. 606; 11 T.L.R. 297; 11 R. 159, H.L.; 35 Digest 376, *1178*.

(28) *Perry Herrick* v. *Attwood* (1857), 2 De G. & J. 21; 27 L.J.Ch. 121; 30 L.T.O.S. 267; 11 Jur.N.S. 101; 6 W.R. 204; 44 E.R. 895, L.C.; 35 Digest 481, *2145*.

(29) *Lloyds Bank, Ltd.* v. *Cooke*, [1907] 1 K.B. 794; 76 L.J.K.B. 666; 96 L.T. 715; 23 T.L.R. 429, C.A.; 6 Digest 136, *899*.

(30) *Lickbarrow* v. *Mason* (1787), 2 Term Rep. 63; 6 East, 20, n.; 100 E.R. 35; reversed sub nom. *Mason* v. *Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; reversed and venire de novo awarded sub nom. *Lickbarrow* v. *Mason* (1793), 4 Bro. Parl. Cas. 57, H.L.; 6 Digest 456, *2911*.

Also referred to in argument:

Leyland Shipping Co. v. *Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp.M.L.C. 258, H.L.; 29 Digest 229, *1858*.

Whitmore v. *Wilks* (1828), 3 C. & P. 364.

London and South Western Bank v. *Wentworth* (1880), 5 Ex.D. 96; 49 L.J.Q.B. 657; 42 L.T. 188; 28 W.R. 516; 6 Digest 72, *577*.

Garrard v. *Lewis* (1882), 10 Q.B.D. 30; 47 L.T. 408; 31 W.R. 475; 6 Digest 68, *553*.

Marcussen v. *Birkeck Bank* (1889), 5 T.L.R. 646, C.A.; 3 Digest (Repl.) 256, *716*.

Appeal by the London Joint Stock Bank, Ltd. from an order of the Court of Appeal (reported [1917] 2 K.B. 439), which affirmed an order of SANKEY, J.

(reported [1917] 1 K.B. 363), made in an action in the Commercial List tried by him without a jury.

The facts appear in their Lordships' opinions.

Douglas Hogg, K.C., and *Alexander Neilson* for the appellants.
Holman Gregory, K.C., and *Jowitt* for the respondents.

Their Lordships took time for consideration.

June 21, 1918. The following opinions were read.

LORD FINLAY, L.C.—This is a case raising an important question of commercial law as to the relations between banker and customer. It has been argued with conspicuous ability by all the counsel engaged on the appeal.

The plaintiffs in the action (now respondents), Messrs. Macmillan and Arthur, are a firm of general merchants in the City. The defendants (appellants) carry on business as bankers, and the plaintiffs kept their account at one of their branches. The action was brought by the plaintiffs to have it declared that the defendants are not entitled to debit the plaintiffs with a cheque for £120, which had been paid by the defendants to one Klantschi, by whom it had been fraudulently filled up for £120 instead of £2. The bank resist the claim on the grounds that the plaintiffs had drawn the cheque so negligently as to lead to the fraud, and that the plaintiffs had entrusted the cheque signed by them to Klantschi authorising him to fill it up. SANKEY, J., before whom the case was tried, gave judgment for the plaintiffs, and his judgment was confirmed by the Court of Appeal (SWINFEN EADY, L.J., SCRUTTON, L.J., and BRAY, J.). The bank now appeal to your Lordships' House. The case was treated in the courts below as turning upon the question whether *Young* v. *Grote* (1), so often cited and so much discussed, is now good law. Both courts below held that that case is no longer of authority, and that the bank could not rely upon it as a defence.

The facts of the case lie in small compass, and may best be stated in the language of SANKEY, J.:

"The plaintiffs had in their employment a confidential clerk of the name of Klantschi. He had been with them for some years, and they had no reason to distrust him. They left to him the keeping of their books and the filling in of cheques for signature. On the morning of Feb. 9, 1915, one of the plaintiff partners, Mr. Arthur, was going out to lunch about midday. He had his hat on and was leaving the office when the clerk came up to him and said he wanted £2 for petty cash, and produced a cheque for signature. The clerk had repeatedly presented cheques for signature to get petty cash, but usually for £3, and Mr. Arthur asked him why it was not £3 on this occasion. The clerk replied that £2 would be sufficient. Mr. Arthur thereupon signed the cheque, which I shall discuss more in detail later on. On the next day the clerk did not come to business. Mr. Arthur took the opportunity to look through the clerk's books, and found matters which so excited his suspicion that he consulted his solicitor, and on Feb. 11 both he and the solicitor went to the bank. They there found that the clerk had presented a cheque for £120, which had been paid to him. The clerk was a thief and absconded with the money. His books were subsequently examined, and in the result a number of discrepancies were found. . . . I recollect that Mr. Arthur was in a great hurry when he signed the cheque, and I find the fact to be that when he signed it there were no words at all in the space left for indicating in words the amount for which the cheque was drawn. That space was a blank. There were the figures '2. 0. 0.' in the space left for figures. The clerk, having obtained Mr. Arthur's signature to the cheque in this condition, properly dated and payable to 'ourselves,' added the words 'one hundred and twenty pounds' in the space left for words, and the figures '1' and '0' on either side of the figure '2.' "

The following is a copy of the cheque, a facsimile of which is before your Lordships : A

No. 0059745. London, Feb. 9, 1915.

The

London Joint Stock Bank, Ltd.,

Charterhouse Street Branch, 89 Charterhouse Street, E.C.

Pay to Ourselves or Bearer

One hundred and twenty Pounds. B

£120. 0. 0.

Macmillan & Arthur.

The only fact which it is necessary to add to the learned judge's statement is that as was proved, the figure "2" which was in the cheque when Mr. Arthur signed it was some way from the left-hand side, and that there was room there, and also on the right-hand side of the figure "2," for the insertion of another figure. Sankey, J., added : C

"Apart from authority, the plaintiffs in my view were not guilty of any negligence up to the time of signing the cheque in question, nor do I think that, having regard to the trust which they rightly reposed in Klantschi, Mr. Arthur was guilty of negligence in signing the cheque as and when he did. Unless, therefore, the state of the authorities is such that I am compelled to hold that the defendants are under the circumstances entitled to my judgment, my decision will be in favour of the plaintiffs." D

This House will accept the findings of fact of the learned judge, concurred in as they were by the Court of Appeal. But his inference from the facts that the plaintiffs were not guilty of negligence stands in a different position. This is a matter of mixed law and fact, on which this House is bound to exercise its own judgment. E

The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. F It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty. Whether what happened in this case can be considered a natural and direct consequence of the customer's negligence in drawing the cheque is in controversy. It has been often said that no one is bound to anticipate the commission of a crime, and that to take advantage of blank spaces left in a cheque for the purpose of increasing the amount is forgery, which the customer is not bound to guard against. It has been suggested that the prevention of forgery must be left to the criminal law. I am unable to accept any such proposition without very great qualification. H Every day experience shows that advantage is taken of negligence for the purpose of perpetrating frauds. A warehouseman is bound to take precautions against theft, and, if he fails to do so, he will be liable to the owner if the goods are stolen. It would be idle for him to contend that he had trusted to the terrors of the criminal law for the prevention of theft. As the customer and the banker are under a contractual relation in this matter, it appears obvious that in drawing a cheque the customer is bound to take usual and reasonable precautions to prevent forgery. Crime is indeed a very serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is, not a remote, but a very natural, consequence of negligence of this description. I

Young v. *Grote* (1) was decided nearly one hundred years ago. It has been often approved by many of our greatest judges and, with the exception of a recent case

in the Privy Council, with which I shall deal later on, there has never been a decision inconsistent with it but for that now under appeal. The facts in *Young* v. *Grote* (1) are few and are stated in the award of the arbitrator on which the decision of the Court of Common Pleas was given. Mr. Young, when leaving home for some days, left with his wife five blank cheques signed by him, and desired her in his absence to have them filled up for such sums as the purposes of his business might require. Mrs. Young wanted £50 2s. 3d. to pay wages, and delivered one of her husband's blank cheques to Worcester, a clerk of his, authorising him to fill it up for £50 2s. 3d. What followed is best stated in the words of the award as set out in the report of the case in 4 Bing. at pp. 254, 255:

> "Worcester accordingly filled it up with that sum and showed it so filled up to Mrs. Young, and she desired him to get it cashed, but the cheque, when it was so filled up and shown to Mrs. Young, presented the following appearance: The first line contained in print the names of the bankers; the second line contained the words 'Pay wages or bearer,' the word 'wages' only being in writing; and the third line contained the words 'fifty pounds' and the figures '2s. 3d.'; but the word 'fifty' commenced in the middle of that third line, and with a small letter, so that ample space was left for the insertion of other words before the word 'fifty'; and there was at the bottom of the draft the figures '50. 2. 3.,' but the figure '5' was at a sufficient distance from the letter '£' to allow another figure to be inserted between it and the letter '£.' "

Worcester afterwards fraudulently inserted the words "Three hundred and" before the word "fifty," and the figure "3" before the figure "5." The alterations were so made that they could not have been detected by any ordinary diligence, and the bank paid to Worcester £350 2s. 3d., against the cheque, and debited the customer with the amount. He objected, alleging that his draft was only for £50 2s. 3d. The award then proceeds as follows:

> "The arbitrator thought that it was his draft for that sum only, but he thought, also, that he had been guilty of gross negligence by causing his draft to be delivered to Worcester (in whose handwriting the body of it had been filled up) in such a state that the latter could and did, by the mere insertion of other words, make it appear to be the draft of Peter Young for the larger sum; and that as he, partly by his negligence, had caused the bankers to pay the larger sum, he was bound to make good to them the loss, which, by reason of his negligence, they had sustained by paying that sum. If the Court of Common Pleas should think that opinion wrong, then he awarded that Peter Young was entitled to receive from Grote & Co. the sum of £300, and ordered accordingly."

It is obvious that the award left to the court the questions whether the arbitrator was right in thinking that Young had been guilty of gross negligence, and whether he was bound to make good to the bankers the larger sum which they had paid owing partly to his negligence. Best, C.J. (ibid. at p. 259), pointed out the negligence in the manner in which the wife had the cheque filled up, and said that it was by the neglect of ordinary precautions that the bankers were induced to pay. He remarked that in *Hall* v. *Fuller* (5), which had been relied upon, that the cheque was properly drawn in the first instance, and the forgery consisted in expunging the words and figures and the insertion of others in their place. The Chief Justice concluded his judgment by saying:

> "We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer."

Park, J., said that he concurred in the opinion of the arbitrator that Young was guilty of negligence; Burrough, J., said that the blame was all on one side; and Gaselee, J., that there certainly was gross negligence on the part of Young, and, therefore, the rule must be discharged.

I have referred at some length to the way in which the court, in *Young* v. *Grote* (1), dealt with the question of negligence for this reason: It has been argued on

behalf of the respondents here that that case merely proceeded on the finding of fact by the arbitrator that there was gross negligence. This is not so. The opinion of the court was invited and given on the question whether the arbitrator was right in finding negligence, as well as on the question whether Young was liable for the loss which ensued. The court concurred with the arbitrator on both points. BEST, C.J., has been criticised for basing his judgment on the well-known passage in POTHIER (TRAITÉ DU CONTRAT DE CHANGE, part 1, c. 4, s. 99), which he quotes (4 Bing. at p. 258) as authority for the proposition that if it be by the fault of the customer that the banker pays more than he ought he cannot be called on to pay again. The passage will be found at p. 61 of the Paris edition (1809) of POTHIER'S TRAITÉ DU CONTRAT DE CHANGE, with notes by Hutteau. It occurs in the course of a long criticism by POTHIER of a passage of the Italian jurist SCACCHIA (quoted in extenso [1896] A.C. 524–527), in which he discusses the question of the right of a drawee to be recouped by the drawer when by reason of a fraudulent alteration in the draft he has been led to pay more than the sum really drawn for. POTHIER criticises (pp. 59–62) the view of SCACCHIA, and dissents from the wide terms in which the right of indemnity in such cases had been asserted by SCACCHIA. POTHIER treats the question as one of the law of mandate. He cites some illustrations from the DIGEST XVII, tit. 1 (Mandati vel Contra), 1.26, para. 6 and para. 7, and DIGEST XLVII, tit. 2 (De Furtis), 1.61 (63), para. 5, and concludes with the passage in question:

> "Cependant, si c'était par la faute du tireur que le banquier eût été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications; putà, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eût ajouté zéro, le tireur serait, en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lieu; et c'est à ce cas qu'on doit restreindre la décision de SCACCHIA."

This passage appears to me to be strictly relevant to the case of banker and customer with which BEST, C.J., was dealing, and to embody the principle of English as well as of the civil law. It is after citing this passage from POTHIER that the Chief Justice goes on to consider whether it was by the fault of Young that the payment was made. It was upon this ground, and this ground alone, that *Young* v. *Grote* (1) was decided by three of the four judges of the Common Pleas. It is true that PARK, J., while concurring in the finding of negligence, also says (4 Bing. at p. 260):

> "Can anyone say that the cheque signed by Young is not a genuine order? I say it is. The cheques left by him to be filled up by his wife when filled up by her became his genuine orders."

And this is the explanation of *Young* v. *Grote* (1) adopted by BINGHAM, J., in *Union Credit Bank, Ltd.* v. *Mersey Docks and Harbour Board* (6) ([1899] 2 Q.B. at pp. 210, 211), while rejecting the reason given by the majority, on what I venture to think are insufficient grounds. It is true that Young left the cheques signed in blank with his wife to be filled up by her. She by the hand of the clerk filled one up with the correct amount, and the fraudulent alteration was afterwards made by the clerk with whom she had left the cheque merely to get payment of the correct amount. But the additional ground suggested by PARK, J., and adopted by BINGHAM, J., whether applicable or not to the facts in *Young* v. *Grote* (1), has, as I shall afterwards show, a most important bearing on the case now under appeal.

The sole ground upon which *Young* v. *Grote* (1) was decided by the majority of the Court of Common Pleas was that Young was a customer of the bank, owing to the bank the duty of drawing his cheque with reasonable care; that he had delegated the performance of this duty to his wife; that she had been guilty of gross negligence in having the cheque filled up in such a manner as to facilitate an increase of the amount; and that the fraudulent alteration of the cheque by the clerk to whom, after being filled up, it had been entrusted by her for the purpose

of getting payment would not have taken place but for the careless manner in which the cheque was drawn. The duty which the customer owes to the bank is to draw the cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery takes place, the customer is liable to the bank for the loss. This is the principle expressed in the passage from Pothier cited above. It may be put in various ways. Sometimes it has been said that an estoppel is created, and that as the negligence of the customer enabled the clerk to alter the amount to that which the banker paid, the customer is estopped from disputing the authority of the banker to pay. Sometimes it has been said that the payment must be allowed in account with the bank in order to avoid circuity of action, the customer being liable to the bank for his negligence, and this latter was the ground on which Cockburn, C.J., rested the decision in *Young* v. *Grote* (1): *Swan* v. *North British Australasian Co.* (7), 2 H. & C. at pp. 189, 190. In whichever of these ways it may be put, the ground is really one and the same—as the negligence of the customer caused the loss he must bear it. The fact that a crime was necessary to bring about the loss does not prevent its being the natural consequence of the carelessness. If the door of a warehouse is left unlocked at night the goods may be stolen, and if a cheque is drawn with neglect of all usual precautions to prevent falsification the cheque may be falsified. The loss in each case is the result of the omission of ordinary and reasonable precaution. The whole matter is stated by Best, C.J., in two sentences (4 Bing. at p. 258). After stating that it is the rule that if a payment be made without authority the banker, not the customer, must suffer, he goes on to say:

> "But though that rule be perfectly well established, yet if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again,"

and quotes Pothier's doctrine that if it was by the fault of the drawer that the banker was misled in the matter, the drawer not having taken care to write the draft so as to prevent falsification, the drawer will be bound to indemnify the banker against loss from the falsification for which the drawer by his fault has given occasion.

This is illustrated by what was said about *Young* v. *Grote* (1) in the curious case of *Ingham* v. *Primrose* (8), in which the acceptor of a bill of exchange, intending to cancel it, tore it in half and threw it into the street. The tearing had been done in such a way that the appearance of the bill was consistent with its having been divided for the purpose of safe transmission by the post. The finder of the two pieces pasted them together and put the bill into circulation. The acceptor was held liable at the suit of a bona fide holder. It had been argued on behalf of the defendants that the putting together of the two halves amounted to forgery, and on this point Williams, J., in delivering the judgment of the Court of Common Pleas, said (7 C.B.N.S. at pp. 87, 88) that, even assuming that the act of reconstructing the bill was a forgery, yet, on the principle of *Young* v. *Grote* (1), this would be no answer to the plaintiff's claim, because the defendant, by abstaining from an effectual cancellation or destruction of the bill, had led to the plaintiff's taking the bill for value without notice. Apart from the merits of the decision in that particular case, this judgment is a recognition by a strong court of the authority of *Young* v. *Grote* (1), and a ruling that the fact that forgery was necessary to take advantage of the negligence would afford no answer.

Of course the negligence must be in the transaction itself—that is, in the manner in which the cheque is drawn. It would be no defence to the banker, if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character. Attempts have often been made to extend the principle of *Young* v. *Grote* (1) beyond the case of negligence in the immediate transaction, but they have always failed.

The grounds of the decision in *Young* v. *Grote* (1) were discussed in 1851, in 1854, and in 1861 by judges of great distinction—Parke, B., Pollock, C.B., and

LORD CRANWORTH. PARKE, B., in the well-known case of *Robarts* v. *Tucker* (9) distinguished *Young* v. *Grote* (1) from the case then under consideration. In the report, 16 Q.B. at pp. 579, 580, PARKE, B., is reported as putting the decision in *Young* v. *Grote* (1) on the ground that the customer had signed a blank cheque, giving authority to anyone in whose hands it was to fill up the cheque in whatever way the blank permitted; while in 15 Jur. at p. 988 he is reported as saying that in *Young* v. *Grote* (1) there was negligence in the drawing of the cheque itself, which was the authority given by the drawer to the bank. POLLOCK, C.B., in delivering the judgment of the court in *Barker* v. *Sterne* (10) (9 Exch. at pp. 686, 687), cites *Young* v. *Grote* (1), and says:

> "It was held that the loss must fall on the drawer as it was caused by his negligence. Now, whether the better ground for supporting that decision is that the drawer is responsible for his negligence which has enabled a fraud to be perpetrated, or whether it be considered that when a person issues a document of that kind the rest of the world must judge of the authority to fill it up by the paper itself and not by any private instructions, it is unnecessary to inquire. I should prefer putting it on the latter ground."

LORD CRANWORTH in giving judgment in your Lordships' House in the Scottish case *Orr and Barber* v. *Union Bank of Scotland* (11) (1 Macq. at p. 523) says of *Young* v. *Grote* (1):

> "The decision went on the ground that it was by the fault of the customer the bank had been deceived. Whether the conclusion in point of fact was in that case well warranted is not important to consider. The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment of a forged order, he should not set up against them the invalidity of a document which he has induced them to act on as genuine."

In 1861 LORD CRANWORTH, in another Scottish case (*British Linen Co.* v. *Caledonian Insurance Co.* (12), 4 Macq. at p. 114), again referred to *Young* v. *Grote* (1) as a case in which there was negligence in circumstances that were the immediate cause of payment by the banker, and said the decision proceeded on the ground that negligence on the part of the drawer had afforded the opportunity for the fraud. To what was said by the three judges whom I have just quoted may be added the observations made by CLEASBY, B., in delivering the judgment of the Court of Exchequer in *Halifax Union* v. *Wheelwright* (13). After referring to some variety in the reasons which had been given for the conclusions reached in *Young* v. *Grote* (1), he said (L.R. 10 Exch. at p. 192):

> "It is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice—namely, that a man cannot take advantage of his own wrong. A man cannot complain of the consequences of his own fault against a person who was misled by that default without any fault of his own."

Perhaps no case has been more frequently cited than *Young* v. *Grote* (1), and very largely by reason of repeated attempts to pray in aid its principle in circumstances to which it has no real relation. The first case of this description was that of *Bank of Ireland* (*Governor & Co.*) v. *Evans' Charities Trustees* (14). In that case stock belonging to Evans' Charities, registered in the Bank of Ireland, had been transferred under powers of attorney to which the seal of the trustees of the charities had been fraudulently affixed by the secretary. The jury found that the trustees had contributed to the loss by their negligence in allowing the secretary to have control of the seal, and it was decided by the House of Lords that this afforded no answer to the claim of the trustees to the stock. *Young* v. *Grote* (1) was much discussed in the course of the argument in their Lordships' House. PARKE, B., delivering the opinion of all the judges, says (5 H.L.Cas. at pp. 409, 410)

A that negligent custody of the seal was not enough and that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself, and proceeded as follows:

> "Such was the case of *Young* v. *Grote* (1), on which great reliance was placed in the argument at your Lordships' Bar. In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn, by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment."

B

C LORD CRANWORTH, L.C., said (ibid. at pp. 413, 414):

> "Now the case of *Young* v. *Grote* (1) went upon the ground (whether correctly arrived at in point of fact is immaterial) that the plaintiff there was estopped from saying that he did not sign the cheque for £350; and if the circumstances are such, whether arising from negligence, or from any other cause, that as between the customer and his banker the customer is estopped from saying that he did not sign the cheque for a particular amount, that as between them is just the same as if he had signed it. Therefore, taking that view of the facts, the case may be well sustained, and appears to have been well decided."

D

This is another way of saying that the customer could not complain of the payment, having caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, to quote the language of PARKE, B. LORD BROUGHAM

E (ibid. at p. 415) cites *Young* v. *Grote* (1) without disapproval, while he goes on to express doubts as to the decision in *Coles* v. *Bank of England* (15).

A little later in the same year (1859) came *Ex parte Swan* (7). The question there arose on a rule nisi to enforce the claim of the applicant to be inserted in the register in respect of shares which had been transferred to third parties under transfers from the applicant which were forgeries. The claim was resisted on

F the ground that the transfers had been executed by the applicant in blank and had been negligently left in the custody of his broker, who afterwards fraudulently filled them up and sold the shares. The court was equally divided in opinion and the rule dropped. *Young* v. *Grote* (1) was referred to with approval by all the four judges, though they differed as to its applicability. ERLE, C.J., quotes *Young* v. *Grote* (1) as an authority, and says that it proceeded on the ground that the

G plaintiff was estopped from setting up against the defendant that the cheque was only £50, inasmuch as it was his negligence by his agent that enabled the fraudulent holder to cheat the banker (7 C.B.N.S. at p. 431). KEATING, J. (ibid. at p. 440), says it went on the ground that a cheque had been drawn so as to admit easily of alteration. WILLIAMS, J., says (ibid. at p. 445): "The case of *Young* v. *Grote* (1) has been recently recognised in this court, and its authority cannot be

H disputed." WILLES, J., distinguished *Young* v. *Grote* (1) as relating to a negotiable instrument.

Next year Mr. Swan brought an action against the company to assert his title to these shares, and a case was stated for the opinion of the Court of Exchequer: *Swan* v. *North British Australasian Co., Ltd.* (7). The four judges before whom the hearing took place were agreed that negligence to operate as an estoppel must

I be the proximate cause of the loss, but differed in their opinion as to the particular case before them. No dissent from the doctrine of *Young* v. *Grote* (1) was expressed by any of the judges, and CHANNELL, B., referring to the fact that *Young* v. *Grote* (1) had been strongly pressed upon the courts, said that it must be considered as explained by PARKE, B., in *Robarts* v. *Tucker* (9) (16 Q.B. at pp. 579, 580) and by the judges in the House of Lords in *Bank of Ireland* (*Governors & Co.*) v. *Evans' Charities Trustees* (14). The case was taken to the Exchequer Chamber in 1863, and it was held there, KEATING, J., dissenting, that the plaintiff was entitled to the shares, the court holding that negligence to operate as an estoppel

must be the proximate cause of the loss. Three of the seven judges referred to *Young* v. *Grote* (1). BLACKBURN, J., while expressing disapproval of *Coles* v. *Bank of England* (15), expresses no disapproval of *Young* v. *Grote* (1), and, on the contrary, after referring to the manner in which *Young* v. *Grote* (1) had been dealt with by WILLIAMS, J., in *Ex parte Swan* (7), where it will be recollected WILLIAMS, J., had said that the authority of *Young* v. *Grote* (1) could not be disputed, proceeds thus (2 H. & C. at pp. 182, 183):

> "It may be that [*Young* v. *Grote* (1)] is to be supported on some of the grounds there stated, or upon the broader ground, apparently supported by the authority of POTHIER in the passage cited in *Young* v. *Grote* (1), that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alteration in it; it is not necessary in this case to inquire how that may be."

I may remark in passing that this last suggestion is too widely put, as was held by this House in *Scholfield* v. *Earl of Londesborough* (3), but is quite correct as applied to the case of banker and customer with reference to cheques, as in *Young* v. *Grote* (1). COCKBURN, C.J. (ibid. at pp. 189, 190), says that *Young* v. *Grote* (1) was not decided on estoppel, but on the ground that, as the loss had been brought about by the negligence of the customer, the latter must bear the loss sustained, and suggested that these facts were held to give a defence to avoid circuity of action. The other judge who refers to *Young* v. *Grote* (1) is the dissenting judge, KEATING, J., who relied upon its authority (ibid. at p. 179). The authority of the case was disputed by no member of the court, but the circumstances of the case then before the court were entirely different.

The group of cases to which I have just referred (1855 to 1863) recognises the authority of the decision of *Young* v. *Grote* (1), while establishing that it applies only to cases in which the negligence is in the transaction itself, and has no application to cases where the fraud has been merely facilitated by negligence in the custody of the seal of a corporation or of transfers in blank. The principle which underlies these decisions is further illustrated in *Arnold* v. *Cheque Bank* (16), *Baxendale* v. *Bennett* (17), *Staple of England (Mayor, etc., of Merchants of the)* v. *Bank of England* (18), *Lewes Sanitary Steam Laundry Co., Ltd.* v. *Barclay & Co., Ltd.* (19), and *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.* (20).

In *Arnold* v. *Cheque Bank* (16) evidence to prove that there had been negligence in the custody and transmission of a draft which had afforded facilities for its being stolen by one Hecht, who forged the endorsement of the plaintiffs and obtained payment, was rejected on the ground that the alleged negligence was collateral only to the transaction. The judgment of the court (LORD COLERIDGE, C.J., and ARCHIBALD and LINDLEY, JJ.) refusing a new trial was delivered by LORD COLERIDGE, who (1 C.P.D. at pp. 586–588) discusses *Young* v. *Grote* (1) and other authorities. He points out that one has only to look at the case itself to see that *Young* v. *Grote* (1) proceeded on the fault of the drawer in the mode of drawing the cheque, "and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases—namely, that negligence in order to estop must be in the transaction itself" (ibid. at p. 587). *Baxendale* v. *Bennett* (17) was the case of an acceptance in blank without a drawer's name being stolen from an unlocked drawer in which it was kept. BRETT, L.J., was mistaken in saying (as he does 3 Q.B.D. at p. 534 in this case) that the decision of the House of Lords in *Bank of Ireland (Governors & Co.)* v. *Evans' Charities Trustees* (14) had shaken the authority of *Young* v. *Grote* (1) and *Coles* v. *Bank of England* (15), as it will be found on examination of the passage referred to, that while it is true of *Coles* v. *Bank of England* (15), it is not true of *Young* v. *Grote* (1). And in *Staple of England (Mayor, etc., of Merchants of the)* v. *Bank of England (Governor & Co.)* (18) LORD ESHER himself explains *Young* v. *Grote* (1) as a case in which the

negligence was in or immediately connected with that which happened, and said that the negligence must be approximately connected with the result (21 Q.B.D. at p. 172). The case last mentioned was one in which the plaintiffs were held entitled to recover stock belonging to them which had been transferred under a transfer to which their seal had been fraudulently affixed by their clerk, notwithstanding negligence on their part in the custody of the seal. The principle was elaborately discussed by KENNEDY, J., in *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co., Ltd.* (19). This was a case of banker and customer. Cheques had been forged by the customer's clerk, and the bank set up as a defence that the customer had been negligent in keeping a clerk in his employment knowing that on a previous occasion he had been convicted of forgery. This contention was rejected by KENNEDY, J., on the ground that to make good such a defence the bank would have to show that it had been misled into making the payments by neglect on the part of the customer in or immediately connected with the forgery or uttering of the cheques, and that the fraud followed as a natural and ordinary result from the negligent conduct of the customer. These are exactly the conditions which existed in *Young* v. *Grote* (1). So in *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.* (20), which was a case of forged cheques, BRAY, J., laid down that it is the duty of the customer of a bank to use reasonable care in the issuing of mandates, citing *Young* v. *Grote* (1) and other authorities, and went on to say ([1909] 2 K.B. at p. 1022):

> "I should come to the same conclusion apart from authority. It seems to me to be clearly the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given."

The learned judge goes on to point out that to afford a defence to the banker, the breach of duty must be, as in *Young* v. *Grote* (1), in connection with the drawing of the order or cheque, and that there is no obligation as between customer and banker that the person should take precautions in the general carrying on of his business or in examining and checking the pass-book.

The celebrated case of *Bank of England* v. *Vagliano Bros.* (21), which arose out of the forgeries of a clerk named Glyka, came up to the House of Lords in 1891. The facts of the case are very different from those now before this House. No doubt was expressed by any of their Lordships who took part in the decision as to the authority of *Young* v. *Grote* (1). LORD SELBORNE refers to "the cases in which the drawer of a cheque has been held bound by fraudulent alterations, for which the state of the paper afforded space," and appears to rely upon them in support of his reasoning against the liability of the Bank of England. LORD BRAMWELL refers to *Young* v. *Grote* (1) as an authority, and says ([1891] A.C. at p. 126) that the result of the authorities is

> "that the conduct of the bank's customer to enable the bank to charge the customer must be conduct directly causing the payment."

LORD FIELD says this (ibid. at p. 170):

> "Reliance was placed by the defendants on the case of *Young* v. *Grote* (1). That case, no doubt, must be considered as well decided; but various opinions have been expressed as to the real ground of the decision. But we have only to look at the case itself to see that it really proceeded on the authority of the extract from POTHIER cited in the judgment of BEST, C.J., which makes the inability to recover depend upon the fault of the drawer of the cheque in the mode of drawing it, and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases—viz., negligence in order to estop must be negligence in the transaction itself: see per BLACKBURN, J., in *Swan* v. *North British Australasian Co.* (7) (2 H. & C. at p. 182)."

A very serious extension of the effect of the decision in *Young* v. *Grote* (1) was attempted in the years 1894 to 1896 in *Scholfield* v. *Earl of Londesborough* (3), decided in the first instance by CHARLES, J., whose decision was confirmed in the

Court of Appeal and in your Lordships' House. In that case the defendant had accepted a bill of exchange for £500 drawn upon him by one Saunders, and bearing a stamp sufficient to cover £4,000. Before endorsement it was fraudulently altered by the drawer to £3,500 by the insertion of the words "three thousand" before the words "five hundred," and the figure "3" before the figure "5." The acceptor was sued on the bill by a holder for value. It is necessary to state the course of this case somewhat fully, in view of its bearing upon the subsequent case of *Colonial Bank of Australasia, Ltd.* v. *Marshall* (4). CHARLES, J., held that a person who signs a negotiable instrument, with the intention that it should be delivered to a series of holders, incurs a duty to those who take the instrument not to be guilty of negligence with reference to the form of the instrument, and that, if he signs it negligently in such a shape as to render alterations easy, in the result he is responsible on the altered instrument. He applied to negotiable instruments generally the doctrine of *Young* v. *Grote* (1) as to a cheque between banker and customer. He then went on to inquire whether the acceptor was guilty of negligence in accepting the bill, and held that he was not. He referred to *Young* v. *Grote* (1), and said that a glance at the cheque there would have satisfied any careful person that it was in a state in which alteration was not merely a possible, but a likely, result, and then said ([1894] 2 Q.B. at p. 665):

> "Here I cannot see anything to warrant such a finding. The unaltered bill was complete in form, and, upon inspection, would not, in my judgment, have excited suspicion in the mind of a reasonably prudent man."

He, therefore, held that the acceptor was liable on the bill for £500 and no more. He pointed out that the question whether the defendant had been guilty of such negligence as would impose upon him a liability for the subsequent forgery was a question not of law but of fact, referring particularly to *Société Générale* v. *Metropolitan Bank, Ltd.* (22). The defendant appealed, and in the Court of Appeal it was held by the majority, LORD ESHER, M.R., and RIGBY, L.J., that the acceptor of a bill incurs no such duty as CHARLES, J., had found. As LORD ESHER points out, it would be a very dangerous doctrine if a draft could be refused acceptance on the ground that there were spaces in it and the bill were to be protested in consequence. He said that *Young* v. *Grote* (1), which he characterised as "the fount of bad argument," had no application, as it was a question between banker and customer, and the person said to be negligent was the drawer of a cheque and not the acceptor of a bill of exchange. He added that the only ground on which *Young* v. *Grote* (1) could be supported was that the customer signed a blank cheque. As to the finding by CHARLES, J., on the question of negligence, LORD ESHER says ([1895] 1 Q.B. at p. 542):

> "Suppose, however, there were a duty owing by the acceptor, it must be a duty not to accept the bill in such a form as to render a forged interpolation easy. The suggested neglect of that duty is that the acceptor ought to have anticipated that the bill would fall into the hands of a felonious person who might take advantage of the spaces, and that the acceptor should on that anticipation have put marks on the bill to fill up the spaces. Unless it can be laid down that the mere fact of leaving such spaces unfilled is conclusive evidence of negligence, it might be that on a similar state of things different juries might take different views. That, again, would be a dangerous state of things. If, however, it is a question of fact for our decision, I am of opinion that such evidence as was given in this case is no evidence of negligence."

He added that, even if there was negligence, it was not the negligence but the subsequent forgery which was the immediate cause of the loss. RIGBY, L.J., on the question of negligence said that it was probable that the drawer had used some means to close the defendant's eyes to the imperfections of the bill, and added: "The state of evidence makes it impossible to say that the plaintiff has proved negligence." LOPES, L.J., differed, holding that the duty existed and that there

had been negligence so that the plaintiff was, in his opinion, entitled to recover on the bill altered to £3,500. It is obvious that the position of the acceptor of a bill of exchange with reference to subsequent holders is very different from that of a customer with reference to his banker in the case of a cheque. In the latter case there is a definite contractual relation involving the obligation to take reasonable precautions.

When *Scholfield's Case* (3) came to the House of Lords, LORD HALSBURY said of *Young* v. *Grote* (1) ([1896] A.C. at p. 522):

> "That case has been pushed so far in argument that I think the time has come when it would be desirable for your Lordships to deal with it authoritatively, and to examine how far it ought to be quoted as an authority for anything."

Towards the close of his judgment LORD HALSBURY refers to *Adelphi Bank* v. *Edwards* (23), a case as to a bill of exchange, and goes on to say (ibid. at p. 532):

> "I entirely concur with what LINDLEY, L.J., said in that case, that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of BOVILL, C.J., in a former case, *Société Générale* v. *Metropolitan Bank, Ltd.* (22), that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land."

The distinction between *Young* v. *Grote* (1) and such a case as *Scholfield* (3) was clearly pointed out by five of the peers who took part in the decision. LORD WATSON says (ibid. at p. 536):

> "In my opinion *Young* v. *Grote* (1) can have no bearing upon the present case if it was decided upon the ground that the customer, by signing a blank cheque, had given implied authority to fill it up to any subsequent holder. Whoever signs a cheque or accepts a bill in blank, and then puts it into circulation, must necessarily intend that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. No such inference would be reasonable in the case where the drawer or acceptor signs for a particular sum specified on the face of the document. If, on the other hand, the decision in *Young* v. *Grote* (1) was based upon the ratio that the customer, in filling up the cheque through his wife, whom he had constituted his agent for that purpose, had failed in the duty which he owed to his banker by giving facilities for its fraudulent alteration, I am not prepared to affirm that it cannot be supported by authority. But it does not, in my opinion, necessarily follow that the same rule must be applied between the acceptor of a bill of exchange and a holder acquiring right to it after acceptance. The duty of the customer arises directly out of contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future endorsees of a bill of exchange. The duty which the appellant's argument assigns to an acceptor is towards the public, or, what is much the same thing, towards those members of the public who may happen to acquire right to the bill, after it has been criminally tampered with. Apart from authority, I do not think the imposition of such a duty can be justified on sound legal principle."

He then reviews the authorities and shows that they lead to the same conclusion, and goes on:

> "The doctrine of POTHIER, out of which the contention of the bill-holder in this and previous litigations has grown, is founded upon reasons which have no application to any question between a drawer or acceptor and a holder acquiring right to the bill after acceptance; and I know of no principle of law which would warrant its extension to that case."

LORD MACNAGHTEN says that on no view of *Young* v. *Grote* (1) could it apply to such a case as that before the House, and ([1896] A.C. at pp. 545–546):

> "Whatever may be the better ground for supporting the decision in *Young* v. *Grote* (1), it is obvious, on referring to the report in Bingham, that the court went very much on the authority of the doctrine laid down by POTHIER, that in cases of mandate generally, and particularly in the case of banker and customer, if the person who receives the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable; but the doctrine has no application to the present case. There is no mandate as between the acceptor of a bill and a subsequent holder."

LORD MORRIS says that in *Young* v. *Grote* (1) the document was in blank, and adds (ibid. at p. 547):

> "Even if well decided on its particular facts, and a case between banker and customer, I fail to see how it governs this case, where the defendant accepted a regularly filled-up bill."

LORD SHAND says (ibid. at p. 548):

> "As to the case of *Young* v. *Grote* (1), I find nothing in the grounds of the judgment which supports the proposition that an endorsee of a bill of exchange for value has a legal claim against the acceptor, against whom no want of bona fides can be alleged, for a sum beyond the amount for which the acceptance was given, on the ground of negligence in his having given his acceptance to a bill in such a form and impressed with such a stamp as enabled the drawer to commit a forgery by enlarging the amount for which the acceptance was granted in such a way as to escape detection by the endorsee."

He then goes on to point out that on neither of the two grounds (negligence and signature of the cheques in blank), on which *Young* v. *Grote* (1) had been supported, could it have application to the facts of the case under discussion. LORD DAVEY expressed his entire agreement with LORD WATSON's judgment, and says:

> "I only desire to say that, in my opinion, our judgment in this case is outside the case of *Young* v. *Grote* (1). The doctrine of that case was one arising out of the relation of mandant and mandatory, which does not exist in the case of the acceptor and holder of a bill of exchange."

The decision of the House of Lords in the *Scholfield Case* (3), therefore, proceeded on the ground that the duty which *Young* v. *Grote* (1) affirmed to exist as between banker and customer had no relation to any supposed duty on the part of the acceptor of a bill of exchange to those into whose possession the bill might pass. The decision of the House of Lords does not infringe upon the authority of *Young* v. *Grote* (1). On the contrary, I think it recognises it.

The last case which it is necessary to notice is that of the *Colonial Bank of Australasia, Ltd.* v. *Marshall* (4), which, though not binding on any English court, commands the most respectful consideration. This was an Australian case in which Marshall, Day, and one Myers were executors and, as such, opened an account with the colonial bank on which cheques were to be drawn signed by the three. The cheques were drawn by Myers, who sent them for signature to Marshall and Day, and then added his own signature. Five cheques for small amounts were drawn by Myers and signed by Marshall and Day. Myers, before signing himself, added words and figures in the cheque as signed by Marshall and Day, and in this way greatly increased the apparent amounts of the cheques. Having signed the cheques himself, he got them cashed for the increased amounts. The question was whether Marshall and Day could throw the loss on the bank. In the judgment of the Judicial Committee (LORD HALSBURY, LORD MACNAGHTEN, SIR ARTHUR WILSON, and SIR ALFRED WILLS) delivered by SIR ARTHUR WILSON, it is said that *Scholfield* v. *Earl of Londesborough* (3) in the House of Lords is now the governing authority, and, after stating the course of that case before CHARLES, J., it is pointed out that

the Court of Appeal negatived the existence of the alleged duty and the allegation that, assuming it existed, there had been a violation of it, so that both propositions were before the House of Lords. SIR ARTHUR WILSON says that the existence of the duty was negatived by the House of Lords, but that that did not affect the case then under appeal, as it was recognised that there is or may be a duty on the part of a drawer of a cheque towards his banker which does not exist on the part of the acceptor of a bill towards holders. He said that no attempt was made to define the extent of such obligation, and that it might be impossible to do so, as the extent of the duty might depend on the course of dealing between the parties. The judgment then proceeds as follows:

"But the duty which, according to the ruling of the learned Chief Justice, subsists between customer and banker is substantially the same as that contended for in *Scholfield* v. *Earl of Londesborough* (3) as existing between the acceptor and the holder of a bill. And, as has been pointed out, the House of Lords had before them on the appeal the question whether the Court of Appeal was right in ruling that the facts found in that case (which included everything existing in the present case) did not amount to a breach of the obligation, supposing that obligation to exist. Not one of the members of their Lordships' House appears to have expressed the slightest disapproval of that ruling, and most of their Lordships distinctly approved of it. The Lord Chancellor expressed his concurrence in the opinion of LINDLEY, L.J.:

> 'that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of BOVILL, C.J., in a former case, *Société Générale* v. *Metropolitan Bank, Ltd.* (22) that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land.'

LORD WATSON approved the same rulings. LORD MACNAGHTEN expressed the same opinion, and LORD DAVEY concurred in the judgment of LORD WATSON. The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilise them for the purpose of forgery is not by itself any violation of that obligation. Their Lordships therefore agree with the High Court of Australia in holding that there was no evidence proper to be left to the jury of negligence on the part of the respondents."

The reasoning of the whole of this passage in the judgment in *Colonial Bank of Australasia, Ltd.* v. *Marshall* (4) rests on the assumption that the standard as to negligence applicable in the case of banker and customer is the same as that which would be applicable in the case of the acceptor of a negotiable instrument if the duty to take care existed. It is, of course, difficult to define the extent of a duty where no duty at all exists, as is the case with an acceptor of a bill and subsequent holders. But on the hypothesis that there is some obligation to exercise care in the case of an acceptor of a bill, as well as in the case of a customer with regard to his cheque, the facts which would constitute negligence would be very different in the two cases. CHARLES, J., while finding the existence of the duty in *Scholfield's Case* (3), held that there had been no negligence, while he fully recognised the doctrine of *Young* v. *Grote* (1) as to banker and customer where the negligence of leaving blank spaces in drawing a cheque is pointed out. The questions are essentially different. As pointed out by LORD ESHER in *Scholfield's Case* (3), the consequences of refusing acceptance of a draft, because there were blank spaces in it, might be serious, and all this must be taken into account in determining whether in such a case the acceptance was given negligently as regards the supposed liability to subsequent holders. On the other hand, in the case of banker and customer, the manner in which the cheque is to be filled up is entirely in the hands of the customer, and if he leaves unusual blank spaces which facilitate

forgery, according to *Young* v. *Grote* (1) and on principle, there is negligence as between him and the banker. The passages cited by SIR ARTHUR WILSON from the judgments in *Scholfield's Case* (3) are rather directed to the negation of the existence of any duty as between the acceptor of a bill of exchange and holders. Without the existence of duty to take care there can be no negligence, and what was settled by *Scholfield's Case* (3) is that no such duty exists as between acceptor and holders of a bill. With the greatest respect, I do not think that these passages support the proposition that as between banker and customer there is no negligence in drawing a cheque with blank spaces which facilitate forgery. Indeed, such an interpretation of these passages is inconsistent with the manner in which *Young* v. *Grote* (1) is treated by five out of the six peers who took part in the decision of *Scholfield's Case* (3). The dictum of LINDLEY, L.J., in the *Adelphi Bank Case* (23), which is cited by LORD HALSBURY, was laid down in a case in which the liability of the acceptor to holders was in question, not on a case of banker and customer, and the same observation applies to the judgment of BOVILL, C.J., in *Société Générale* v. *Metropolitan Bank, Ltd.* (22). In the course of his judgment BOVILL, C.J., is at pains to point out that the circumstances of *Young* v. *Grote* (1) were entirely different from those of the case before him, where there was simply a blank in the printed form of the bill of exchange.

The question whether there was negligence as between banker and customer is a question of fact in each particular case, and can be decided only on a view of the cheque as issued by the drawer, with the help of any evidence available as to the course of dealings between the parties or otherwise. If the existence in a cheque of blank spaces of an unusual nature and such as to facilitate interpolation, is declared to be no evidence of a breach of duty as between customer and banker, the duty would have little left to operate upon. To recognise the duty of care by the customer in drawing cheques and then to lay down as a matter of law that there is no breach of that duty by leaving such blank spaces in the cheque, is in effect to eviscerate the duty. If *Young* v. *Grote* (1) is right, the judgment now appealed from is wrong. In my opinion, the decision in *Young* v. *Grote* (1) is sound in principle and supported by a great preponderance of authority, and must be treated as good law. The ground on which *Young* v. *Grote* (1) proceeded was, according to the judgment of three out of the four judges, simply this, that if a customer in drawing a cheque neglects reasonable precautions against forgery and forgery ensues, he is liable to make good the loss to the banker, and that the fact that a crime has to intervene to cause the loss does not make it too remote. Indeed, forgery is the very thing against which the customer is bound to take reasonable precaution. Leaving blank spaces in the cheque is the commonest way in which forgery is facilitated, and to lay down as a matter of law that it is no breach of duty would be a somewhat startling conclusion. In *Young* v. *Grote* (1) there was the additional circumstance of the small "f" at the beginning of the word "fifty," but I cannot doubt that without this the result would have been the same.

In the present case the customer neglected all precautions. He signed the cheque, leaving entirely blank the space where the amount should have been stated in words, and, where it should have been stated in figures, there was only the figure "2" with blank spaces on either side of it. In my judgment, there was a clear breach of the duty which the customer owed to the banker. It is true that the customer implicitly trusted the clerk to whom he handed the document in this state to fill it up and to collect the amount, but his confidence in the clerk cannot excuse his neglect of his duty to the banker to use ordinary care as to the manner in which the cheque was drawn. He owes that duty to the banker as regards the cheque, and it is no excuse for neglecting it that he had absolute, and, as it turned out, unfounded, confidence in the clerk. The duty is not a duty to have clerks whom the customer believes to be honest. It is a specific duty as to the preparation of the order upon the banker. If the customer chooses to dispense with ordinary precautions because he has complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss which results. No one can be

A certain of preventing forgery, but it is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. If, owing to the neglect of such precautions, it is put into the power of any dishonest person to increase the amount by forgery the customer must bear the loss as between himself and the banker. But, further, it is well settled law that if a customer signs a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instru-
B ment as filled up by the agent. Thus has been suggested as the real ground for the decision in *Young* v. *Grote* (1). For the reasons which I have already stated, I do not think that on the facts of that case it is the true ground of the decision. But the principle is thoroughly established, and it seems to me to apply to the facts of the present case. The customer signed the cheque in the condition which I have described, and handed it over to the clerk to be filled up by him. For all
C practical purposes the cheque was in blank, as the figure "2" in its isolated position afforded no security whatever against a fraudulent increase. The clerk had the authority of the customer to fill up the words denoting the amount in the body of the cheque, and to put other figures before and after the "2" was quite easy owing to its position. The examination of the facsimile of the cheque when filled up shows how impossible it was to detect the fraud. On such facts the customer
D is liable for the act of the clerk just as much as if the cheque had been completely in blank when he signed it and handed it to the clerk to fill it up. There was no apparent limitation on the authority of the clerk in filling up the cheque. On this ground also, which, on my view of *Young* v. *Grote* (1), is independent of that decision, I am of opinion that this appeal should be allowed. For these reasons I think that judgment should be entered for the bank with costs here and below.

E

VISCOUNT HALDANE.—The respondents, who are in partnership as general merchants, at the time of the transaction in question were customers at the appellant bank. They employed as their clerk one Klantschi, who was their book-keeper and cashier, and who, among other duties which he discharged, used at times to fill in cheques for them for signature. In the forenoon of Feb. 9, 1915,
F Mr. Arthur, one of the respondent partners, was going out of his office to luncheon He appears to have been in a hurry, and to have had his hat already on, when Klantschi called him back and said that he wanted him to sign a cheque for petty cash for the firm. Klantschi brought him a loose cheque torn out of the cheque book, and without the counterfoil. Mr. Arthur appears from his own account to have taken a pen which Klantschi handed to him, and to have signed the cheque
G without further consideration. He only remarked that he did not like signing with Klantschi's pen, and that he wished he would bring cheques to his private office in future. He, however, signed the firm's name to this one, with the observation that the cheque was for £2, and that usually Klantschi asked for £3 for petty cash. The latter replied that the amount was enough. The cheque was not completely filled in when the partner signed it. It was already dated and made
H payable to "Ourselves or Bearer." But, as SANKEY, J., who tried the case, found, no words at all had been inserted in the space provided for the indication in words of the amount, and in the space provided for figures there was a "2," with room in which other figures could be inserted on each side of this figure. After Mr. Arthur had left the office Klantschi proceeded to fill in the cheque thus left incom-
I plete. His employer had without doubt authorised him to fill it in so as to be a complete cheque for £2, and then to take it to the bank and cash it. But he inserted "one hundred and twenty" pounds in the space provided for words, and he further inserted a "1" to the left and a "0" to the right of the "2" in the space where the latter figure was written, making a corresponding amount in figures of £120. He subsequently took the cheque to the bank, obtained cash for it over the counter, and almost immediately afterwards absconded. There were other cheques as to which questions were raised by the respondents, but these questions have all been disposed of. The only thing that remains in controversy is whether the respondents were entitled to succeed in an action which they brought to have it

declared that the bank were not entitled to debit the respondents' account with more than £2 in respect of the cheque I have described, or, alternatively, that the respondents were entitled to £118 as damages. SANKEY, J., decided in favour of the respondents, and the Court of Appeal has affirmed this decision.

The question before us is whether the courts below, in dealing with the facts found as I have stated them, came to a true conclusion as to what ought to result from them in law. In order to consider the proper conclusion it is necessary to ascertain what relevant principles have been established. The decided cases in point have been fully brought before your Lordships in the able arguments to which we have listened from the Bar. After considering the authorities I do not, speaking for myself, entertain any doubt that certain important principles have at length been placed beyond controversy.

Ever since this House in 1848 decided *Foley* v. *Hill* (24) it has been quite clear that the relation between a banker and the customer whose balance he keeps is, in ordinary circumstances, one simply of debtor and creditor. But in other judgments, and notably by a later decision of this House, *Scholfield* v. *Earl of Londesborough* (3), it was made equally clear that along with this relation and consistently with it there may subsist a second one. This further relation, and the duties which arise out of it, differentiate the additional relation between the customer who draws a cheque on his banker from any relation which exists between the parties to an ordinary negotiable instrument, between, for example, the acceptor of a bill of exchange, and the person who buys it in the market in reliance on his signature. The acceptor of a bill of exchange may well be under the general obligation which affects persons who invite others to act upon their undertakings given for valuable consideration, not to express these undertakings in such a form as may naturally mislead those who act upon them. But the customer of a bank is under a yet more specific duty. The banker contracts to act as his mandatory, and is bound to honour his cheques without any delay to the extent of the balance standing to his credit. The customer contracts reciprocally that in drawing his cheques on the banker he will draw them in such a form as will enable the banker to fulfil his obligation, and, therefore, in a form that is clear and free from ambiguity. The correlative obligation is thus complementary to the obligation of the mandatory to apply the balance in paying without delay the cheques as and when presented to him. It may be that if the cheque is completely and distinctly drawn, the mere fact that so much space has been left between the words and the figures on the one hand, and the marginal limits provided by the blank form on the other, as to have enabled a skilful forger to commit a crime by altering the amounts, is not, if that be all, a breach of the obligation of the customer. People are not called on to anticipate the commission of forgery when they are exercising ordinary care in writing their cheques. To have left such spaces, if there is nothing more, may not bring the case within the category of those in which the customer is deemed to have failed in his duty to his banker. At all events the Judicial Committee of the Privy Council so decided in *Colonial Bank of Australasia, Ltd.* v. *Marshall* (4), and I do not think that in order to dispose of the present appeal it is necessary to discuss the question how far that case binds us sitting here, or what authority should be attributed to the judgment. What I wish to make plain is that in the case of a cheque drawn by a customer on his banker there is a special duty to exercise care in the framing of what is a mandate, a special duty which does not exist in the same fashion in the instance of the acceptor of a bill of exchange, where the instrument is drawn for circulation among the members of the public generally, and is not a direction to a designated person to pay out of a balance for which he has to account, a person who has a right to insist that the direction he receives to be acted on without any delay shall be so drawn as not to require exceptional consideration and so impose delay. The obligation of the customer to avoid negligence in this regard was, I think, well expressed by KENNEDY, J., in *Lewes Sanitary Steam Laundry Co., Ltd.* v. *Barclay & Co., Ltd.* (19) when that very accomplished judge defined it as including

A "a duty to be careful not to facilitate any fraud which, when it has been perpetrated, is seen to have in fact flowed in natural and uninterrupted sequence from the negligent act."

The limitation of the liability to that which flows directly from the act established as negligent was obviously introduced by KENNEDY, J., because of what has been repeatedly laid down in the decided cases as essential—that the negligence should B be of such a kind that the loss has resulted immediately from it and not from some intervening cause which, although it was able to produce its effect because of what the customer had previously done or omitted to do, was not itself brought into existence as the immediate and natural outcome of his action. Thus a man may be imprudent in leaving his cheque-book and pass-book in the hands of his clerk, who is thereby enabled to forge a cheque. But he is not liable for the reason that C the direct and real cause of the loss is the intervention of an act of wickedness on the part of the clerk which the law does not call on him to anticipate in the absence of obvious ground for suspicion. In *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.* (20) BRAY, J., stated the principle with conspicuous lucidity.

A cheque is a bill of exchange within the definition in the Bills of Exchange Act, D 1882. The statement in a cheque of the sum payable as expressed in words is, therefore, in accordance with s. 9 of that Act, instructive, inasmuch as in the case of a discrepancy the statement in words is to prevail over that in figures. Although a bill of exchange is a complete order for payment within the definition in s. 3, even if the sum payable is stated in figures only, yet it may be that a banker would be justified in refusing to pay a cheque in which a statement in words had E been omitted from the space provided for it. For, as I have observed above, the banker as a mandatory has a right to insist on having his mandate in a form which does not leave room for misgiving as to what he is called on to do, and there is nothing in the Act which in any way abrogates this right if by usage between himself and his customer he is entitled to expect the amount to appear in writing as well as in figures. The point does not, however, arise for decision in the present F case. The statute also declares the law on another point which is not without bearing on the question before us. Section 20 (1) enacts:

"Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a primâ facie authority to fill it up as a complete bill for any amount the stamp will cover, G using the signature for that of the drawer, or the acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit."

By sub-s. (2) of the same section:

"In order that any such instrument when completed may be enforceable H against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. . . ."

These words probably do no more than express the law merchant as it stood prior to the statute, and they leave open for determination by the law outside the statute the question how the authority given is to be proved. I think that a banker has I more than one answer to his customer if he is challenged for paying a cheque which on the face of it appears to have been duly filled in before signature, although in fact it has really been filled in subsequently and otherwise than in accordance with instructions given by the customer to his clerk when he signed it and handed it to the latter to complete and cash, with a restriction on the clerk's authority of which the banker knew nothing. If the customer objects to be debited with the amount of such a cheque on the ground that the clerk has inserted an amount which was not authorised, the banker may reply either of two things. He may say that the customer was under a legal obligation to see that any cheque which he

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signed in order that it might subsequently be filled in and presented was in order when presented, and that the existence of this obligation precludes him from setting up that the clerk had not authority in fact. The presentation at the counter of a cheque for a definite amount which he authorised to be presented in order to be cashed, although he actually intended that it should be cashed for a different amount, is a representation that the bearer presenting it has authority to receive payment.

The special duty of the customer towards his banker to which I have already referred is in itself a sufficient ground for attributing an intention to make such a representation, and I think that its inference may also be justified on the more general principle of estoppel by conduct enunciated by PARKE, B., in the well-known case of *Freeman* v. *Cooke* (2), explained in this connection by BLACKBURN, J., in the Exchequer Chamber in *Swan* v. *North British Australasian Co., Ltd.* (7). In *Freeman* v. *Cooke* (2) PARKE, B., points out the difference between estoppel by record or by deed, as to which the rules of pleading which did not favour it are strict, and estoppel in pais, which is, generally speaking, a mere application not of any technical rule, but of common sense. He quotes *Pickard* v. *Sears* (25) for the proposition that when a man by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. He explains that by saying that by "wilfully" is meant not necessarily that the party represents that to be true which he knew to be untrue, but that at least he meant his representation to be acted on, and, therefore, that, whatever a man's real intention may be, if he so conducts himself that a reasonable person would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be precluded from contesting its truth. He goes on to add that conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to make known the facts accurately, may have the same effect. The principle laid down by PARKE, B., is one the recognition of which is essential to the conduct of business between the members of every well-ordered community. It is generally recognised in ordinary social life as imposing obligations of honour as much as of law. And it may be observed that it is hardly a rule of what is called substantive law in the sense of declaring an immediate right or claim. It is rather a rule of evidence, capable not the less on that account of affecting gravely substantive rights. The principle of estoppel thus explained is one which it appears plain that a banker, in proper circumstances, might invoke as a defence against his customer's claim.

I think, further, that the banker may alternatively say that even if the customer would otherwise primâ facie be entitled to recover from him the amount paid on such a cheque as I have referred to, on the footing that the latter had no voucher which justified the payment, he, the banker, must be entitled in such a case to recover against the customer for the loss sustained by a negligent act, and that, to prevent circuity of action, he must be allowed to set up a defence based on his immunity from the loss so occasioned: see the judgment of COCKBURN, C.J., in *Swan* v. *North British Australasian Co., Ltd.* (7) (2 H. & C. at p. 190).

The case of a customer drawing a cheque on a banker to whom he owes the duty referred to is different from that of, for example, an acceptor of a bill of exchange who has not such a special duty. I should hesitate before saying that the proposition laid down by LORD HALSBURY in *Scholfield* v. *Earl of Londesborough* (3) in commenting on the unreported decision in *Adelphi Bank* v. *Edwards* (23), ought to be extended without qualification to a cheque drawn on a banker. LORD HALSBURY cites with approval what LINDLEY, L.J., laid down in the latter case to the effect that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and also a wider proposition of BOVILL, C.J., in *Société Générale* v. *Metropolitan Bank, Ltd.* (22) (27 L.T. at p. 856), that

people are not supposed to commit forgery, and that the protection against forgery is, not the vigilance of parties excluding the possibility of committing forgery, but the law of the land. For the reasons which I have already given, I think that, at all events, in the case of cheques drawn by a customer on his banker, this proposition cannot be applied without qualification by other principles which are plainly applicable. Even in regard to other kinds of negotiable instruments that must be remembered which was pointed out by MOULTON, L.J., in *Smith* v. *Prosser* (26) ([1907] 2 K.B. at p. 752, that

> "if a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument."

The decision of this House in *Brocklesby* v. *Temperance Building Society* (27) is a further illustration of the way in which the proposition of LORD HALSBURY has to be taken as laying down only a general rule which is subject to qualification in special instances. There a father entrusted his son with title-deeds for the purposes of raising a limited sum. The son, by fraudulent concealment of the written authority given to him and by means of forgery, succeeded in borrowing a larger sum on equitable mortgage by deposit of the deeds, and appropriated it. It was held by LORD HERSCHELL, LORD WATSON, and LORD MACNAGHTEN, following the well-known decision of LORD CRANWORTH in *Perry Herrick* v. *Attwood* (28), that the father could not redeem the security without paying the lender all he had lent. The principle laid down by this House was that if a person permits title deeds to be dealt with for the purpose of creating a charge of definite amount, and the limit is exceeded, he cannot, as against an innocent third party who has advanced his money without notice of the limit, complain that the authority which he gave has been exceeded. No doubt this principle becomes applicable owing to the importance which the Court of Chancery always attached to the possession of title deeds, but it furnishes none the less a further illustration of the caution which is required before relying on the general proposition to which I have referred.

I have come to the conclusion that if the principles which I have now stated are applied in the present case we cannot avoid the conclusion that the decision in the courts below was erroneous. The respondents signed a cheque which was blank altogether as regards the words which, according to usage, were to be inserted to describe the amount, and, as to the figure space, was in such a condition that the figure "2" was inserted in a place where other figures could easily be added on each side. They left it to their clerk to fill up the cheque thus imperfect. It was drawn payable to bearer, and he was authorised to present it for payment. On the face of the cheque there was nothing of any kind to awaken any doubt in the minds of the officials of the bank that the cheque, which it was their duty to honour if in order without delay, was in order. The bank paid the amount for which it appeared to be drawn over the counter in cash to the fraudulent clerk. Both upon the principles and upon the authorities I have referred to, it seems to me that the bank acted rightly in law in so doing. It was said in the judgments in the court below that the insertion of the figure "2" in the cheque before signature was a limitation on the face of it of the authority of the clerk, and that, therefore, the real cause of the loss was not the failure to tell the bank of the restriction on his power, but his own fraud for which the respondents were not liable. I cannot agree. So far as the bank was concerned, no limitation of the amount appeared on the face of the cheque when presented. Before signature there was that which, if left alone, would have been such a limitation. But then the respondents left the clerk in a position to make additions to the cheque, which was not only in an imperfect condition, but had the limiting figure in such a place that the clerk could, by merely adding figures on each side, make it disappear as completely as if it had never been inserted. He did make additions which, when the cheque was presented at the bank, had rendered the original limiting figure

for all practical purposes non-existent. It was immediately due to the action of the respondents, and not to any other cause, that he was able to do this, and I am of opinion that in putting as much as they did within his power they took the risk of failure in the discharge of their duty to the bank of which they were customers. It follows that they cannot now recover the amount of a loss which was due to their own negligence.

Much was said in the course of the discussion, both at the Bar of this House and in the courts below, about *Young* v. *Grote* (1). There the plaintiff, having occasion to leave home, signed a blank cheque and handed it to his wife with authority to fill it up for such sum as she might think requisite for the purposes of his business. She told a clerk to fill it up with the sum of £50 2s. 3d. He filled in that sum and showed the cheque so made out and payable to bearer to the lady, who told him to get it cashed. The amount was inserted in words as well as figures, but the word "fifty" commenced in the middle of a line and had a small "f," and the figure "50" was inserted so far from the sign "£" as to permit another figure to be inserted in the interval. The clerk then fraudulently altered the words and figures by such insertions as made the cheque appear as one for £350 2s. 3d., and obtained payment from the defendants, the plaintiff's bankers. The latter claimed to debit the plaintiff with the larger amount, and the dispute which arose was referred to arbitration. The arbitrator found that the plaintiff had been negligent in causing his cheque to be handed to the clerk in such a state that he could, by the mere insertion of words, make it appear to be a cheque for the larger sum. He appears to have stated the facts in his award, and to have referred the question whether they imported a duty, the breach of which amounted to negligence in law, for the opinion of the Court of Common Pleas. That court decided that the bankers were not liable for the loss sustained by the plaintiff. The case is a very well-known one, and has been frequently discussed. I think that the outcome has been a substantial balance of authority in support of the result reached by the Court of Common Pleas. To me it appears that the conclusion come to by that court was the right one. I think that the facts established were in some respect not so favourable to the bankers as those in the case now before us. The cheque as signed was complete, which is not the case here. But the small "f" in the word "fifty" was a feature of importance when taken in conjunction with the way in which the figure "50" was placed at a distance from the "£." There was also the finding of the arbitrator which seems to have implied that he thought the plaintiff had been careless in his conduct. In these points the circumstances of the case differ from those in *Colonial Bank of Australasia, Ltd.* v. *Marshall* (4) to which I have referred earlier, and I see no reason for saying that the result reached by the Court of Common Pleas is inconsistent with the weight of subsequent authority. But having gone so far I wish to add that I doubt whether the case is to-day a particularly instructive one. The judges who decided it did so on grounds which varied. BEST, C.J., proceeded on that of negligence, and so did GROSE, J. But PARK and BURROUGH, JJ., appear to have based their conclusions mainly on the ground that the plaintiff signed an authority to the bankers so general that it covered what was done by his wife and the fraudulent clerk in combination. I think that since *Young* v. *Grote* (1) was decided the principles on which questions of this kind ought to be disposed of have been rendered much clearer than they were made in the judgments of the Court of Common Pleas. While I have no quarrel with the particular decision in the case I am, therefore, not disposed to rely on these judgments as containing any exposition of the law which is of much value to-day.

LORD SHAW (read by LORD ATKINSON).—The facts of this case are very simple, and they have been told by your Lordships who preceded me. The case is one between banker and customer. It is almost as important, in view of the large citation of authority which has been made in the courts below and at the Bar of this House, to keep in mind some things which are not part of this case as those

things which are. In the first place, not only is this not a case between the drawer and the acceptor of a bill or between the acceptor and a holder of the bill in due course, but it is not the analogue of such a case. The reason that I state this in the forefront of my opinion is that it disposes at once of a considerable body of authority which was cited as relevant to the consideration of the present suit. The distinction between a case of the latter sort and of the present was very clearly brought out in *Scholfield* v. *Earl of Londesborough* (3) by LORD WATSON and by LORD DAVEY. In the words of the former, which are directly applicable to the present case ([1896] A.C. at p. 537),

> "the duty of the customer raises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future endorsees of a bill of exchange."

In the next place, on the facts before us themselves the elements are of the simplest. It is the case of a customer drawing a cheque in his own favour from his banker. There is no complication as to the cheque having passed to a payee, third party, nor is there any question accordingly as to any conduct of misconduct on the part of such payee. The case is direct in that sense. Nor is there any question of the genuineness of the signature; it is admitted to be genuine. I state this elementary point because it disposes again of a considerable portion of the authorities cited to us in regard to forged cheques. A cheque with the signature of a customer forged is not the customer's mandate or order to pay. With regard to that cheque, it does not fall within the relation of banker and customer. If the bank honours such a document not proceeding from its customer, it cannot make the customer answerable for the signature and issue of a document which he did not sign or issue; the banker paying accordingly has paid without authority, and cannot charge the payment against a person who was a stranger to the transaction. This was the ground stated by CRANWORTH, L.C., in *Orr and Barber* v. *Union Bank of Scotland* (11) (1 Macq. at p. 522):

> "The payment of a forged cheque or order is not of itself any payment at all as between the party paying and the person whose name is forged. This is, I apprehend, the law both of England and Scotland."

The case, then, must be taken as the simplest one—namely, of a cheque duly signed, forwarded on behalf of the customer to the banker, and honoured. There are in these circumstances reciprocal obligations. If the cheque does not contain on its face any reasonable occasion for suspicion as to the wording and figuring of its contents, the banker, under the contract of mandate which exists between him and his customer, is bound to pay. He dare not, without liability at law, fail in this obligation, and the consequences to both parties of the dishonour of a duly signed and ex facie valid cheque are serious and obvious. In the second place, if there be on the face of the cheque any reasonable ground for suspecting that it has been tampered with, then that, in the usual case, is met by the marking "refer to drawer," and by a delay in payment, until that reference clears away the doubt. Always granted that the doubt was reasonable, the refusal to pay is warranted. These obligations on the banker do not, of course, exist until after the cheque has been presented. Upon the other part there are obligations resting upon the customer. In the first place, his cheque must be unambiguous and must be ex facie in such a condition as not to arouse any reasonable suspicion. But it follows from that that it is the duty of the customer, should his own business or other requirements prevent him from personally presenting it, to take care to frame and fill up his cheque in such a manner that when it passes out of his (the customer's) hands it will not be so left that before presentation, alterations, interpolations, &c., can be readily made upon it without giving reasonable ground for suspicion to the banker that they did not form part of the original body of the cheque when signed. To neglect this duty of carefulness is a negligence cognisable

by law. The consequences of such negligence fall alone upon the party guilty of it—namely, the customer. A

It appears to me that a crucial consideration in a case such as the present is this: What is the point of time at which these respective obligations meet. The point of time is the presentation of the cheque. Not until that moment is the banker confronted with any mandate or order, and, in my opinion, the responsibility for the cheque and all that has happened to it between its signature and its presentation is not and ought not to be laid upon the banker. If at that moment three things are satisfied—namely, (i) that the cheque is duly signed, (ii) that its appearance and statement of contents present no reasonable ground for suspicion, and (iii) there are customer's funds available—then the banker is bound to pay. But if a banker were bound to inquire, in regard to every cheque with quite genuine signatures, what had been their history from the time that the customer lifted his pen from the cheque until the time when it was presented at the bank, banking business would be greatly impeded or impossible, and, in my humble view, it would be subjected to risks for which there is no foundation in legal principle. It is entirely different, however, on the matter of this intervening period, with regard to the obligations of the customer. When a customer makes a cheque payable to himself or bearer it is entirely at his option when to present it. The responsibility for what occurs between signature and presentation, a period in his control, lies entirely with him. If, as in the present case, he gives it to a clerk, who tampers with it in such a way that no man of ordinary skill can find the roguery out, there does not seem to me to be any foundation in law for discharging the customer from the responsibility for these events or for laying them upon the banker, who was in no sort of position either of control over or participation therein. It may be true—it is true in this case—that what happened in the meantime to increase the nominal value of the cheque and to deceive all parties was a crime. But it was a crime brought about during this period of the customer's responsibility, and, as frequently happens in such cases, the crime of the customer's own servant. Accordingly, the condition of the cheque has been altered, not only during the period of the customer's responsibility, but by the act of some person with whom he had left the document in charge. If it is suggested that this is a hardship upon the customer (abating for the moment the obvious consideration that it is still harder for the banker) the answer of the general case is obvious—namely, that it is part of the customer's duty to fill up his cheque in such a way as to prevent roguery being made easy. B C D E F

I do not here pronounce any judgment upon another type of case which may be figured. I refer to a case in which there has been no negligence on the part of the customer in the respect last alluded to, but in which erasures of great skill or deletions, say accomplished by chemical aid, have been made upon a cheque so as to undo all the care properly exercised by the customer in regard to its contents. Yet I cannot conceal from your Lordships that I should have the greatest doubt whether—this kind of roguery having been practised during that period of responsibility on the part of the customer to which I have referred—the customer would not also be liable. But the present is not a case of that kind. It is a case of negligence, and it is necessary to state again that in which the negligence consists. The negligence consists in the breach of a duty owing by the customer to the banker. That duty is so to fill up his cheque as that when it leaves his hands a signed document it shall be properly and fully filled up, so that tampering with its contents or filling in a sum different from what the customer meant it to cover shall be prevented. This is the sole ratio of the blank cheque decisions. The customer in such cases is bound to accept the responsibility for whatever the contents of the cheque may be, if he has allowed a cheque to pass out of his hands blank. The present case was upon its facts a very near approach to that of a blank cheque; a figure "2" was upon it with space before and behind it which easily permitted the "2" being turned into "120." As for the words of the cheque, these were wholly blank and the clerk to whom it was entrusted filled in the words "one G H J

A hundred and twenty pounds." In that condition it was presented to the bank and honoured. I ask myself: So far as the banker was concerned, what difference did it make to his obligation to pay, that between the time when his customer signed it, and his customer's servant presented it, the servant had filled up that cheque from being a blank to what it was, or from being a cheque with a figure "2" to what it was?, and I ask myself with regard to the customer, what difference does B it make in principle that the cheque is left by him entirely blank or is left so blank that the contents finally appearing on it may so appear without arousing the slightest suspicion? There is a suggestion in some of the judgments below that the limitation of the authority to the clerk was a limitation to £2 because of the isolated figure "2." That was a limitation of authority only indicated to the clerk, and no care was taken that such a limitation of authority should reach the C knowledge of the banker. So that in truth, my Lords, for all practical purposes and so far as the banker was concerned the same limitation of authority could have been pleaded, although the figure "2" had not been inserted, and that by simply establishing that the clerk knew perfectly well that it was to be a £2 and nothing more. The roguery would have been little more and little different than it was whether the cheque had been entirely blank or with the figure "2" placed D where it stood. It does not appear to me that on principle the duty of properly and fully filling up the cheque is met by what was done in the present case. It is no doubt true that, had the cheque been presented as signed, it might have been honoured without impropriety, but when a cheque is not presented as signed and has been tampered with before presentation, the question whether the customer has been negligent in a duty that lay upon him of so filling up his cheque as to E prevent such tampering, if answered in the affirmative, absolves the banker if the latter has paid on an ex facie unsuspicious document.

I had intended to go over in detail the authorities from *Young* v. *Grote* (1) downwards; but this is unnecessary, and I think it would be presumptuous in me to do so after the full treatment thereof by my noble and learned friend on the Woolsack. I express my entire agreement with his Lordship's narrative and conclusions upon F that subject. In particular I desire to say that I think *Young* v. *Grote* (1) was rightly decided. I may further indicate my view that many subsequent decisions which have referred to it have introduced a certain embarrassment into this portion of our law, not because of what was said in *Young* v. *Grote* (1) itself, but of what later judges, even while approving the decision, thought must have underlain it. Not a word is said, for instance, in *Young* v. *Grote* (1) about estoppel. It may be G that some such doctrine was in the judges' minds in deciding it. I am not enough of a psychological expert to say. It is enough for me, agreeing as I do entirely with the result of the decision, to observe that I think it safest to place the case upon the grounds which the judges themselves put it. It was treated by them as a case of negligence. As Best, C.J., said: "We decide here on the ground that the bank has been misled by want of proper caution on the part of his customer." H Park, J., concurred with the arbitrator on the fact of negligence. "Great negligence" was the reason assigned by Gaselee, J. And, said Barrow, J., "the blame is all one side." That was the ground of his judgment. I do not think it expedient to speculate upon anything deeper than or different from that, and, as I say, I think the course of the law has been disturbed by speculations of that order. It is true that Best, C.J., founded upon certain sentences of Pothier, but J these sentences seem, like *Young* v. *Grote* (1) itself, to be perfectly apposite to the present case and to be entirely sound. They are these:

> "Cependant, si c'était par la faute du tireur que le banquier eût été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications; puta, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eût ajouté zéro, le tireur serait en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lieu."

I think this sentence of POTHIER's may be held as a plainly sound statement of the law of England and Scotland on the subject in the present day. *Young* v. *Grote* (1) has been approved, by a preponderating body of decisions and in the highest quarters, since its date. I beg to say, however, that I express no surprise that great difficulty was felt upon this topic in the courts below. That difficulty is caused for two reasons. The first I have already alluded to—namely, the speculations made in subsequent cases as to what underlay or was supposed to underlie that judgment. Alongside of these explorations des arrières pensées, it is consoling to be able to place the few simple sentences in which the judges in *Young* v. *Grote* (1) pronounced their own opinions. There was also a certain note of invitation to review in the language used by LORD HALSBURY in *Scholfield's Case* (3), although it has to be borne in mind that the learned Lord's doubts and queries were answered in the case itself by the other four learned Lords who sat with him.

A very substantial difficulty, however, has been caused by *Colonial Bank of Australasia, Ltd.* v. *Marshall* (4), to which great respect has to be paid. In that case, as the judgment of SIR ARTHUR WILSON undoubtedly shows, the crux of the decision was the opinion expressed in these words—namely, that the duty which

> "subsists between customer and bank is substantially the same as that contended for in *Scholfield* v. *Earl of Londesborough* (3) as existing between the acceptor and the holder of the bill."

In my opinion, this was erroneous, and I illustrate the error not only by the passage from LORD WATSON already quoted, but by the following citation from LORD MACNAGHTEN. Referring to the report in BINGHAM he says ([1896] A.C. at p. 545),

> "the court went very much on the authority of the doctrine laid down by POTHIER that in cases of mandate generally, and particularly in the case of banker and customer, if the person who received the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable; but the doctrine has no application to the present case. There is no mandate as between the acceptor of a bill and a subsequent holder."

I humbly think *Colonial Bank of Australasia, Ltd.* v. *Marshall* (4) to be in conflict with the great and binding authority of *Scholfield* (3), and I do not see my way to follow it. I agree with the motion proposed from the Woolsack.

LORD PARMOOR (having stated the facts): Two points arise for decision: (i) What was the mandate which the customer sent to his banker? (ii) Was there a breach of the duty which a customer owes to his banker in the preparation and issuing of a cheque on an ordinary cheque form, and, if so, did such breach of duty directly conduce to the payment which the appellants claim to debit against the account of the respondents? SANKEY, J., decided in favour of the respondents on both points, and his decision was unanimously upheld in the Court of Appeal. The decision of this appeal depends upon the special relationship of a customer and banker. No doubt, assistance may be obtained from cases which have arisen as between a holder, who is not the drawer, and an acceptor, of a bill of exchange, but in that case there is no contractual relationship between the parties such as exists between a customer and a banker. The relationship between a customer and a banker is that of creditor and debtor: *Foley* v. *Hill* (24). The relationship implies, however, a special duty on the customer to use due caution in the preparation and issue of a mandate to his banker requiring him to make a payment as his mandatory to the debit of his account. In ordinary business the customer issues his mandate as a cheque on a cheque form which contains two spaces, one for stating the sum which he desires his banker to pay on his behalf in words, and another for stating the sum in figures. If the cheque is presented for payment in proper form, there is a primâ facie obligation on the banker to pay the sum inserted in words and figures, and he has a corresponding right to debit this sum

A to the account of his customer. The risk of paying a forged mandate ordinarily rests upon the banker; but there are exceptional instances in which a banker is entitled to charge the account of his customer, although the amount has been paid by him on a forged document.

The first principle on which the appellants rely is that the respondents entrusted to their clerk an authority to fill up the cheque under such conditions that they B are responsible for the amount fraudulently inserted, and are precluded from showing that the authority of the clerk was limited by instructions, since such limitation was not apparent on the face of the document and had not been communicated to them in any way. It would, I think, make no difference whether the action of the clerk was due to carelessness or fraud. This principle has been variously traced to the law merchant, or to the common law doctrine of estoppel; C but the importance lies not so much in the origin of the principle as to the nature of the conditions under which it is applicable. The cases show that these conditions can be inquired into: *Lloyds Bank, Ltd.* v. *Cooke* (29) and *Smith* v. *Prosser* (26). What, then, are the conditions in the present case? If the respondents had signed a cheque in blank leaving it to be filled up by the clerk, and the clerk had carelessly or fraudulently filled it up in excess of the amount of his D authority, the appellants would have been entitled to debit the forged amount to the account of the respondents. It is well established that in such a case it would not have been open to the respondents to adduce evidence that they had limited the authority of their clerk in a way not appearing on the face of the instrument and of which the appellants had not received any notice. On the other hand, if a cheque is completely filled up before issue by a customer, and then subsequently E altered by the fraudulent or careless action of his agent, to whom it has been entrusted for presentation to a bank, the loss, so long as it is due to a mere alteration in the units or figures or in both and the customer had not committed any breach of his duty in his relationship to the banker, would fall on the banker: *Colonial Bank of Australasia, Ltd.* v. *Marshall* (4). The banker would in many cases have no means of detecting whether the fraud or carelessness had been F committed in the filling up of a blank cheque or in the alteration of a filled-up cheque, but the question depends on the relationship of agency. MOULTON, L.J., in *Smith* v. *Prosser* (26) says ([1907] 2 K.B. at p. 752):

> "The law stands thus: If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a G negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not appearing on the face of the instrument."

It was held both by SANKEY, J., and the Court of Appeal that, by the insertion of "£2 0. 0." in figures a limitation did appear on the face of the cheque, and that, therefore, the authority of the clerk was limited within the principle expressed by MOULTON, L.J.

H It is, however, I think necessary to consider more closely the nature of the actual transaction. The document handed by the respondents to their clerk, and intended by them to form the basis of a mandate to the appellants, was a cheque form signed by the respondents with the space for words left blank and "£2 0. 0." inserted in the figure space. If such a cheque form had been presented to a bank, the banker would have probably refused to act upon it, and in ordinary course I would have endorsed the form "refer to drawer." It was wanting in an essential particular before the cheque form could be regarded as a mandate for payment—namely, the statement of the amount in the space for words. The form could only be converted into a mandate which the mandatory would be likely to honour by the clerk filling up the cheque form so as to make it on its face a complete cheque. Section 20 of the Bills of Exchange Act was not relied on before this House. In my opinion, it is not directly applicable. I agree, however, with BRAY, J. [in *Kepitigalla Rubber Estates* v. *National Bank of India* (20)], that s. 20 is founded on a principle of law which applies to this case, and that the clerk may in the

circumstances of this case be regarded as in the same position as the holder of a negotiable instrument. Section 20 provides that where a bill is "wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit." By the proviso in sub-s. (2), "as against a holder in due course the drawer is precluded from denying the authority." The cheque was wanting in a material particular—namely, the insertion of the amount in the space for words—and the clerk must be treated as having authority to fill up this space in any way he thinks fit. So soon as the blank space has been filled up in words by their agent the respondents are responsible to the same extent as if they had themselves inserted the words. In my opinion, the bankers would have been justified in not accepting as a mandate for payment a cheque form in which the amount inserted in the space for words differs from the amount inserted in the space for figures. The same question, therefore, arises as in the case of an agent entrusted with the presentation of a cheque for payment, where the cheque form has been handed to him with a different amount in the space for words from that in the space for figures. In such a case some alteration must necessarily be made before the cheque form becomes an effective mandate. In my opinion, as against the banker, the customer in these circumstances must be taken to have given his agent authority to issue a mandate complete on its face, and that he is precluded from producing evidence to show that he never gave such authority.

In *Freeman* v. *Cooke* (2) PARKE, B., in delivering the judgment of the court, says in reference to estoppels in pais (2 Exch. at p. 662):

> "For instance, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds him in the same manner as if he made it himself and it is his contract in point of law; and no form of pleading would leave such a matter at large and make the jury to treat it as no contract."

A similar question came before BIGHAM, J., in *Union Credit Bank, Ltd.* v. *Mersey Docks and Harbour Board* (6). In this case the delivery order was signed by the goods owner containing the name of the ship and the number (246) but leaving a blank in the column provided for designating the quantity of the goods. Nicholls, to whom the delivery order was handed, fraudulently filled in 263 in the number column and eighteen hogsheads in the quantity column. By means of this forged order Nicholls obtained delivery of eighteen hogsheads of tobacco warehoused by the Mersy Dock Board. BIGHAM, J., held that the document handed to Nicholls was not a delivery order, but a delivery order form, and that, if it had been presented as originally signed, the warehousemen would probably have refused to act upon it, since it was wanting in an essential—namely, the statement of the quantity of goods. He held further that it became a valid delivery order under the authority which the plaintiffs had conferred upon their agent to convert the order form into an order, and that in such circumstances the plaintiffs could not be heard to say that they had instructed their agent to perfect this order in a particular way.

BIGHAM, J., in giving his decision referred to *Young* v. *Grote* (1), which was so constantly referred to in the argument before your Lordships, adopting the opinion of PARKE, J., that the cheque was a genuine order of Young, because he had authorised his wife to fill it up, and that when she had filled it up, it became his genuine order. It is said that the facts in *Young* v. *Grote* (1) do not support a judgment based on this ground, but the opinion of BIGHAM, J., is not inconsistent with the opinion expressed by other judges of high authority. In *Robarts* v. *Tucker* (9) PARKE, B., in giving the judgment of the court says (16 Q.B. at p. 579):

> "In *Young* v. *Grote* (1) the customer had signed blank cheques and left them with his wife to fill up. She filled them up in such a manner that the holder was enabled to add to the amount, and it was held that the bankers who had paid the larger amount might charge their customer with it. This was in

A truth considering that the customer had by signing a blank cheque given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted."

In *Scholfield* v. *Earl of Londesborough* (3) LORD MACNAGHTEN says ([1896] A.C. at p. 545):

B "Other judges, including PARKE, B., himself in the earlier case of *Robarts* v. *Tucker* (9), have held that *Young* v. *Grote* (1) is to be supported on the ground that the customer had by signing a blank cheque given authority to anyone in whose hands it was to fill it up in any way the blank permitted."

I do not overlook that LORD MACNAGHTEN had also referred to the opinion of LORD CRANWORTH, L.C., in *Orr and Barber* v. *Union Bank of Scotland* (11) and *Bank* C *of Ireland (Governor & Co.)* v. *Evans' Charities Trustees* (14), and to the observations of PARKE, B., in delivering the opinion of the judges in the last case; but his own opinion appears to agree with that of LORD WATSON, who says in his judgment (ibid. at p. 535):

"The reported opinions of the learned judges leave it doubtful whether this D decision in *Young* v. *Grote* (1) went upon the doctrine of POTHIER or upon the ground that the customer by signing a blank cheque had undertaken liability for any sum which might be filled in before it was presented for payment."

The second point to consider is whether the respondents did commit a breach of the duty which they owed to the appellants, as their bankers, in and about the preparation and issue to them of their mandate to charge their account. Apart E from special contract or some accepted course of dealing between the parties, it is the duty of a customer to use due caution in the preparation and issue of a mandate to his banker to charge his account at the bank, and if he commits a breach of this duty, and thereby misleads his banker to make a payment on a forged instrument, and such payment follows in natural and uninterrupted sequence from such breach, the consequent loss falls not on the banker, but on the customer. F The principle is well established that the negligence which would deprive the customer of his right to insist that payment on a forged cheque is invalid must be negligence in or immediately connected with the actual transaction: see *Bank of Ireland (Governor & Co.)* v. *Evans' Charities Trustees* (14), opinion of PARKE, B.; *Swan* v. *North British Australasian Co., Ltd.* (7), per BLACKBURN, J. (2 H. & C. at p. 182). LORD HALSBURY in *Bank of England* v. *Vagliano Bros.* (21) says:

G "The carelessness of the customer or neglect of the customer to take precautions, unconnected with the act itself, cannot be put forward as justifying his own default."

In the present instance the negligence alleged on the part of the customer, if there has been negligence, is certainly immediately connected with the transaction itself—namely, in the preparation and issue of the cheque form for presentation H to the banker.

The next question, therefore, which arises is whether the act of the respondents did amount to negligence. In my opinion, the answer is in the affirmative. I have already stated my view that where a cheque form is handed to a clerk for issue with a blank in the space intended for the insertion of the amount in words there is authority for the clerk to fill up the blank in any way he pleases, and I that, when the amount has been so filled in, it must be taken as the genuine entry of the customer. Therefore, the conditions in the present case are similar to those which would apply where the customer has handed a cheque to his agent having filled up "one hundred and twenty" in the space for words, and having at the same time placed "2 0. 0." in the figure space in such a position that there is no difficulty in altering "2" into "120." Can it be said that this is not negligence in the customer? Such conduct appears to me to be unquestionably negligence in the actual transaction. It is not material to show that in other respects the respondents acted in a reasonable manner, being justified in the

confidence which they placed in their clerk. It is, however, not sufficient to show negligence in or immediately connected with the actual transaction unless it can further be shown that the act of the banker in making the payment, of which the customer is making complaint, followed in natural and uninterrupted sequence from the negligent act. In the present case the clerk, who, under the conditions already referred to, fraudulently altered the cheque form, presented the cheque for payment. It appears to me that he was enabled to present it in a fraudulent form as the direct result of the customer's negligence, and that thereby the banker was directly misled into making a payment on the forged cheque. If this is a correct interpretation of the conditions, the respondents are not entitled to succeed. An estoppel is created by their negligence in a duty which they owed to their bankers in the actual transaction in question with the result that evidence is not admissible to prove that the clerk acted fraudulently and in excess of his authority.

In the hearing of the appeal a very large number of cases were referred to in the exhaustive arguments of counsel. I desire only to refer further to two of these cases. It must be taken that the rule expressed by ASHURST, J., in *Lickbarrow* v. *Mason* (30) (2 Term Rep. at p. 70) is too wide when he says he may lay it down as a broad general principle that

> "whenever one of two innocent parties suffers by the act of a third person, he who has enabled such person to occasion the loss must sustain it,"

and that the accurate rule is stated by BLACKBURN, J., in *Swan* v. *North British Australasian Co., Ltd.* (7), who, referring to the judgment of WILDE, B., says (2 H. & C. at p. 182):

> "That he omits to qualify the rule [he had stated] by saying that the neglect must be in the transaction itself and be the proximate cause of leading the party into that mistake, and also must be the neglect of some duty to the person led into that belief, or, what comes to the same thing, to the general public of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy."

The other case to which I would refer is *Young* v. *Grote* (1). This has been referred to in a great number of subsequent cases, and in the main with approval; but, whatever may have been the basis of decision in that case, the principles involved in the duty which a customer owes to his banker have been further defined and made more exact in a number of subsequent decisions. In my opinion, the appeal should be allowed.

Solicitors: *Morley, Shirreff & Co.*; *E. H. Coopman.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law*,]

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NEVILLE *v.* LONDON EXPRESS NEWSPAPER, LTD.

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Phillimore), October 17, 18, 21, 22, 24, 25, December 16, 1918]

B [Reported [1919] A.C. 368; 88 L.J.K.B. 282; 120 L.T. 299; 35 T.L.R. 167; 63 Sol. Jo. 213]

Maintenance of Action—Special damage—Need to prove—Effect of success of maintained action.

An action for maintenance will not lie without proof of special damage: C so **held** by Lord Finlay, L.C., Lord Shaw, and Lord Phillimore (Viscount Haldane and Lord Atkinson dissenting). The action is competent even though the suit, cause, or defence maintained is successful: so **held** by Lord Finlay, L.C., Viscount Haldane, and Lord Atkinson (Lord Shaw and Lord Phillimore dissenting).

Observations as to the measure of damages recoverable.

D Decision of Court of Appeal, [1917] 2 K.B. 564, reversed.

Notes. Followed: *Hickman* v. *Kent or Romney Marsh Sheepbreeders Association* (1920), 37 T.L.R. 163. Applied: *Wiggins* v. *Lavy* (1928), 44 T.L.R. 721. Explained: *Constantine* v. *Imperial Hotels, Ltd.*, [1944] 2 All E.R. 171. Referred to: *Wild* v. *Simpson*, post, p. 682; *Ellis* v. *Torrington*, [1920] 1 K.B. 399; *Haseldine* v. *Hasken*, [1933] All E.R.Rep. 1; *Howard* v. *Odhams Press, Ltd.*, E [1937] 2 All E.R. 509; *George* v. *Mitchell and King*, [1943] 1 All E.R. 233; *Baker* v. *Jones*, [1954] 2 All E.R. 553.

As to maintenance of actions, see 1 Halsbury's Laws (3rd Edn.) 39–43; and for cases see 1 Digest 66 et seq.

Cases referred to:

F (1) *Ashby* v. *White* (1703), 1 Bro. Parl. Cas. 62; Holt, K.B. 524; 2 Ld. Raym. 938; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 14 State Tr. 695; 1 Smith, L.C., 12th Edn., 266; 1 E.R. 417; 1 Digest 23, *187*.

(2) *Couch* v. *Steel* (1854), 3 E. & B. 402; 2 C.L.R. 940; 23 L.J.Q.B. 121; 22 L.T.O.S. 271; 18 Jur. 515; 2 W.R. 170; 118 E.R. 1193; 42 Digest 990, *195*.

(3) *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; G 36 L.T. 761; 42 J.P. 183; 25 W.R. 794, C.A.; 42 Digest 759, *1850*.

(4) *Cowley* v. *Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45, H.L.; 26 Digest (Repl.) 419, *1290*.

(5) *Bradlaugh* v. *Newdegate* (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 31 W.R. 792; 1 Digest 69, *569*.

H (6) *Wallis* v. *Duke of Portland* (1797), 8 Bro. Parl. Cas. 161; 3 Ves. 494; 3 E.R. 508; 1 Digest 68, *566*.

(7) *Oram* v. *Hutt*, [1914] 1 Ch. 98; 83 L.J.Ch. 161; 110 L.T. 187; 78 J.P. 51; 30 T.L.R. 55, C.A.; 1 Digest 84, *683*.

(8) *Alabaster* v. *Harness*, [1895] 1 Q.B. 339; 64 L.J.Q.B. 76; 71 L.T. 740; 43 W.R. 196; 11 T.L.R. 96; 14 R. 54, C.A.; 1 Digest 83, *681*.

I (9) *Scott* v. *National Society for Prevention of Cruelty to Children and Parr* (1909), 25 T.L.R. 789; 1 Digest 83, *679*.

(10) *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210; 54 L.J.Q.B. 449; 53 L.T. 163; 49 J.P. 756; 33 W.R. 709, H.L.; 1 Digest 67, *552*.

(11) *British Cash and Parcel Conveyors, Ltd.* v. *Lamson Store Service Co., Ltd.*, [1908] 1 K.B. 1006; 77 L.J.K.B. 649; 98 L.T. 875, C.A.; 1 Digest 84, *685*.

(12) *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C.B.N.S. 336; 28 L.J.C.P. 242; 33 L.T.O.S. 366; 5 Jur.N.S. 1104; 7 W.R. 464; 141 E.R. 283; 42 Digest 752, *1768*.

(13) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415; 9 L.J.O.S.K.B. 42; 109 E.R. 842; 1 Digest 26, *215.*

(14) *Embrey* v. *Owen* (1857), 6 Exch. 353; 20 L.J.Ex. 212; 17 L.T.O.S. 79; 15 Jur. 633; 155 E.R. 579; 1 Digest 27, *217.*

(15) *Beaumont* v. *Greathead* (1846), 2 C.B. 494; 3 Dow. & L. 631; 15 L.J.C.P. 130; 6 L.T.O.S. 297; 135 E.R. 1039; 17 Digest (Repl.) 75, *8.*

(16) *Grant* v. *Thompson* (1895), 72 L.T. 264; 43 W.R. 446; 11 T.L.R. 207; 18 Cox, C.C. 100; 15 R. 290; 1 Digest 67, *554.*

(17) *Findon* v. *Parker* (1843), 11 M. & W. 675; 12 L.J.Ex. 444; 1 L.T.O.S. 289; 7 J.P. 385; 7 Jur. 903; 152 E.R. 976; 1 Digest 81, *661.*

(18) *Prosser* v. *Edmonds* (1835), 1 Y. & C.Ex. 481; 160 E.R. 196; 1 Digest 74, *601.*

(19) *Pechell* v. *Watson* (1841), 8 M. & W. 691; 11 L.J.Ex. 225; 151 E.R. 1217; 1 Digest 88, *719.*

(20) *Harris* v. *Brisco* (1886), 17 Q.B.D. 504; 55 L.J.Q.B. 423; 55 L.T. 14; 51 J.P. 37; 34 W.R. 729; 22 T.L.R. 709, C.A.; 1 Digest 82, *671.*

(21) *Flight* v. *Leman* (1843), 4 Q.B. 883; 1 Dav. & Mer. 67; 12 L.J.Q.B. 353; 1 L.T.O.S. 287; 7 Jur. 557; 114 E.R. 1130; 1 Digest 67, *551.*

(22) *Hutley* v. *Hutley* (1873), L.R. 8 Q.B. 112; 42 L.J.Q.B. 52; 28 L.T. 63; 37 J.P. 518; 21 W.R. 479;

(23) *Sprye* v. *Porter* (1856), 7 E. & B. 58; 26 L.J.Q.B. 64; 28 L.T.O.S. 229; 21 J.P. 55; 3 Jur.N.S. 330; 5 W.R. 81; 1 Digest 70, *590.*

(24) *Bradshaw* v. *Lowe* (1582), Sav. 41; 123 E.R. 1001; 15 Digest (Repl.) 840, *8038.*

Also referred to in argument:

Master v. *Millar* (1791), 4 Term Rep. 320; 100 E.R. 1042; 1 Digest 78, *631.*

Pierson v. *Hughes* (1673), 1 Freem.K.B. 71, 81; 89 E.R. 53, 60; 1 Digest 84, *687.*

R. v. *Davies*, [1906] 1 K.B. 32; 75 L.J.K.B. 104; 93 L.T. 772; 54 W.R. 107; 22 T.L.R. 97; 50 Sol. Jo. 77, D.C.; 14 Digest (Repl.) 138, *1009.*

Goodright d. Fowler v. *Forester* (1809), 1 Taunt. 578; 127 E.R. 958, Ex. Ch.; 44 Digest 190, *191.*

Cotterell v. *Jones* (1851), 11 C.B. 713; 21 L.J.C.P. 2; 16 Jur. 88; 138 E.R. 655; 33 Digest 507, *505.*

Holden v. *Thompson*, [1907] 2 K.B. 489; 76 L.J.K.B. 889; 97 L.T. 138; 23 T.L.R. 529; 1 Digest 82, *670.*

Appeal by the plaintiff in the action and **Cross-Appeal** by the defendants from an order of the Court of Appeal, reported [1917] 2 K.B. 564.

Shortly before January, 1916, the plaintiff Neville, who traded as the South Coast Land and Resort Co., promoted and advertised a competition offering a prize of £100 for the most suitable name for a "new south coast estate," and in addition free plots of land on the estate were offered as consolation prizes, subject to the proviso that the winners of the consolation prizes paid 3 guineas for a deed of conveyance. The prize of £100 was divided between two competitors who had submitted "New Anzac-on-Sea" as a name for the estate. The competition was criticised in a series of articles published by the defendants in their newspaper, the "Daily Express," which alleged in substance that the competition was not a bona fide one and that the plots of land were of little or no value. In the articles the defendants stated that they were prepared to instruct their solicitors to take legal proceedings at their (the defendants') expense on behalf of persons who had paid their 3 guineas and desired to get their money back, if they would send their names to the defendants' solicitors. One hundred and twenty-five persons accepted this offer. Writs were issued in the Chancery Division on their behalf, and nine cases were selected to go to trial, the plaintiffs claiming from Neville the return of their money on the ground that they had been induced to pay by his fraudulent misrepresentation. The actions came on for trial before YOUNGER, J., but before the plaintiffs' case was opened Neville's counsel said he would submit to judgment for the sums paid. The plaintiffs' counsel contended he was entitled to open the

case, and YOUNGER, J., held that he was entitled to do so. Thereupon the defendant's counsel, acting on his client's instructions, withdrew from the case. The trial of the action then proceeded, and YOUNGER, J., gave judgment for the plaintiffs for the return of the money paid by them, with costs. Neville then commenced the present action, alleging that the articles in the "Daily Express" were defamatory of him, and that the actions in the Chancery Division had been maintained by the defendants. The statement of claim alleged (inter alia) that

> "the defendants maliciously and with intent to injure the plaintiff procured divers persons . . . to join in and bring two actions in the Chancery Division of the High Court of Justice and to permit the use of their names for the purpose of the said actions being brought against the plaintiff and the defendants have maliciously and with such intent as aforesaid maintained the said persons on the said actions and in the bringing and conduct thereof, and have paid and are paying the costs of the said persons in and in relation thereto."

The defendants, by their defence, traversed these allegations, and in the alternative pleaded that

> "the said actions were proper and necessary actions brought in the public interest as well as in the interest of the said persons, and the defendants were entitled to maintain the said persons in the said actions inasmuch as it was their public duty to do so, or, alternatively, because they bona fide believed that it was their public duty to do so, and also because they acted out of charity and benevolence towards the said persons who were unable to bear the expenses and costs of the said actions."

On the question of libel the jury found for the plaintiff with £300 damages. On the claim for maintenance the following questions were left to the jury:

> "Did the defendants act from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their right? Did the defendants act solely from this desire? Did the defendants act in the bona fide belief that the persons who sued had a well-founded claim against Neville?"

All these questions the jury answered in the negative. LORD READING, C.J., who tried this action, gave judgment for the plaintiff on this head of claim, and on the question of the amount of damages, which was left for his Lordship's decision, held that the plaintiff was entitled to recover the costs ordered to be paid by the defendant to the plaintiffs in the maintained action and the costs, as between solicior and client, incurred by the defendant in defending that action. The defendants appealed. The Court of Appeal (SWINFEN EADY and SCRUTTON, L.JJ., and BRAY, J.) ordered a new trial of the whole action. The plaintiff appealed, asking that the order for a new trial should be set aside, and that the judgment entered at the trial in his favour should be restored. The defendants cross-appealed, asking that judgment should be entered for them on both heads of claim.

Harney for the appellant.
Sir Ernest Pollock, K.C., and *Sir Hugh Fraser* for the respondents.

LORD FINLAY, L.C.—In this case the appellant, Mr. Neville, brought an action for libel against the respondents in respect of a series of attacks upon him which appeared in the "Daily Express," a newspaper owned by them, in January and February, 1916, reflecting upon his conduct with regard to an estate which he had purchased on the coast of Sussex and was endeavouring to develop into a seaside resort under the name of New Anzac-on-Sea. The statement of claim alleged that the defendants meant and were understood to mean that the plaintiff was carrying on a fraudulent and dishonest business and was obtaining money by deception and false pretences. The plaintiff further claimed damages on the ground that the defendants had "maintained" certain persons in bringing actions

against the plaintiff in the Chancery Division. The defendants in their defence denied the innuendoes alleged with regard to the libel and pleaded that the words complained of were in their natural and ordinary meaning true in substance and in fact, and so far as they consisted of comments that they were fair comments upon a matter of public interest. With regard to the claim for maintenance, the defendants denied the maintenance and alleged that the actions were necessary and proper in the public interest and that they were entitled to maintain the actions on the ground of public duty, or, alternatively, on the ground of charity and benevolence towards the plaintiffs in these actions. The case was tried before the Lord Chief Justice [Lord Reading] and a special jury. The trial lasted for nine days. Five questions were put to the jury and answered by them, as follows: As to the libels: (i) Are the statements substantially true? No. (ii) Is the comment fair and made bona fide? No. (iii) Damages? £300. As to maintenance: (iva) Did the defendants act from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights? No. (ivb) Did the defendants act solely from this desire? No. (v) Did the defendants act in the bona fide belief that the persons who sued had a well-founded claim against Neville? No." The claim for maintenance was argued on further consideration before the Lord Chief Justice, and he decided that on the findings of the jury judgment should be entered for the plaintiff for the amount of the taxed costs which he had to pay to the successful plaintiffs in the Chancery actions, and for the costs incurred by him in these actions to be taxed as between solicitor and client. Judgment was entered accordingly for the plaintiff on the libel claim for £300, and on the claim for maintenance with costs. An appeal was brought to the Court of Appeal consisting of Swinfen Eady, L.J., Scrutton, L.J., and Bray, J., who decided that the judgment for £300 damages for the libels must be set aside and ordered a new trial. They also held that the findings in the claim for maintenance must be set aside as against the evidence and perverse, and directed a new trial as to this part of the action also. The plaintiff has appealed to this House against the order for a new trial and asks that the judgment in his favour on both heads of claim should be restored. The defendants by a cross-appeal ask that judgment should be entered for them both on the claim for libel and on the claim for maintenance.

In my opinion, this House ought to let the order for a new trial stand as regards the libels. It is unnecessary, and, in view of the fact that the case is to be tried again, undesirable, that we should give any detailed judgment on the circumstances of the case. It seems to me quite impossible that the findings of the jury as to the libels should stand in view of the evidence and the undisputed facts in the case. It is equally impossible to accede to the request of the defendants that judgment should be entered for them upon the libels. This could be done only if there was no evidence fit to be left to the jury in support of the plaintiff's claim, and, in my opinion, it is impossible so to hold. There was evidence to go to the jury, and upon the new trial a fresh jury will have to decide upon the rights of the parties.

I now pass to the consideration of the question whether the defendants are entitled to have judgment entered for them on the claim for maintenance. The facts relating to this part of the case are as follows. Mr. Neville, the appellant, invited the public to send in suggestions for the name of the seaside resort which he proposed to establish on his estate in Sussex. He offered prizes for suggestions; the first prize was to be £100 in cash, and there were to be fifty other prizes consisting of freehold plots on the estate. Each winner was to have a conveyance of his plot on sending in the sum of three guineas for the cost of a conveyance duly stamped. A very large number of suggestions were sent in and some 12,500 persons were informed by Mr. Neville that they had been successful in the competition and would be awarded prizes or consolation prizes in the shape of plots of land on payment of three guineas for the conveyance. Over 2,000 persons took up the offer and paid three guineas each. The defendants in their newspaper invited all who had done so to bring actions to recover the sums they had paid on

A the ground that they had been obtained from them by fraud, and 125 persons sued together in two such actions which were brought before Younger, J., and the plaintiffs' costs in the litigation were borne by the defendants in the present action. Lord Reading, C.J., in his judgment on further consideration, described what occurred in these actions as follows:

> "When the trial commenced counsel appearing for Mr. Neville, the defendant in the action, submitted to the payment of the sums of money claimed, but counsel for the plaintiffs insisted on his right to open the case and proceed with his proof, and then to elect in what form he would ask for his remedy. Argument took place, and in the result Younger, J., held that the plaintiffs in those actions were entitled to open their case and prove it. Thereupon the defendant, by his counsel, who was acting under specific instructions from his client, withdrew from the defence and left the case to be proceeded with in his absence. In the result, evidence having been called, the learned judge gave judgment for these plaintiffs, all of whom recovered except eleven, who, for reasons unnecessary to state, were not willing to be joined as plaintiffs, and consequently had to be dropped out of the action. The result was, therefore, that 114 out of 125 plaintiffs recovered their three guineas each, and they recovered them with costs."

The judgment declared

> "that the plaintiffs in each action were respectively induced to enter into the contracts in the pleadings mentioned with the defendant by his fraudulent misrepresentation,"

and went on to order that the contracts, with the exceptions mentioned in the schedule, be rescinded, and that each of the plaintiffs in these actions should recover against the defendant the sum of three guineas and costs. That judgment has never been appealed against, and it is, in my opinion, shown to be right by the evidence given in this case. The claim in this action for maintenance is in respect of the promotion of these actions by the present defendants. On further consideration, the Lord Chief Justice held that the action in respect of the maintenance was well laid, although Mr. Neville had been found guilty of fraud and ordered to return the several sums of three guineas. In other words, he decided that the fact that the actions mentioned were rightly brought and succeeded did not prevent Mr. Neville, the present plaintiff, from recovering damages against the present defendants for maintaining these actions. The Lord Chief Justice, in dealing with the quantum of damages, said that the amount of damages which he felt bound to give according to law was not in accordance with his own views, and proceeded to give judgment in Mr. Neville's favour, as I have already stated, for the costs he had been put to by the litigation. In dealing with this part of the case the findings of the jury with regard to the maintenance must be accepted. In other words, it must be assumed for this purpose "that the defendants did not act from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights," and that the defendants did not act in the bona fide belief that the persons who sued in the actions as maintained by them had a well-founded claim against the plaintiff. These findings were stigmatised by the Court of Appeal as against the evidence and perverse, but the question with which we have now to deal is one purely of law, whether, even on the assumption that the facts were as this jury found them, Mr. Neville is entitled to recover for maintenance. It was contended on behalf of the present defendants that judgment must be entered for them on this head of claim on the ground that no person can succeed in an action for maintenance unless he can prove that he has sustained special damage thereby, and that in the present case there was no damage to sustain this action, and also upon another and broader ground to which I shall revert hereafter.

Maintenance in a court of justice is defined in Hawkins' Pleas of the Crown (1824, 8th Edn.), Vol. 1, c. 27 (6), s. 3, at p. 454, as being

"Where one officiously intermeddles in a suit depending in any such court which no way belongs to him by assisting either party with money or otherwise in the prosecution or defence of any such suit." A

He goes on to point out, however, that acts of this kind may be justified in various cases—e.g., if there is an interest in the thing at variance, in respect of kindred or affinity, in respect of other relations, as lord and tenant or master and servant, or in respect of charity. In s. 26, p. 460, the learned author says: B

"It seems to be agreed that anyone may lawfully give money to a poor man to enable him to carry on his suit."

In s. 38, p. 462, he says:

"It seemeth that all maintenance is strictly prohibited by the common law as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits which perhaps they would not venture to go on in upon their own bottoms; and therefore it is said that all offenders of this kind are not only liable to an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be indicted as offenders against public justice, and adjudged thereupon to such fine and imprisonment as shall be agreeable to the circumstances of the offence. Also it seemeth that a court of record may commit a man for an act of maintenance done in the face of the court." C D

The action for maintenance is, in my opinion, one which can be sustained only if special damage has been occasioned to the plaintiff by the maintenance. The maintenance may be punishable as an offence, but to give a right of action the commission of the offence must have caused damage to the plaintiff. Of course, if a right has been infringed, as in *Ashby* v. *White* (1), where a man was deprived of his right to vote, no proof of damage is necessary. As Lord Holt expressed it, "an injury imports a damage if a man is thereby hindered of his right." The same rule applies if an assault, even the most trifling, is committed, though it occasions no damage whatever, or if trespass is committed to the plaintiff's land or goods. But the action for maintenance at common law is not, in my opinion, an action for the invasion of a right, it is an action in respect of an offence which causes damage to the plaintiff. This class of action was discussed in *Couch* v. *Steel* (2), *Atkinson* v. *Newcastle Waterworks Co.* (3), and in a passage of Lord Herschell's judgment in *Cowley* v. *Newmarket Local Board* (4) ([1892] A.C. at p. 352). In my opinion, it cannot properly be said that maintenance invades a right within Lord Holt's rule so that an action will lie without damage. The criminal law prohibits and may punish the act, but in the absence of damage the remedy is not by civil action. When Serjeant Hawkins says, as he does in the passage which I have above quoted, that offenders of this kind are liable to an action of maintenance at the suit of the party aggrieved wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, I think he means that the recovery is to be in respect of damage, not that nominal damages may be recovered even if the plaintiff has sustained no damage whatever. An action to recover damages in respect of maintenance is, of course, quite different from an action to recover penalties which by certain statutes have been imposed in respect of various kinds of maintenance. In such actions for penalties the person guilty of maintenance is liable to pay the amount of the penalty to the person who sues for it by force of the statute, while in the common law action for damages he is liable only if damage be proved. In the present case there is no damage. The plaintiff, it is true, has had to repay money which he had obtained by fraud and to pay costs in respect of his having resisted payment. It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them. If it were otherwise, the consequences would be extraordinary. It would follow that if A. sues with the help of C. to recover a debt which is due E F G H I

A to A. from B., and B. defends the action and has judgment against him, B. would then be entitled to sue C. for maintenance and recover from C. the whole of the debt which he had been compelled to pay and all the costs incurred by reason of his wrongful defence. A result still more remarkable would follow in case of maintenance of a defence, for if A. sued B. on a wrongful claim and C. supplied B. with the money to make good his defence, A. could sue C. for maintenance on the B ground that C. had prevented him from succeeding in a wrongful claim and could recover the amount of the claim with the costs which he had incurred in trying to enforce it.

LORD COLERIDGE in *Bradlaugh* v. *Newdegate* (5) (11 Q.B.D. at p. 15) would appear to have been prepared to proceed on the admission made by counsel that the penalty in that action, if recovered, and the costs incurred in resisting the C proceedings for it might be got back in an action for maintenance. But as the House of Lords afterwards decided that the penalty was not recoverable at all the point did not arise. I think there may be a difference in this respect between actions for proceedings for penalties and actions for a debt due, but it is unnecessary for the purpose of the present case to decide their point. As there was no damage in the present case, I am of opinion that the action for maintenance must D fail and that judgment must, therefore, be entered for the defendants on this head of claim. I think it would be futile to send the case down for a new trial even if it were regarded as one in which for the maintenance of the action proof of damage is not necessary. We have all the facts before us, and it is clear that even on this view only nominal damages could be recovered. Any verdict giving substantial damages on these facts would be perverse and would be set aside. If E then the action for maintenance were to be regarded as one for the invasion of a right, to sustain which special damage is not necessary, the proper course would be to give judgment for the plaintiff for nominal damages. But, in my opinion, this head of claim fails altogether.

I am unable to agree with the broader proposition put forward on behalf of the respondents to the effect that no action can be maintained for maintenance unless F the action or defence maintained has failed. Nor can I assent to the proposition that the offence of maintenance exists only when the claim or defence maintained is unfounded or when it has been maintained by procuring false evidence or in some other unlawful way. Maintenance is a common law offence. It was not constituted by statute, although statutes have been passed imposing penalties on particular kinds of maintenance. As regards maintenance at common law, there G is not, so far as I am aware, any authority in support of either of the above propositions. The essence of the offence is intermeddling with litigation in which the intermeddler has no concern, unless the case falls under some of the heads of exception to which I have above adverted. It was considered that it is against public policy that litigation should be promoted and supported by those who had no concern in it. BLACKSTONE in his COMMENTARIES (Book IV, c. 10, s. 12), after H reproducing in substance HAWKINS' definition of maintenance, says:

> "This is an offence against public justice, as it keeps alive strife and contention and perverts the remedial process of the law into an engine of oppression."

I LORD COKE in the SECOND INSTITUTE (p. 212) defines maintenance thus:

> "Maintenance is an unlawful upholding of the demandant or plaintiff, tenant or defendant, in a cause depending in suit, by word, writing, countenance, or deed. This maintenance as hath been said is malum in se and against the common law, and that is notably proved by this Act (Westminster 1st c. 28) for hereby maintenance is branded with this quality that thereby common right is delayed or disturbed, and consequently against the common law."

Champerty is a form of maintenance and occurs when the person maintaining

another takes as his reward a portion of the property in dispute. At p. 207 of the same Institute, LORD COKE says: A

> "Every champerty is maintenance but every maintenance is not champerty, for champerty is but a species of maintenance, which is the genus. It was an offence against the common law; for the rule of law is culpa est se immiscere rei ad se non pertinenti." B

The promotion of suits and defences by one who has nothing to do with them may undoubtedly lead to grave abuses and was regarded by the common law as against public policy. No doubt in former centuries the doctrine was pushed to extreme lengths, and decisions were given which would not now be followed, but there is, I think, good sense underlying the doctrine and it seems to me impossible to say that it is not part of the common law of England. LORD COKE observes (ibid. at p. 213) that "manutenentia curialis is divided into lawful and unlawful." C This appears to me to refer to the distinction between maintenance promoted by charity or falling within some other of the excepted cases, and, therefore, lawful maintenance by intermeddling with another's suit in any case not falling within the exceptions, and therefore unlawful. That the offence of maintenance was irrespective of the rights or wrongs of the particular suit in which it took place would appear to be indicated by the fact that a writ might be obtained to restrain D the maintainer from going on with the maintenance. It would, of course, have been impossible on such an application to try the case in which maintenance occurred upon its merits, but as the maintenance was wrongful, whether the suit maintained ultimately turned out to be right or wrong, it might at once be restrained. E

Wallis v. *Duke of Portland* (6) is decisive against the proposition that the proceedings maintained must have failed. In that case there was a demurrer to a bill for discovery in aid of a proposed action against the Duke of Portland as having employed Mr. Wallis, a solicitor, to act for a Mr. Tierney, and conduct a petition praying that Sir George Jackson who had been returned as member of Parliament for the borough of Colchester should be unseated and that Mr. Tierney F should be declared duly elected. The petition succeeded and Mr. Tierney became member for Colchester. The demurrer was supported on the ground of maintenance and it was said that as the action for the costs which Mr. Wallis had incurred on the duke's retainer must fail on this ground, the discovery should not be allowed in aid of it. LORD LOUGHBOROUGH, C., allowed the demurrer on this ground and he was affirmed in the House of Lords. The report of the case in the G House of Lords states in the headnote (8 Bro. Parl. Cas. 161) that the demurrer was allowed on the appeal

> "principally because such a transaction amounts to maintenance at the common law; and incidentally on the grounds of public policy, and because the discovery could have no effect to enable the plaintiff to maintain any action." H

The report does not contain the judgment of the peers who took part in the decision, but there is no ground for doubting the correctness of the headnote, and, as LORD LOUGHBOROUGH sat in the case in the House of Lords, it is probable that in dismissing the appeal he proceeded on the same grounds on which in the court below he had allowed the demurrer. It was suggested in the present case that the decision in the House of Lords might have proceeded on some other ground I than that of maintenance. There is no other ground on which the judgment could have been given. There was nothing in the point taken by the defendant that the contract was void under the Statute of Frauds as being a promise to answer for the debt of another. On the demurrer the allegations of fact in the bill must, of course, have been accepted for the purpose of the argument, and one of these allegations was that the duke had retained Mr. Wallis, so that there was no question of his being a mere surety. This was a case in which the proceedings maintained had been successful, and it was held all the same that the

A transaction was illegal on the ground of maintenance. I cannot see how the case can be reconciled with the contention that there is maintenance only where the party maintained has failed in the action or defence. It is a direct decision of the House of Lords the other way, and there is no decision to the contrary. The same law was laid down by the Court of Appeal in 1914 in *Oram* v. *Hutt* (7). In both these cases it was decided that the offence of maintenance is constituted B although the claim maintained succeeded. No question, of course, arose in these cases as to an action for maintenance, but this does not affect the value of those decisions for the present purpose. They settled what constitutes maintenance, and when that is ascertained, a right of action is conferred on anyone who sustains damage by the commission of the offence. In 1895 LORD ESHER, in *Alabaster* v. *Harness* (8), took precisely the same view of this subject, and said ([1895] 1 Q.B. C at p. 342):

> "The doctrine of maintenance, which appears in the YEAR BOOKS, and was discussed briefly by LORD LOUGHBOROUGH in *Wallis* v. *Duke of Portland* (6), and more elaborately by LORD COLERIDGE, C.J., in *Bradlaugh* v. *Newdegate* (5), does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do D not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful. LORD LOUGHBOROUGH in *Wallis* v. *Duke of Portland* (6) E says that the rule is, 'that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom, and at his own expense.' But the law from the earliest times has countenanced some relaxation of the utmost strictness of that rule; and some particular cases have been specifically allowed as constituted excuses for that interference in the suit of another which would otherwise have amounted to F maintenance."

The same view was taken by BRAY, J., in *Scott* v. *National Society for Prevention of Cruelty to Children and Parr* (9).

An action for maintenance differs essentially from an action for malicious prosecution which can be maintained only if the prosecution failed. *Metropolitan* G *Bank* v. *Pooley* (10) was governed by considerations analogous to those which apply in actions for malicious prosecution and is not material for the present purpose. It has not, so far as I am aware, ever been suggested that the offence of champerty would not be constituted if an agreement had been made to share property to be recovered however right the claim to that property might be. As LORD COKE says, maintenance is the genus and champerty the species of that genus. It is im- H possible to suppose that the wrongfulness of the claim maintained was material in the one case and not in the other.

As I have said, maintenance is a common law offence. It is true that various statutes were passed inflicting particular penalties upon various kinds of maintenance. The statutes are 3 Edw. 1, c. 28; 28 Edw. 1, c. 11; 33 Edw. 1, stat. 3; 1 Edw. 3, stat. 2, c. 14; 1 Ric. 2, c. 4; and 32 Hen. 8, c. 9. Some of them relate I particularly to the abuse of maintenance by the King's officers and to maintenance by false evidence or other sinister means, which would of course be an aggravation of the offence, but none of them in any way cut down the common law upon the subject. The latest and most important is 32 Hen. 8, c. 9. That statute begins by reciting that the administration of the law was greatly

> "hindered and letted by maintenance, embracery, champerty, subornation of witnesses, sinistre labour, buying of titles and pretenced rights of persons not being in possession whereby great perjury hath ensued and much inquietness, oppression, vexation, troubles, wrongs, and disinheritance hath followed."

The statute goes on to provide that all statutes against maintenance, champerty, and embracery shall be put into due execution. Section 2 is directed against the purchase or sale of pretensed rights in land, unless there has been possession for a year before the sale, with an exception by s. 4 for cases where the purchaser was in lawful possession. Section 3 is in the following terms:

"And furthermore, That no manner of Person or Persons, of what Estate, Degree, or Condition soever he or they be, do hereafter unlawfully maintain, or cause or procure any unlawful Maintenance, in any Action, Demand, Suit, or Complaint in any of the King's Courts of the Chancery, the Star-Chamber, Whitehall, or else where within any of the King's Dominions of England or Wales, or the Marches of the same, where any Person or Persons have or hereafter shall have Authority, by Virtue of the King's Commission Patent or Writ, to hold Plea of Lands, or to examine, hear, or determine any Title of Lands, or any Matter or Witnesses concerning the Title, Right, or Interest of any Lands, Tenements, or Hereditaments; and also that no Person nor Persons, of what estate, degree, or condition soever he or they be, do hereafter unlawfully retain, for Maintenance of any Suit or Plea any Person or Persons, or embrace any Freeholders or Jurors, or suborn any Witness, by Letters, Rewards, Promises, or by any other sinister Labour or Means for to Maintain any Matter or Cause, or to the Disturbance or Hindrance of Justice, or to the Procurement or Occasion of any manner of Perjury by false Verdict or otherwise, in any manner of Courts aforesaid upon pain of forefeiture for every such offence x.li. the one moiety thereof unto the King our Sovereign Lord, and the other moiety to him that will sue for the same by Action of Debt, Bill, Plaint, or Information in any of the King's Courts; in which action no Essoin Protection Wager of Law nor injunction shall be allowed."

It has been urged that the unlawful maintenance mentioned in this section denotes cases in which unfounded claims have been supported, or in which sinister means have been used in their support. I do not think that this is the true meaning of the words. Unlawful maintenance simply denotes the cases in which the justification for the support of another man's action did not exist, such as was offered by motives of charity or relationship. No inference can be drawn in favour of the respondents' contention from the hard words which occur in some of the indictments or pleadings with regard to maintenance. Such expressions are very common in old pleadings, and when they are used with regard to maintenance they refer not to any injustice in the particular legal proceeding in the course of which the maintenance occurred, but to the view of the law that all maintenance, unless in the excepted cases, was unlawful and against public policy. The respondent's argument on this head, in my opinion, fails, but as I have said, I am of opinion that the claim for maintenance fails on the short ground that no damage has accrued, and that judgment should therefore be entered upon this head for the respondents.

VISCOUNT HALDANE.—As to the appeal brought by Mr. Neville, I agree that it fails. I do not, however, think that the case is one where judgment ought to be entered for the respondents. The proper course in the circumstances appears to me to be simply to affirm the judgment of the Court of Appeal in so far as it orders a new trial.

The only question which to my mind presents real difficulty is that which relates to Mr. Neville's claim for damages for maintenance. As to this he obtained a special verdict to the effect that the defendant newspaper company did not act solely or at all from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights, or in the bona fide belief that the persons who sued had a well-founded claim against Mr. Neville. By agreement the amount of damages under this head was left to be dealt with by the Lord Chief Justice, who had tried the case with the jury, and he assessed damages on this claim for maintenance at a sum equal to the amount of the

A taxed costs which Mr. Neville had been made to pay in the Chancery actions and of his extra costs incurred as between solicitor and client in these actions, as well as of his costs of the consolidated actions. I agree that this verdict was perverse and cannot stand, and I also think that the measure of damages adopted by the learned Lord Chief Justice was wrong. If this were all, a new trial would be the natural result. But by their cross-appeal the newspaper company ask that B judgment should be entered in their favour as to this branch of the claim, on the ground that in the circumstances an action could not lie. They point out that the actions for maintenance which they were held to have maintained were adjudged to have been justified, and they say that they were only upholding those who were insisting on the fulfilment of a legal duty on the part of Mr. Neville to pay money due together with the costs of obtaining it. It is argued on the C newspaper company's behalf that there was accordingly no damage, and that, therefore, no action for maintenance would lie.

The question so raised is one of much difficulty. What the newspaper company did was to publish an offer in these terms:

> "In view of the widespread interest taken in the proposal of the South Coast Land and Resort Co. to develop New Anzac-on-Sea, and to the fact D that many of the winners of so-called consolation prizes are being refused the return of the three guineas paid by them, and have written to us on the subject, we are prepared to instruct our solicitors to take proceedings for the recovery of these sums, at our own expense, if those who have paid these sums choose to avail themselves of this opportunity. The 'Daily Express' has taken this matter up from a sense of public duty, and to assist those who E hesitated, on the ground of expense, to bring their cases before the court."

They then invite communication with their solicitors. It will be observed that this offer is made not merely to claimants who are poor, but to all claimants irrespective of their means. Did this, and the steps taken on it, amount to maintenance?

F Various definitions of maintenance are to be found in the authorities. To abstain from it is a duty which the common law recognises and which has been affirmed also by statutes. Some of the definitions are collected in the judgment of LORD COLERIDGE, C.J., in *Bradlaugh* v. *Newdegate* (5), and also in that of BUCKLEY, L.J., in *British Cash and Parcel Conveyors, Ltd.* v. *Lamson Store Service Co., Ltd.* (11). It is true that the courts are not to-day disposed to extend the G principle, and that various legal excuses for it, such as that resting upon motives of charity, have been introduced. A common interest, speaking generally, may make justifiable that which would otherwise be maintenance. But the common interest must be one of a character which is such that the law recognises it. Such an interest is held to be possessed when in litigation a master assists his servant, or a servant his master, or help is given to an heir, or a near relative, or to a poor H man out of charity, to maintain a right which he might otherwise lose. But in the present case none of these justifications is present, for the case is simply one of a newspaper undertaking to conduct a suit for any reader with a case who may apply to it, whether rich or poor and without distinction of person. Can it be said that this does not fall within the principles, if it survives at all? I do not think so. For the broad rule remains unrepealed by any statute that it is un- I lawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence. As to this being the rule all the definitions agree in substance.

It is argued that the suits maintained in the present case succeeded, that their justification in law was established, and that this fact takes the case outside the principle forbidding maintenance. It is further argued that Mr. Neville had only to pay the money and costs for which the law declared him liable, and that not only can damages not be recovered by him in respect of that as damage suffered,

but that there was no damage at all, and that apart from some damage no suit for maintenance could lie at his instance. A

As to the measure of damages important questions arise which have to be considered separately, but the first question, that which lies at the root of the controversy, is whether it was necessary to prove actual pecuniary damage as a condition of the right to sue. Now, it must be observed that so to hold would be to prevent anyone from bringing an action for maintenance until the litigation B maintained had been disposed of, and a result definitely ascertained, a process which might take years. But the definition of the duty, as I have given it, not to maintain appears to me to be wholly inconsistent with this view, and the language of the statutes on the subject seems to me to be not less so. For example, 1 Edw. 3, stat. 2, s. 14, enacts that

C

> "because the King desireth that common right be administered to all persons, as well rich as poor, he commandeth and defendeth that . . . none . . . in this land, great nor small, shall take upon them to maintain quarrels nor parties in the country, to the let and disturbance of the common law."

Various statutes have made maintenance a criminal offence and have prescribed penalties for that offence. But it is clear from the authorities that, throughout, D the breach of this law has been treated as a civil wrong for which damages were recoverable. The only question is, as I have pointed out, whether actual pecuniary damage, arising from the suit having been maintained unjustifiably, need be proved.

Taking the statutes as they stand, and bearing in mind that certain of them annex penalties to a wrong which was already recognised as a wrong by the E general law apart from them, what is the proper canon for their construction? What was said by Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.* (3) is no doubt true. He questioned the broad terms in which the law had been laid down by Lord Campbell, C.J., in *Couch* v. *Steel* (2), to the effect that when a statutory duty is created any person who can show that he has sustained injury from the non-performance of that duty can bring an action for damages. Lord Cairns F pointed out that in each case this must turn on the character of the statute, and the intention to be collected from its terms read as a whole. The canon of interpretation in these cases is one which is not obscure, however difficult may be its application to particular statutes. It is laid down by Willes, J., with the precision which distinguished the utterances of that most accomplished lawyer in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (12) (27 L.J.C.P. at p. 246): G

> "There are three classes of cases in which liability may be established by statute. (i) There is that class where there is a liability existing at common law, which is only remedied by the statute with a special form of remedy: thus, unless the statute contains words expressly excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. (ii) Then there is a second class, which consists of those H cases in which a statute has created a liability, but has given no special remedy for it: Thus the party may adopt an action of debt or other remedy at common law to enforce it. (iii) The third class is where a statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it. . . . With respect to that class it has always been held that the party must adopt the form of remedy given by the statute." I

The statute interpreted in the case before Lord Cairns was a plain example of the third of the classes to which Willes, J., then refers. But here the statutes enact a liability recognised by the common law, and thereby declare a correlative right. Nothing is said about the civil remedy, nor is the right to protection by the courts confined to protection from the maintenance of unjustifiable suits. If this be so the violation of the right imports an injury independent of proof of legal damage. As Lord Holt showed in *Ashby* v. *White* (1), every violation of a right imports damage in contemplation of law. This principle applies whether

A the right arises out of a contract, as in *Marzetti* v. *Williams* (13), or out of a tort, as in *Embrey* v. *Owen* (14). The damage may be substantial, but may also amount to what is merely nominal. As MAULE, J., said in *Beaumont* v. *Greathead* (15) (2 C.B. at p. 499):

> "Nominal damages are a mere peg on which to hang costs . . . nominal damages in fact mean a sum of money that may be spoken of but has no existence in point of quantity."

B

As PARKE, B., observed in *Embrey* v. *Owen* (14) (6 Exch. at p. 368):

> "actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage."

C He went on to point out that the principle did not apply to the case with which he was dealing because the right was to the flow of a stream, a right only to the flow subject to its reasonable enjoyment and possible slight diminution by higher riparian owners. The right there was only a qualified one. But where the right is, as it often is, an absolute right, the doctrine laid down by LORD HOLT in *Ashby* v. *White* (1) applies, and every infringement of such an absolute right gives a D claim to nominal damages, even though all actual loss or injury is disproved.

I think that the right to protection against maintenance is an absolute one. The statutes say nothing about justification of the suit maintained. The maintenance of any suit is forbidden, and the only excuse which the authorities have recognised is that of a common interest of that defined nature which prevents the act done from coming within the category of maintenance by a stranger. In the present E case, if I am right, the excuse does not prevent what was done from being maintenance by a stranger, and it follows from the other conclusions at which I have arrived that Mr. Neville had a right of action against the newspaper company. But it does not follow that he was entitled to the damages in the shape of costs which the Lord Chief Justice assessed. These were costs in which he was justly condemned for resisting a proper legal claim. The real cause of the expenditure F to which he was put was his own improper resistance, and not the mere fact of the actions brought in order to overcome it. He ought to have paid back all the money without compelling resort to proceedings in court. In these circumstances I think he was entitled to no more than nominal damages for the violation of his right, and that the jury ought to have been directed to this effect. I think that justice will be done if judgment on the claim for maintenance is entered for G him for merely nominal damages, unless the jury on a new trial think that exemplary damages should be given. No direction suggesting such damages should be given. But the question is one for the jury on a new trial.

LORD ATKINSON.—Apart from the contention of counsel for the respondents to the effect that the respondents were entitled to have a verdict directed for them, H both on the plea of fair comment and also on the claim for maintenance, I am of opinion, for the reasons stated in the judgments delivered in the Court of Appeal, that the order appealed from directing a new trial was right, and should be affirmed.

As the two points made on behalf of the respondents were argued fully, and as one of them at least is of importance in itself, it is, I think, only fitting that this I House should pronounce an opinion upon them. As to the libel, I think it would have been impossible for the learned Lord Chief Justice to have ruled as a matter of law, that the publications complained of were not reasonably susceptible of a defamatory meaning. They were, in my view, clearly susceptible of such a meaning. If this be so, it is plain that one question of fact at least must have been left to the jury on the plea of fair comment, namely, whether the comment was, in fact, fair or not, and, therefore, that a verdict for the respondent could not properly have been directed upon the issues raised upon that plea.

The question of the respondent's right to a direction on the claim to recover

damages for maintenance, notwithstanding the findings of the jury on the questions left to them is, in my opinion, more difficult. The civil action alleged to have been maintained by the respondents was that instituted in the Court of Chancery and tried before YOUNGER, J. For convenience' sake it may be styled the maintained action. It was entirely successful. The appellant was found guilty of fraud and false representation; the contracts impeached were decreed to be rescinded; the sums received by the appellant as the cost of conveyance of the plots allotted to the plaintiffs, the so-called prize winners, were ordered to be refunded, and the appellant was ordered to pay the costs of the plaintiffs. I use the word "proceedings" throughout this judgment, to indicate civil proceedings, as the maintenance of criminal proceedings is not actionable: *Grant* v. *Thompson* (16). Now the contention of counsel for the respondents resolves itself into this general proposition, that the fact that a maintained action is successful is in itself sufficient to sustain a plea in bar to any action brought to recover damages, for the maintenance of the action so maintained. That is the wide and bald proposition he has, in argument, sought to maintain. Unless he succeeded in maintaining it he, as I understand him, frankly admitted that he would not be entitled to have a verdict directed for him in the action for maintenance. In other words, he, in effect, contended that according to modern ideas maintenance to furnish a cause of action at law must involve the rendering officiously of support or assistance to unsuccessful litigation, by one not having in the subject-matter of the same any interest, such as, by the law is recognised. The word "litigation" used in this connection, of course, includes the defence of legal proceedings as well as the institution of them. With the view of showing the soundness of his contention, counsel further urged that if the right to sue for maintenance did not depend upon the result of the maintained litigation, the necessary consequence would be that if, for instance, A. should assist and support a creditor in recovering from his debtor the amount of the debt the latter owed, that debtor could, in an action for maintenance brought against A., recover as damages the full amount of the debt he was forced reluctantly to pay, together with all the costs he incurred in dishonestly but unsuccessfully defending himself against a just and lawful claim. A result, similar in kind, he said, would follow if the maintained action had been brought to recover damages for some tort committed by the plaintiff in the action for maintenance. Indeed, the damages awarded to the appellant in the present case by the Chief Justice are measured so as to cover the cost incurred by him in unrighteously and unsuccessfully defending himself in the Chancery suit. I am not at all convinced that in the instances counsel has chosen by way of illustration, the damages properly recoverable in the action for maintenance would necessarily include the debt or damages recovered in the maintained action, together with costs. If it did necessarily include them, that circumstance might, no doubt, afford some support to his general proposition. If, however, the essence of the action of maintenance be the officious intermeddling in and supporting litigation, in which the maintainer has no legitimate interest, if it means the invasion of a person's right not to be harried in courts of justice by litigation of this sort, as I think it is, then the debt or damages recovered in these maintained actions would be due as much or more to the fact of the defendant's indebtedness or the fact of his guilt of the tort for which the damages are awarded as of the invasion of his right to be spared from officious litigation. The invasion of this right does not create the liability in either case. It existed independently of it. Where, on the other hand, the maintained action fails, matters are wholly different. There the costs incurred by the defendant in defending himself are the direct and unmixed result of the invasion of his right not to be harried by such suits, and are properly recoverable as damages in the action for maintenance. It appears to me that a debt which a debtor is forced by litigation to pay cannot properly be called damages, either in the maintained action or the action for maintenance, neither can the costs incurred by him in defending himself unsuccessfully against a charge of fraud. I cannot find that, from the YEAR BOOKS down to the most

A recent authority, there is, with one doubtful exception, any decision or statement of the law by any court or judge on the subject of maintenance tending to support the respondent's contention. That exception is to be found in the statement of the law by LORD ABINGER, C.B., in *Findon* v. *Parker* (17). That most distinguished judge there said (11 M. & W. at p. 682):

B "The law of maintenance, as I understood it, upon the modern construction, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others to bring actions or to make defences they have no right to make."

The significance of this statement depends upon the meaning of the words "they have no right to make." Do they apply to the persons maintained or the persons C who maintain these latter? As every person has a right to bring any suit in which he is successful, if it refers to the former it obviously excludes successful suits or defences, inasmuch as the very fact of success shows that the person who succeeds had a right to bring the action or set up the defence which has been successful, but if it refers to the maintainers the statement applies whatever may be the result of the maintained action or defence, since maintainers have no right D "to improperly and for the purpose of stirring up strife" either to bring an action or to set up a defence, whether it be successful or the contrary. Moreover, it is to be remembered that in this case of *Findon* v. *Parker* (17), in which a maintained defence was made, it neither succeeded nor failed. The trial was abortive, as the jury disagreed upon the issues raised on this defence and were discharged, and the action of the solicitor to recover his costs from the maintainers of the defence E was brought and decided before those issues were determined. The solicitor succeeded because it was held that the maintainers whom he sued had an interest such as the law recognised in the subject-matter of the litigation in which this defence was set up. Again, the same learned judge, LORD ABINGER, in *Prosser* v. *Edmonds* (18), purports to state what is the principle upon which all cases of champerty and maintenance are founded in words which do not suggest in the F slightest degree that the maintenance of litigation which is successful does not furnish a cause of action, while that which is unsuccessful does. In dealing with the assignment of a bare right to litigate, he says (1 Y. & C.Ex. at p. 497):

"What is this but a purchase of a mere right to recover? It is a rule—not of our law alone, but of that of all countries—that the mere right of purchase G shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce."

That statement of the law has been many times approved of in modern cases H such as *Alabaster* v. *Harness* (8), *British Cash and Parcel Conveyors, Ltd.* v. *Lamson Store Service & Co., Ltd.* (11). If the respondents be right, LORD ABINGER should have qualified his statement of the law by confining it to unsuccessful litigation. As far as I have been able to discover, no learned judge who ever quoted this passage with approval, and they are numerous and distinguished, ever suggested it should be so narrowed. Ancient statutes, eight in number, ranging I from the 3 Edw. 1 to the 32 Hen. 8, c. 9, have been cited in argument. The last is possibly the widest in reach and the most instructive. LORD ABINGER, in giving judgment in *Prosser* v. *Edmonds* (18), said of it that it was a short and useful statute, consistent with the general policy and principles of courts of law and equity. In *Pechell* v. *Watson* (19), which has been many times approved of, it was, according to the headnote of the case, decided that maintenance is, at common law, a wrongful act, that the several statutes relating to it are merely declaratory of the common law, and that because of this a declaration in case for maintenance need not charge that the maintenance was committed contra forma statuti. The

object to effect which this statute of Henry 8 was passed appears from the preamble in s. 1. It is there stated to be that

> "nothing which conserveth his loving subjects in more quietness, rest, peace, and good concord than the due and just administrations of the laws, and the true and indifferent trial of such titles and issues as have to be tried according to the laws of his realm."

It is then stated that these things are greatly hindered by maintenance, embracery, champerty, subornation of witnesses, sinistre labour, buying titles, and pretended rights of persons not in possession, whereupon great perjury hath ensued, and much unquietness, oppression, vexacious troubles, wrongs, and disinheritances have followed amongst the King's subjects . . . to the great hindrance of justice within his realm. Then it is enacted that for avoidance of these misdemeanours, it is among other things provided that all statutes theretofore made concerning maintenance, champerty, and embracery or any of those then standing and being in full strength and force shall be put in due execution according to the tenors and effect of the same. Section 2 deals with the buying or selling of, or bargaining for, any right in land if the seller be not in possession, and by s. 3 it is enacted that no person shall thereafter unlawfully maintain or cause or procure the unlawful maintenance in any action demand or complaint in the King's Courts of Chancery, the Star Chamber, Whitehall, or elsewhere . . . upon pain of forfeiture for every such offence of a certain sum named. Some argument has been directed to the use in this statute of the word "unlawfully." I think from what is laid down in the cases I am about to refer to, the word is used to denote maintenance by persons who are not influenced by these motives of charity, nor are possessed of those interests in the subject-matter of the litigation which justifies their interference. The important consideration in relating to the point I am now dealing with is the entire absence from the statute of any distinction between successful and unsuccessful litigation, the reason apparently being that both kinds tend equally to disturb the "quietness, rest, peace and good concord" of the King's subjects.

I now come to *Wallis* v. *Duke of Portland* (6), which, if properly considered, is, in my view, crucial upon this point. In the year 1789, one George Jackson was returned as member of Parliament for the borough of Colchester. A petition was presented against his return by one George Tierney, praying that it might be declared that Jackson was not duly elected, and that he, Tierney, was duly elected member of Parliament for the said borough. In the journals of the House of Commons, under date Apr. 6, 1789, the report of the Select Committee appointed, according to the then existing practice, to try this petition, is set out. From this it appears that they determined that Jackson was not duly elected, and that Tierney was duly elected, and ought to have been returned a burgess to serve in the then existing Parliament for the borough of Colchester. The House then ordered that the determinations of the committee should be entered on the Journals of the House, and further, that the Deputy Clerk of the Crown should attend the House on the following morning with the last return for the borough of Colchester, and amend the same by making it a return of George Tierney. Tierney's petition was, therefore, successful in omnibus. Solicitors named Wallis had conducted this petition on behalf of Tierney. It was alleged by them that they had been employed so to do by the Duke of Portland, at his, the Duke's expense. This, apparently, the Duke denied. The solicitors delivered their bill of costs to both the Duke and Tierney, but the bill was not paid. Thereupon the solicitors filed a bill for discovery against the duke, alleging that without discovery they could not make their demand available at law, and praying that discovery might be made as to the facts which were set out at length in the bill, and, in effect, whether the plaintiffs had been employed by the duke as solicitors to present and prosecute the petition on behalf of Tierney. This bill was demurred to, and the demurrer allowed, as stated in the headnote, on the ground of public

A policy, and because the discovery would have no effect, and principally because such a transaction as that alleged would amount to maintenance at common law. The fact that the petition was determined was stated in the bill, but the result was not stated, as if success or failure was immaterial. At the end of the argument, the Lord Chancellor, Lord Loughborough, said he wished to defer his judgment, not from any doubt that he entertained, but that he might give it more B correctly. He proceeded to say that the question happened not to be entirely new to him, and referred to a case which had come before him where the same point was raised. He wound up by saying (3 Ves. at p. 501):

> "All the law books state the offence of maintenance to be not upon the statutes, but it is repeatedly said to be malum in se, and those acts that are acts of maintenance in a suit not subject to particular provisions of the C statutes, are punishable by indictment in the King's suit. I do not mean to go further into the case now."

It is clear that in these remarks the point he was dealing with was maintenance. When he came on Aug. 7 to deliver his considered judgment, the point of maintenance is practically the only point considered. In the last paragraph of his D judgment, he says (ibid. at p. 503):

> "I do not go into the argument which was very properly urged in support of the demurrer upon considerations of public policy, because I am of opinion upon the whole of the case that it is directly stating a transaction of maintenance; praying a discovery of that which, if discovery was made, would fall within that specific reprobated offence stated by the common law; that if E discovery was made it would be malum in se. Therefore, I am of opinion, it is not fit for a court of equity to permit the suit to proceed further. Allow the demurrer with costs."

This passage establishes I think that in the opinion of the Lord Chancellor the employment by one man of a solicitor for reward to prosecute for another a suit in which the employer has no interest such as is recognised by law, is a tort F amounting to maintenance, is malum in se, and that it is not purged of its illegality by the fact that the suit so presented had been successful. If the respondents' contention were sound, namely that it is not a tort, not malum in se, to support and maintain litigation which has been successful, the objection to the discovery on which the decision of the court was based would not have applied. In an earlier portion of his judgment, Lord Loughborough laid down the law in G these words. The case disclosed is of this nature (ibid. at p. 501):

> "An undertaking supposed between the plaintiff and the defendant that the latter would contribute to the expenses of a petitioner against the return of a member of Parliament, in the whole, or to a given extent. That is an engagement between two parties to the injury and oppression of a third; in short, H it is maintenance, for maintenance is not confined to supporting suits at common law. In the first book one opens upon the subject (one naturally turns to Hawkins), it is stated to be either in pais or by prosecuting suits. Maintenance in pais is punished by indictment. Maintenance by prosecuting suits, without distinguishing what suits are punishable by an action by the party grieved also; and that is an action at common law. Statutes prohibiting I particular species of maintenance add penalties; but it is laid down, as a fundamental authority, that maintenance is not malum prohibitum, but malum in se, that parties shall not by their countenance aid the prosecution of suits of any kind which every person must bring on his own bottom and at his own expense. There is no case in contradiction to this."

Lord Loughborough draws no distinction between successful and unsuccessful suits. It is, in my view, quite inconceivable that he should not have done so if the law recognised any such distinction.

This statement of the law by Lord Loughborough is quoted with approval in

many modern cases. By FRY, L.J., in delivering the judgment of the Court of Appeal in *Harris* v. *Brisco* (20), in which, after citing COKE, 2 INST. 208, COMYNS DIGEST, LES TERMES DE LA LEY, and *Pechell* v. *Watson* (19), he treats it as clearly established that an action for maintenance lies at common law. LORD ESHER in *Alabaster* v. *Harness* (8), after quoting the above extracted passage from LORD LOUGHBOROUGH'S judgment, said ([1895] 1 Q.B. at p. 342) the doctrine of maintenance

> "does not appear to me to be founded so much on general principles of right and wrong or of natural justice as upon considerations of public policy. I do not know that, apart from any specific law upon the subject, there would necessarily be anything wrong in assisting another man in litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for it if unsuccessful."

If this be so, as I think it is, then this mischief to the public interest is done by the act of affording assistance and support to the litigation irrespective of the result of it. No doubt in modern times many transactions which would formerly have been held to amount to maintenance would not now be so regarded: see *British Cash and Parcels Conveyors, Ltd.* v. *Lamson Store Service, Ltd.* (11), but the general principles of the law remain the same.

Wallis v. *Duke of Portland* (6) was brought on appeal to the House of Lords. LORD COLERIDGE, in *Bradlaugh* v. *Newdegate* (5), stated that he had found that LORD LOUGHBOROUGH, LORD KENYON, and LORD WALSINGHAM were present at the hearing of the appeal. The case is reported in vol. 8 of BROWN'S PARLIAMENTARY CASES, 161, and it is stated in the headnote that LORD LOUGHBOROUGH'S decree was affirmed principally on the ground that "the transaction amounted to maintenance at common law." It is also reported in 3 ENGLISH REPORTS 508. The judgments, if any, delivered by these noble Lords are not given. In the final paragraph of the report, it is stated as follows:

> "In support of the order and against the appeal, the following short reason was stated in the respondent's printed Case because the discovery sought by the bill appears from the bill itself to be neither material nor necessary, and because a court of equity will not aid a plaintiff seeking discovery in a case of maintenance, and in the other circumstances of it such as the plaintiff has stated in the bill. It has accordingly ordered that the appeal be dismissed and that the order therein complained of be affirmed."

It is hardly possible, I think, to believe that if the grounds upon which LORD LOUGHBOROUGH had pronounced the judgment appealed from had been disapproved of, some notice of that fact would not have been found in this report, insufficient though it be. In the present case, one is not concerned with the class of cases in which persons, owing to their charitable motives or the interests which they have in the subject-matter of the maintained suits, are held not to be responsible for the maintenance of these suits. It is not contended that the respondents came within that class.

LORD COLERIDGE in *Bradlaugh* v. *Newdegate* (5) said that it was conceded that if the House of Lords had not relieved Mr. Bradlaugh of the penalty he would have been entitled to recover as damages the penalty and all the cost of defending himself. I must say that with all respect to the defendant's counsel, I think that was a very rash concession. In *Scott* v. *National Society for the Prevention of Cruelty to Children and Parr* (9) one Watson, an inspector of the defendant's society, sued a woman named Scott for slander. The action was unsuccessful. Scott had obtained from the justices at petty sessions a bastardy order against Watson. On appeal by Watson to the justices at quarter sessions that order was quashed. The defendant society undoubtedly supported and maintained Watson in all the proceedings. Scott sued the society for maintenance and claimed the costs she had incurred, as well in obtaining the bastardy order from

the justices in petty sessions, as in defending herself in the appeal, and also the cost she incurred on the action for slander. BRAY, J., in giving judgment, said (25 T.L.R. at p. 791):

> "As to the bastardy proceedings, it was said that, as Mrs. Scott had failed, she could not recover costs. He thought the cases showed that it was immaterial what the result might be. It was the wanton intermeddling that was the cause of action. Mr. Manesty, however, did not press his claim for the costs, and as the facts were not quite clear he did not propose to give anything in respect of them, but as to the appeal before the justices in quarter sessions and the defence of the slander action, she was entitled to recover her costs as between solicitor and client."

So far as the direct authorities go, I cannot find a single suggestion to support the respondent's contention as to the effect of success in the maintenance action. When *Pechell* v. *Watson* (19) and *Flight* v. *Leman* (21) were decided it was considered that to procure the commencement of a suit was not maintenance, and hence a count was framed to meet such a case to the effect that the defendant unlawfully and maliciously and without reasonable and probable cause instigated and stirred up A.B. to institute an action against the plaintiff, who sued for damages. It was held that in analogy to the action for malicious prosecution the want of an averment of the absence of reasonable and probable cause was fatal. It is no longer the law that procuring the institution of a suit as distinguished from supporting one already commenced may not amount to maintenance: *Hutley* v. *Hutley* (22); *Sprye* v. *Porter* (23). The absence or presence of probable cause that the litigation is well founded is obviously immaterial if absolute and accomplished success is immaterial. There is no analogy between this action of maintenance and an action for malicious prosecution, because every person acting on behalf of the Sovereign as all prosecutors in effect do, is justified, in the interests of society, in putting the criminal law in motion if he does so without malice and with reasonable and proper cause. There is in such a case no officious intermeddling with litigation that does not concern the meddler: see *Grant* v. *Thompson* (16). The statute 32 Hen. 8, c. 9, does not expressly or impliedly take away the right to sue for the tort of maintenance in a common law action on the case, though it turns the tort into a crime and imposes a penalty on the commission of the crime. The case then would seem to fall within the first or, if not, the second of the three classes mentioned by WILLIS, J., in his judgment: *Wolverhampton New Waterworks Co.* v. *Hawkesford* (12) namely, the class where there was liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law. There, unless the statute contains words which expressly exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy.

What, then, is the nature of the common law action brought for the tort of maintenance? Is it one in which damage is of the essence of the action which must be proved, as in an action, for instance, for personal injuries due to the defendant? Or is it one, like actions for trespass, assault, or libel, or such as *Ashby* v. *White* (1), in which the mere invasion of the plaintiff's legal right imports damage and is sufficient to maintain the action? In my view, it is of the latter class. I think the authorities show that every subject has a legal right not to be harried in courts of justice by actions such as I have mentioned, brought by an officious intermediary who has no legitimate interest in their subject-matter. The following passage from the judgment of HOLT, C.J., in *Ashby* v. *White* (1) is, I think, directly in point. He said (2 Ld. Raym. at p. 955):

> "My brother POWELL, indeed, thinks that an action on the case is not maintained because there is no hurt or damage to the plaintiff, but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for damage is not merely pecuniary;

but an injury imports damage where a man is thereby injured of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking of them, yet he shall have his action. So if a man gives another a cuff in the ear, though it costs him nothing, no, not so much as a little diachylon, yet he will have his action, for it is a personal injury. So a man will have an action against another for riding over his ground, though it do him no damage, for it is an invasion of a man's property."

In the present case the legal right of the plaintiff of the kind described was invaded by the respondent's action. The success in the maintained action, even if it affected the damages, could not, in my view, absolutely bar his right to recover nominal damages for that invasion. As at present advised I do not think the appellant was entitled to recover as damages for maintenance the amount of the cost incurred by him in the maintained action. I think he was only entitled to recover nominal damages. The respondent's contention therefore, in my opinion, fails, and his cross-appeal should be dismissed with costs.

LORD SHAW.—In these cross-appeals two questions are raised. The first is whether the defendants are entitled to a new trial in that part of Mr. Neville's action under which damages were asked against the respondents in respect of libel. Upon this I have nothing to add to what has been said from the Woolsack, and I respectfully agree therewith. The second question arises upon that head of the action under which damages are claimed in respect of maintenance. Upon this question my opinion is that, in circumstances such as have occurred in this case, such an action fails. It is, in my view, not warranted by the doctrines of the English common law, and it appears to me to be beyond all question contrary to its spirit. In view of the judgment of the courts below, and of the great respect due to the learned judges there, those doctrines and that spirit demand a careful examination.

The circumstances stand clear. Mr. Neville, a speculator in land, bought a section of ground on the Sussex shore, and conceived the scheme or dream of turning it into a seaside resort. He induced a large number of persons to take from him, as prizes won by them, plots of the ground which were represented each to be worth about £50—the land to be got for nothing but a payment of three guineas to be made, which payment was held out to be the fee for the legal conveyance. A crowd of people read his advertisements and fell into his trap. The "Daily Express" newspaper exposed the transaction and brought upon itself in doing so this action for libel which is to be retried. It also undertook to assist the people who had been entrapped to get their bargains rescinded and their money back. One hundred and twenty-five persons accepted this assistance. Writs were issued in Chancery on their behalf, in which they repudiated the bargains and claimed refund of the moneys paid. The basis of the repudiation and demand was that the appellant had been guilty of fraud. Nine of those cases were selected as a test, and they went to trial. The actions were successful; fraud was established. The language of the declaration of YOUNGER, J., was:

"This court doth declare that the plaintiffs in each action were respectively induced to enter into the contracts in the pleadings mentioned with the defendant by his fraudulent misrepresentations."

This judgment stands. It was not appealed from; it is not impeached. And in the present action it is not alleged or suggested that it was wrong either in law or in fact. The actions were maintained for the plaintiffs by the respondents against Mr. Neville. The result was that justice was done, injustice was defeated, and by the aid of the maintenance given the law was put in force to achieve right, and right was achieved. In my opinion, it is no part of the common law of England to make it possible to construct out of this maintenance either a wrong in itself or a wrong sounding in damages. The learned judges in the courts below have, however, deferred to the view that this is possible. This has made an independent examination of the statutes and authorities necessary.

By 3 Edw. 1, c. 25, passed in the year 1275, it was provided that

> "no officer of the King by themselves, nor by other shall maintain pleas suits or matters hanging in the King's Courts for land tenements or other things, for to have part or profit thereof by covenant made between them; and he that doth shall be punished at the King's pleasure."

This enactment is plainly directed against a pactum de quota litis, against champerty and nothing else, and that on the part or behalf of the King's officers. The first real reference to maintenance as such does, however, occur in the statutes of this Parliament. It is in chapter 28 and is as follows:

> "And that no clerk of any justice or sheriff take part in any quarrels of matters depending in the King's court, nor shall work any fraud, whereby common right may be delayed or disturbed; and if any so do he shall be punished by the paine aforesaid or more grievously if the trespass so require."

It is true that the maintenance here condemned is maintenance by the King's officers, but it is, in my opinion, not without importance to observe that even with regard to them, and so early as the thirteenth century, the ratio of such legislation and the essential quality of the practice condemned—that quality without which no offence can be constituted—are expressed in this: "whereby common right may be delayed or disturbed." I think, my Lords, that this quality is vital; it was vital then, and, in my opinion, it is after six centuries vital still. By 28 Edw. 1, c. 11, passed in the year 1300, it is provided:

> "and further because the King hath heretofore ordained by statute that none of his ministers shall take to no plea for maintenance by which statute other officers were not bounden before this time; the King will that no officer nor any other, for to have part of the thing in plea shall not take upon him the business that is in suit."

This was again a statute directed against the pactum de quota litis—against champerty, and does not affect the doctrine of maintenance as such. By the 33 of Edw. 1, passed in the year 1305, an ordinance was made against conspirators:

> "Conspirators be they that do confeder or bind themselves by oath covenant or other alliance that everyone of them shall aid and bear the other falsely and maliciously to indite or falsely to move or maintain pleas."

Up to this point the essential quality of the contravention is falsehood and malice, that is to say, the malice of the maintainer and the falsehood of the plea. But the "conspirators" also include others, namely

> "such as retain men in the country with liveries or fees for to maintain their malicious enterprises and to drown the truth, and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords which by their signory office or power undertake to bear or maintain quarrels, pleas, or debates that concern other parties than such as touch the estate of their lords or themselves."

I think that the error which appears occasionally in the treatment of this subject finds its origin here. The later part of this ordinance taken by itself would appear to strike—in the case of maintenance by the servants or retainers of great lords—at maintenance by them as such. It appears to me on the contrary that the ordinance must be read as a whole; and if it be so read it is in line with what has preceded it on the statute book; the essential quality of the illegality is set forth, and that quality must be present, namely, that those charged were maintaining "their malicious enterprises" and to drown the truth. Whether this last phrase has escaped certain later authorities or not I do not know, and it is notable that the words themselves only appear in a footnote in the revised statutes. But there was no reason for this omission from the main text for the original of the statute contains quite plainly the vital words "et pur verite esteindre." The attempt accordingly to divorce the act of maintenance from its quality of "drowning the

truth" or in the language of the earlier acts something "whereby common right may be delayed or disturbed" is to turn an act which may be promotive of justice, and a righteous act, into something wrongful and penal, that is to say, is to upset the foundations on which the ordinance is based. This view is strongly confirmed by the language of the statute, 1 Edw. 3, stat. 2, c. 14, passed a quarter of a century afterwards, namely, in 1326–27. The Act says:

> "Because the King desireth that common right be administered to all persons, as well poor as rich; he commandeth and defendeth that none of his counsellors nor of his house, nor none other of his ministers, nor no great man of the realm, by himself, nor by other, by sending of letters, nor otherwise, nor none other in this land great nor small shall take upon them to maintain quarrels nor parties in the country to the let and disturbance of the common law."

What in short is to be accomplished is the impartial administration to poor and rich alike, and what is alone prohibited is maintenance of "quarrels and parties" "to the let and disturbance of the common law."

Then comes fifty years afterwards—namely, in 1377, the statute of 1 Ric. 2, c. 4. It deals with penalties, and it is prefaced undoubtedly with prohibitive language thus:

> "It is ordained and stablished and the King our lord straitly commandeth that none of his counsellors, officers, or servants nor any other person within our realm of England, of whatsoever estate or condition they be, shall from henceforth take nor sustain any quarrel by maintenance in the country nor elsewhere upon a grievous pain,"

the pain upon the King's officers to be ordained by him, other officers to lose their services, other persons to be imprisoned and so on. I have very considerable doubt whether the intendment of this statute was the maintenance of suits of law. Primarily it was directed to promoting the civil peace in the country districts or elsewhere, and preventing the spreading of embroilments destructive of public order. This doubt is not resolved by the inclusion of this Act among the statutes which are confirmed by the fifteenth of 7 Ric. 2 (1383) for "the grievous complaint that is made of maintainers of quarrels and champerters." This doubt is confirmed, and, in my opinion, a point of much obscurity and difficulty is set at rest by the statute of Henry 8 to which I am about to refer. The statute was passed in the year 1540, and is the 32 Hen. 8, c. 9. It deals specifically with legal administration and with the various forms in which that may be impeded or distorted to evil ends. In the preamble, or rather in s. 1, this is made clear. The King calls to his remembrance that

> "there is nothing within this realme that conserveth his loving subjects in more quietness rest peace and good concorde than the due and juste ministration of his lawes and the true and indifferent triall of suche titles and issues as ben to be tried according to the lawes of this realme which his most roiall Majestie perseyveth to be gretely hindered and lettid by maintenance, embracerie, champertie, subornation of witnesses, sinistre labour, buying of titles and pretensed rights of personnes not in possession, wheruppon great perjury hathe ensued, and muche unquietnes, oppression, vexacion, troubles, wronges and disinheritaunce hath followed among his most loving subjects, to the great displeasure of Almighty God, the discontentacion of his Majestie, and to the great hinderaunce and lett of justice within this his realme."

The third section of the Act provides that no person

> "doo hereafter unlaufully maineteyn or cause or procure any unlaufull maintenance in any action demande sute or complainte in anny of the Kings courts"

. . . and also that no person

> "doo hereafter unlaufully reteigne, for maintenance of any sute or plea any persone . . . or embrace any freeholders or jurours or suborne any witnes . . .

A for to maineteigne any mateir or cause, or to the distourbance or hinderaunce of justice or to the procurement or occasion of any maner of perjury by false verdict or otherwise in any maner of court."

I have seen occasion to point out that these statutes from the thirteenth century onwards do not condemn maintenance of suits as such, but they do condemn and alone condemn such maintenance of suits as is to the delaying or disturbing, the B hindrance or denial, of justice, and that accordingly to bring within their range a maintenance which is and may be clearly and demonstrably shown to be promotive of justice and in support of right is an erroneous construction. This last cited Act supplements and confirms, and, in my view, gives plain Parliamentary sanction to, what appears to me to be the more reasonable and sensible and sound C view. What is aimed at is the just and due administration of the laws. The maintenance which has displeased God and made the King and his subjects discontented is the maintenance which is to the great hindrance and let of justice. And it is this sort of thing, and no other maintenance, which is struck at by s. 3—unlawful maintenance, procuring any unlawful maintenance, unlawful retaining for maintenance, or getting a false verdict through perjury or similar nefarious D means. I ask myself what is the use of all this language about "unlawful" maintenance if by the common law of England all maintenance was in itself unlawful. The laws are directed against robbery, arson, theft, or murder; how curious would be the language if it were directed against unlawful robbery, unlawful arson, unlawful theft, unlawful murder. If maintenance were unlawful in itself, the law would, one would have thought, have prohibited it simpliciter; and the simple truth as I view it, and as I think the legislature viewed it, is that that maintenance E alone is unlawful which is to the delaying, the interference with, the distortion or the prevention of justice in the courts of the realm.

The attempted answer to this appears to be that when these statutes were enacted or put into force the common law of England had already made exceptions, and that it was only the cases that did not fall within the exceptions that were F unlawful. This brings me to examine the institutional writers referred to. Commenting on the twenty-fifth of the first Parliament of Westminster—against champerty—COKE in Part 2 of his INSTITUTES, vol. 2, p. 208, observes that BRACTON, who wrote before its date "rehearsing the articles requirable by the justices in Eyre, speaks of the sustaining by a champerter 'per quod justitia et veritas occultetur.'" He adds:

G "and Fleta agreeth with him when it is said 'per quod justitia et veritas occultetur': it appeareth that the end of champerty and maintenance is to suppresse justice and truth or at least to work delay, and, therefore, it is malum in se and against the common law."

In a further paragraph he says:

H "An action of maintenance did lie at the common law, and if maintenance in genere was against the common law, 'a' fortiori champerty, for that of all maintenances is the worst."

Commenting further upon the 28th of this Parliament, against maintenance, it is, in my view, nowhere to be found that COKE places maintenance on a different foundation or describes it as having any wider scope under the common law than I it had simply under this statute where it was described as something "whereby common right may be delayed or disturbed." COKE puts the matter thus:

"Maintenance is an unlawful upholding of the demandant or plaintiffe, tenant or defendant in a cause. . . . This maintenance (as hath been said) is malum in se and against the common law and that is notably proved by this Act, for hereby maintenance is branded with this quality that thereby common right is delayed or disturbed and consequently against the common law."

So far, in short, as COKE is concerned he appears to give no countenance to the proposition that a maintenance which, say, assists or promotes or procures justice

would fall within that "unlawful" maintenance which is struck at. Nor does it support the condemnation of all and every maintenance as "unlawful." On the contrary, COKE appears to treat that maintenance and that alone as unlawful which is branded with the quality of delaying or disturbing common right. And it must in conclusion be added that COKE does not deal with the general question of maintenance at all. His observations are, and are alone, upon statutes affecting officers of the King or of the courts, and even with regard to them they are of the guarded character described. So far COKE.

BLACKSTONE says of the offence of maintenance that it is "an officious intermeddling in a suit that noways belongs to one." He says this

> "is an offence against public justice, as it keeps alive strife and contention, and prevents the remedial process of the law into an engine of oppression. A man may, however, maintain the suit of his near kinsman, servant, or poor neighbour out of charity and compassion with impunity."

Here is in this last sentence what in other treatises and text-books is called the list of exceptions, but which upon examination are not exceptions to officious interference, but are defences to it. As HAWKINS (1 PLEAS OF THE CROWN, p. 456) treats it, it is "in what respects some acts of this kind may be justified." A man may be as officious as he likes in assisting his sons or other kinsmen, or in helping the poor in their litigations. These litigations may even tend to turning the law into an oppression, but yet he will have a defence for his action if his conduct sprang from kinship, service, charity, or compassion. But this defence throws no light upon the question whether an interference which is not officious and does not pervert the law into an engine of oppression, but, on the contrary, helps the law to be an instrument of justice—whether such an interference could ever be construed as an offence or fall within the denomination of "unlawful."

The search in HAWKINS' PLEAS OF THE CROWN would yield a rich reward to those who inquired as to the extraordinary lengths to which in certain ages and by certain authors the doctrine of maintenance was carried. As for instance this: Maintainers, it is said, include all such as assisted

> "by opening the evidence to the jury, or by giving evidence officiously without being called upon to do it; or by speaking in the cause as one of the counsel with the party; or by retaining an attorney for him; or perhaps by barely going along with him to inquire for a person learned in the law."

It was as if law courts were a plague-ridden or infected area, to help another into which was an injury and a crime. Needless to say, these things, once claimed as being part of the common law of England, have long since disappeared. They are repugnant to sensible and modern ideas. What remains of the doctrine deserves, in these circumstances, a scrupulous examination; and I am of opinion that the test of maintenance is the test of the quality of the act itself as it bears upon the attainment of justice in the particular case, and that the test either of tort or of offence is primarily whether it contains that quality which is essential both by the statute and the common law of England. Everything, in short, which HAWKINS opines must, in my view, be governed by his major definition. He says:

> "Maintenance is commonly taken in an ill sense, and in general seemeth to signify an unlawful taking in hand or upholding of quarrels or sides to the disturbance or hinderance of common right."

I cannot but think that HAWKINS' statement (Book I, c. 27, s. 43) "that it is not material whether the plaintiff . . . were non-suited or recovered in the action," must be subjected to the same qualification—namely, that it was to the disturbance and hindrance of common right. But upon that topic I content myself with referring to and adopting the judgment of my noble and learned friend, LORD PHILLIMORE. Finally, HAWKINS considers the general point: "How far offences of this kind are restrained by the common law." Of this he says (p. 462):

A "It seemeth that all maintenance is strictly prohibited by the common law as having a manifest tendency to oppression by encouraging and assisting persons to persist in suits which perhaps they would not venture to go on in upon their own bottoms; and therefore it is said that all offenders of this kind are not only liable to an (a) action of maintenance at the suit of the party grieved wherein they shall render such damages as shall be answerable B to the injury done to the plaintiff, but also (b) that they may be indicted as offenders against public justice."

This is a civil suit. I am of opinion that in any civil action in respect of maintenance it is necessary to establish these two things—namely, that the maintenance was unlawful in the sense above described both in statutes and in text-books, that is to say, that it was to the hindrance or disturbance of common right, C to the delay or distortion or withholding of justice, and that the plaintiff in an action of maintenance shall have suffered actual injury by reason thereof, for which injury alone and to the extent of it is the maintenance answerable.

Having so concluded from an examination of the ancient statutes and law, I ask myself next: What was the practice of the courts of England? Did they treat, did they hold as relevant, an action or indictment which libelled maintenance as D such, as either a tort or a crime? So far as I can maintain, they did nothing of the kind. A curious instance comes to my hand. In 1592–4 WILLIAM WEST, of the Inner Temple, published his "SYMBOLEOGRAPHIE, which may be termed the art or description of instruments and Presidents." The book had a great vogue; edition after edition appeared; that from which I quote was issued in 1647—this last being, in the opinion of a biographer, probably issued by his sons. In short, E it appears that here was an exhaustive book of practice of the law of England from the end of the sixteenth to at least the middle of the seventeenth centuries. It gives examples, a form of indictment against a barrator, another against a champertor, and, lastly, against a maintainer. That, however, against the maintainer is grounded upon the thirty-second of Hen. 8, which is cited fully. The style is headed: "For maintenance upon the statute of anno 31 Hen. 8 against F one maintaining in an action of debt." The citation from the Act being made, the form proceeds:

"Nevertheless, T.L., little pondering (minime ponderans) the foresaid statute maintained and sustained a certain action which was in the court of our lady the Queen between a certain R.B. plaintiff and a certain T.D. for a G plea of debt by the said R.B. versus the said T.D. to the manifest retardation and disturbance of justice and in contempt of our lady the present Queen and to the serious loss of the foresaid T.D. and contrary to the said Act."

If, by the common law of England maintenance of suits was by itself either an offence against the law or was by itself a tort, then it appears to me to be H inconceivable that a style of indictment in this form could have been formed. Presumably it was composed as expressing a statement of the elements relevant and necessary to the action of maintenance. If maintenance was per se unlawful what more was necessary than to libel the fact, and to state that thereby the law per the statute had been broken. This is not the style, and one asks and sees plainly from it wherein the gravamen of the offence or tort consists. What I was it that had been done unlawfully, what was it that was in contempt of the Queen? It was that an action of debt had been maintained with these two essential qualities, (i) "to the manifest retardation and disturbance of justice, and (ii) to the serious loss of the foresaid" plaintiff. This last expression, "grave damnum," in my humble opinion, excludes the idea of merely nominal damages. The damages must be real and actual. As has been seen, this is the kernel of the whole matter, and these two essentials the common law of England has, in my opinion, never abandoned. It, therefore, follows that where the action maintained has succeeded, no suit for damages can lie by the party against whom the

action was maintained. Justice was not denied; it was done; the cause maintained was won at law; how can a man in a court of law be heard to say that thereby he was wronged? If under the common law of England such a right existed, then, in my opinion, the books would have shown many such. Rich crops of litigation might have remained to litigants, including fraudulent and dishonest litigants, who had most justly lost their causes—for damages against those who had helped to that end by maintaining, from wholly disinterested motives and with entire success, the cause of just dealing between man and man. No doubt Parliament would long ago have taken some action in the matter. There is no such rich crop, nor any.

Much reliance was not unnaturally placed upon what, in my opinion, is the only decided case in which the fact of the success of the process maintained was brought forward. That case is *Wallis* v. *Duke of Portland* (6). The duke was said to have agreed with the solicitor for Mr. Tierney to support him with funds for contesting a Mr. Jackson's election for Colchester and declaring that the seat was won by Mr. Tierney. The petition succeeded. Tierney was declared elected; but upon the solicitor presenting his bill to the duke the latter refused payment. The solicitor sued, and the point before the Court of Chancery was as to a discovery of documents. In the course of the argument by the Attorney-General Mansfield, four points at least were taken by way of demurrer which may be shortly put as (i) nothing calling for answer; (ii) a step in a maintenance suit, therefore to be refused; (iii) against a standing order of House of Commons; and (iv) no writing by the duke. In the Court of Chancery, Lord Loughborough, L.C., upheld the second point, viz., maintenance, and opined that maintenance was malum in se. The case went to the House of Lords, and the appeal failed; but there is no record of any pronouncement by their Lordships as to the grounds of judgment. I am humbly of opinion that this authority—a point of discovery in an action by a solicitor against an alleged client—does not cover an ordinary action for maintenance by an unsuccessful suitor against the maintainer of a successful suitor. It is notable that the cases cited by Bullen and Leake on this topic are *Flight* v. *Leman* (21) and *Pechell* v. *Watson* (19). But in each of these cases the fact was that the plaintiff (maintained) had been non-suited. The former case was raised in order to recoup the plaintiff for the costs to which he had been put by resisting the suit—which costs he could not recover from his former antagonist. The allegation was that the defendant had "unlawfully, maliciously and without probable cause" stirred up and maintained. In short, it was for recovery of costs against the veritable dominus litus. So was *Flight* v. *Leman* (21). But there, although the action maintained had also failed, a suit against the maintainer failed on the further and express ground that it did not contain an allegation of want of reasonable or probable cause on the part of the maintainer. Such a case, it was held by Patteson and Coleridge, JJ., was "in strict analogy with actions for malicious prosecution or arrest." In short, these cases, if they bear on the question of any liability on the part of the maintainer of a good and a successful suit, bear in a negative direction. They form no support whatever for such liability. Nor does *Bradlaugh* v. *Newdegate* (5). The attempt to make Mr. Bradlaugh liable in penalties for having voted in the House of Commons without having taken the oath failed, and accordingly the judgment of Lord Coleridge, C.J., was pronounced against the maintainer of a suit which had been held by your Lordships' House to be without legal warrant. In these circumstances, the judgment is substantially occupied with two considerations, namely, whether maintenance in any circumstances (for the competency of any suit for maintenance was broadly challenged) can ground an action of damages, and, secondly, whether the facts of the case were such as to enable him to answer the point of casuistry as he did, namely, that "to do what is illegal is legally immoral, and that a motive which impels to an illegal act is legally a bad motive." He reached the conclusion that "in this sense" Mr. Newdegate's conduct was immoral and his motive bad.

A It is no part of my judgment in the present case that in no circumstances can an action of damages in respect of maintenance lie. Nor does the second point arise here, for the cause maintained was not illegal but was won; and it would have been interesting to see whether the learned judge would, upon the same reasoning, have felt forced to the conclusion that had the litigation reached a different end and the cause succeeded, the motive of the maintainer would have B been held to be good. One may conjecture what would have been his view upon that, and upon the actual question for decision in the present case by the warm approval with which he cites the words of LORD ABINGER in *Findon* v. *Parker* (17), and the adoption thereof by LORD BLACKBURN in *Hutley* v. *Hutley* (22). These words are well known:

C "The law of maintenance as I understand it upon the modern constructions is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they have no right to make."

In my opinion, that is still the law of England. This is unquestionably not one of those cases. Not only had the plaintiffs a right to bring their actions, but D they succeeded therein and no court can question this outstanding and vital fact. The same view was, I think, entertained by WILLS, J., in *Harris* v. *Brisco* (20) in which he held that the maintainer should "have some sort of reasonable ground for his interference" where he has no legal interest, or "some reasonable ground for his belief that he is furthering the cause of justice." The Court of Appeal in no way questioned this, but the reversal in the course of which the valuable E citation of authorities was made by FRY, J., was made on the ground that the case was one of charity, and that, howsoever unreasonable it might have been, the maintenance, being done out of charity, could not be made a ground of action. I have nothing to add to the review of the recent case of *Oram* v. *Hutt* (7), and to the conclusion thereon of my noble and learned friend, LORD PHILLIMORE.

But I submit to your Lordships that light is desirable upon the present question F from the views expressed in this House in *Metropolitan Bank* v. *Pooley* (10), and in particular from the opinion of EARL SELBORNE, upon a point which has been far too little attended to—namely, the broad and conclusive effect of decisions of court of law on the merits of the root question, namely, the rights or wrongs of the legal proceeding which was maintained. My Lords, upon the other view a maintainer, however high-minded he be, or however prompted by a sense of G justice or a reprobation of deceit, and however successful he be in having justice done and deceit exposed, is civilly responsible in damages for what he has done, and furthermore he is a criminal offender. To my mind, it is fairly clear that such a doctrine is as morally reprehensible as it is legally indefensible, and as I have said I do not think it ever was the law of England. LORD SELBORNE furnishes two striking illustrations of the sort of principle to be applied. He cites the two H cases of malicious prosecution and of a petition of bankruptcy: in such cases what if the prosecution or petition succeed? Could any responsibility under either the civil or criminal law attach in respect thereof?

"An action for malicious prosecution cannot be maintained until the result of the prosecution has shown that there was no ground for it. If a man has been tried and convicted on that prosecution and there is no writ of error I brought and no reversal of the decision such an action will not lie. And it is manifestly a matter of high policy that it should be so."

Then dealing with the action of a bankrupt for maintenance against the supporter of bankruptcy proceedings, his Lordship added:

"The adjudication stands; and even if he had never litigated or disputed it, the fact of its standing would be a sufficient answer to this cause of action."

My Lords, I think the very same principle—embedded in the law of England and going far to explain the reiterated reference to those qualities which make

maintenance "unlawful," namely, that the proceedings maintained were in delay and defeat of justice—that same principle applies to the present case. The proceedings against the appellant failed, and justice was done; his frauds were exposed; the moneys obtained by him had to be repaid: all this is concluded definitely by law: and this, in my opinion, is a sufficient and instant answer to the appellant's claim, a sufficient and instant negation that the maintainer was either civilly or criminally a wrongdoer. The ground of the action thus fails, but upon the further point whether the suit might lie for merely nominal damages my opinion is in the negative. I entirely agree with my noble and learned friend, LORD PHILLIMORE. In my opinion, for the reasons given on the authorities cited the damages in all cases of maintenance are only such as are answerable to the wrong caused by the maintenance and thereby suffered by the plaintiff. Where accordingly it is ab ante demonstrable that no actual wrong has been caused or suffered an action for damages for maintenance will not lie. This demonstration is, in my opinion, afforded by the successful result of the suit alleged to have been maintained. My view on the whole case is accordingly that quoad the libel portion of the action a new trial should be granted, and, quoad the maintenance portion, that the suit should be dismissed.

LORD PHILLIMORE.—I agree that so far as the plaintiff's claim for damages for libel is concerned the order of the Court of Appeal should be affirmed.

On the question of maintenance, the jury gave an answer which was unsatisfactory and there should be, therefore, at least a new trial. Let me explain. There were a number of persons who complained that they had been induced to part with a sum of three guineas upon the representation made by Neville that each had won a piece of land as a prize, and that the three guineas was the cost of the necessary deed of conveyance of the prize, whereas in truth the cost of the conveyance was only a few shillings or even pence, and the balance represented more than double the price of the land which they were told was given them gratis as a prize. The "Daily Express" company, no doubt, encouraged these people to bring actions to recover their money. It collected them, it instructed solicitors and counsel for them, and it made itself responsible for the costs. In legal language it maintained the action. The questions which the Lord Chief Justice left to the jury were directed towards the ascertainment of the motives which induced the defendant company to maintain this action. Question (iva) was as follows: "Did the defendants act from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights?" Question (v) "Did the defendants act in the bona fide belief that the persons who sued had a well-founded claim against Neville?" Upon reflection it will be seen that in the order of thought question (v) comes before question (iva), this is, in fact, a component part of question (iva), and if (v) is answered in the negative (iva) must equally be so answered. The jury answered (v) in the negative. This, speaking with all respect to the jury, is absurd. The case for the several purchasers was, as I have said, based upon fraud committed by Neville. It came on for trial before YOUNGER, J. Thereupon counsel for Neville offered to pay the several sums claimed in full and the costs so as to avoid a formal inquiry into his alleged frauds. Counsel for the purchasers refused this offer and insisted upon proceedings to prove his case, and the judge accepted his contention. Whether this was right or wrong does not much matter; but I agree with the Master of the Rolls that there was sufficient reason for proceeding with the trial. Thereupon Neville instructed his counsel to withdraw from the case. The trial proceeded, the fraud was proved to the satisfaction of the judge. Judgment was entered against Neville on the ground of fraud, and there was no appeal. It was not suggested that this judgment came as a surprise to those who represented the newspaper, or that they were unaware beforehand of the facts which proved the fraud. In these circumstances it was absurd to say that the defendant company, through its servants, had not an honest belief that the plaintiffs in the Chancery action had a righteous

A case. The verdict, therefore, upon this head cannot stand, and the least that could be done was to order a new trial.

But the defendant company has, upon its cross-appeal, asked your Lordships' House to do more for it, and to enter judgment for it as to this part of the case, upon the ground that on the admitted facts no action for maintenance could lie. Your Lordships have had an interesting and far-reaching argument upon this point, B and I trust that the result of your Lordships' decision will be the clearing up of a somewhat obscure portion of our law. The Court of Appeal made short work of this point. The learned lords justices thought that they were concluded by the decision in *Oram* v. *Hutt* (7). But an analysis of that decision will show that it is only of value for one link in the chain of reasoning which should decide the present case. The outline of the facts which led to that decision is as follows: C One Nicholas spoke slanderous words of Johnson, the general secretary, and Dewis, a lodge secretary, of a trades union. These slanders reflected not only upon the individuals, but upon the management of the union and were considered to be likely to damage its interests. Accordingly, those in authority for the union resolved that it was expedient that actions for slander should be brought by Johnson and Dewis and that the union should support them in the matter of costs. D The actions were brought and were successful; but the costs were heavy, and Johnson, who was a man of straw, could pay neither damages nor costs. This being so, the committee of the trades union paid, or proposed to pay, the costs which their officers had incurred. Oram, who was a member of the union, brought the action to restrain the committee from making what he contended was an improper application of the funds of the union, and he succeeded before E Swinfen Eady, J., and before the Court of Appeal upon two grounds—that the rules of the union did not permit of such an application of the funds, a ground which of itself would be enough to warrant the judgment, and upon the further ground to which, no doubt, the greater prominence was given, that it was unlawful for the union to interfere in the suits between their officers and the slanderer, that it was an unwarranted act of maintenance, and, therefore, must be ultra vires. F The discussion turned a good deal upon the consideration of the questions of common interest and the right of a master to maintain or support a suit by his servant. The judges held that there was no such common interest, and no such relation of service as to warrant the interference of the union. Whether in this respect they did not put an unduly narrow construction upon these principles is not material to the case now before your Lordships. What is material and what G carries the present case a certain length in favour of the plaintiff, Neville, is that they decided that the maintenance and support of a just and successful suit is none the less an officious interference, and unless brought within some of the recognised categories of excuse, unlawful. But the court did not decide upon the second matter which is a necessary step in the present case, namely, that such an interference is not only unlawful, but gives to the other party in the suit who has lost, H and rightly lost, his case an action for damages against the maintainer upon the ground, which is somewhat humorous, that but for his interference justice would not have been done. This point could not have arisen in *Oram* v. *Hutt* (7) and, as it so happens, Lord Parker in his judgment in the Court of Appeal expressly reserved it. It follows that the Court of Appeal should not have made such short work of the present case, and that the whole matter must be, as it has been at I your Lordships' Bar, opened and considered.

The law of maintenance is stated in the text-books to be in itself part of the common law, though affirmed or declared and supported by various ancient statutes. These, as I gather, at any rate those which were brought to your Lordships' notice, are the following: 3 Edw. 1, cc. 25, 28; 20 Edw. 1, ordinance concerning conspirators; 28 Edw. 1, c. 11; 1 Edw. 3, stat. 2, c. 14; 4 Edw. 3, c. 11; 1 Ric. 2, c. 4; 7 Ric. 2, c. 15; 32 Hen. 8, c. 9, which have been analysed by my noble friend Lord Shaw, and to which I would add 3 Hen. 7, c. 1. A perusal of these statutes shows that in the days when they were enacted the ordinary subject

of the King found great difficulty in procuring a fair trial when his adversary was in some privileged position. Sometimes the King's officers were induced by a bribe or by the offer of a share of the spoil to favour his adversary. Sometimes great men gave countenance to his adversary, sometimes confederacies were formed to support unjust claims or defences. And the statutes are directed against maintenance, champerty and confederacy, or conspiracy, while embracery and subornation of perjury were some of the means used to secure these unlawful ends. Great men gave liveries to large bodies of retainers and supported them in their unjust quarrels. A convenient summary of the state of society in England during this period can be found in HALLAM'S MIDDLE AGES, vol. 3 part 3, chap. 8, pp. 245, 246 (edition of 1829), and in his CONSTITUTIONAL HISTORY, vol. 1, chap. 1, pp. 69–73 (edition of 1829); and the Act 3, Hen. 7, c. 1, already referred to created a special court consisting of certain great officers of State and judges which sat in the Star Chamber for the express purpose of correcting and preventing such miscarriages of justice. So mischievous might maintenance be that the statutes strike against it in general or absolute terms. But the judges construed them as they interpreted the common law as not being so absolute, but as admitting of exceptions and as permitting a subject to maintain another's suit or defence when the relations were such that there was a common interest, or the master was helping his servant, or even when the act was done out of charity to a poor man. There is no warrant in any of the statutes for many of these exceptions. The only warrant for any exception is to be found in 28 Edw. 1, c. 11, known as "articuli super chartas." This allows a man to have counsel of "ses prochaines amis."

How, then, were the judges enabled to make these exceptions? It appears to me that it can only have been because all maintenance was not evil. The passages in LORD COKE and his citations from earlier writers have been already given by LORD SHAW, and they appear to show that it is maintenance of an unjust or at least a wrong cause or defence which is unlawful, and even this is excused by the ties of kinship or the promptings of pity. The only passage in COKE which points in another direction is that where he quotes FITZHERBERT and two passages apparently from the YEAR BOOK, and says that an action for champerty may be brought before judgment; be it observed champerty not maintenance, and while the issue is uncertain, not when the event has shown that the action or defence maintained was right. I venture to lay stress upon the fact that it was as unlawful to maintain a defendant, unless in the excusable cases, as it was to maintain a plaintiff. The language of the statutes shows this.

In two of the three writs which are given as precedents in the Registrum Brevium, if I rightly understand them, the complaint is for maintenance of the defendant, and in quite modern times, in *British Cash Co.* v. *Store Service Co.* (11), the cause of action was for maintaining a defence. It is, indeed, obvious, and HALLAM points out that in those times much of the litigation in our courts arose out of "disseisin, or forcible dispossession of freeholds," and that the mischief to be provided against was the unlawful support of the disseisor. FITZHERBERT'S ABRIDGEMENT has the following passages, which are the only material ones, if indeed the first is material, paras. 17 and 20, which I translate:

> "Note that it was said that notwithstanding that the plaintiff has recovered (in his action) he may still have a writ of maintenance against him who maintained the defendant, because the statute is prohibitory in itself: YEAR BOOK, Michaelmas Term, 7 Edw. 4, 5, 6."
>
> "A man shall have a writ of maintenance notwithstanding that he was non-suited in the action in which maintenance is supposed (Easter Term, 33 Edw. 3). Contrary YEAR BOOK, 7 Hen. 4, in the King's Bench."

There are apparently no Year Books from 30 Edw. 3 to 39 Edw. 3. And a reference to the index of subject-matter does not give any passage anywhere in the Year Books of Edw. 3 down to the fortieth year of the reign which can be this

A passage. The passage supposed to be contrary to the proposition supposed to be taken from 33 Edw. 3 is not contrary to it as stated by Fitzherbert. I translate it as follows:

"Writ of maintenance was brought suggesting (alleging) that the defendant had maintained a suit in an assise of novel disseisin coram vobis summonita et capta. . . . Judgment on the writ, for that the writ suggests by this word B [capta] that the assise was taken, while we inform you that the plaintiff was non-suited and the assise was not taken, wherefore judgment on the writ. Culpeper: Since you do not deny the maintenance at the assise, whether the assise was taken or not, this word 'capta' is not material, wherefore we demand judgment and pray for our damages 'et sic ad judicium.' Gascoyne: You C shall have another writ suggesting that the assise was summoned but not taken (i.e., the jury were summoned but no verdict was taken) 'per quod,' &c." (7 Hen. 4, Coram Rege, Mich. T., pl. 8, p. 30.)

The reference to 33 Edw. 3 is one of those given by Coke. He may have taken it from Fitzherbert without verification.

His other citation is from the Year Book of 47 Edw. 3. I have translated the D material passages.

"Ralph de Norton brought his action for champerty against Richard de Norton, and declared through Persay [? his counsel] that as by the statute made by Edward, grandfather of our Lord the King who now is, for the profit of his Kingdom it was ordained that neither his Minister nor anyone else should take or maintain the quarrel of another neither for a tenement nor E for any other thing in consideration of some part of the thing in demand, and that it should not be lawful to any man to assign his right to another, &c. Yet when one Thomas Winwike brought an assise, &c., against him Ralph and Elinor his wife for tenements in Birley, he thereupon took up the quarrel of the plaintiff the said Thomas Winwike, so that by reason of his maintenance the assise passed against him Ralph and his wife wrongfully and he has been F damaged to the amount of 1,000 marks."

And the writ ran "cepit manutenendum et adhuc manutenet," and in the writ and the declaration it was suggested that he who brought the assise had got execution and that he against whom the action (for maintenance) was brought had purchased the land (in dispute). Tanke (counsel for the defendant) (takes the point that the G assise had been against husband and wife and wife is not now suing). Belknap (counsel for the plaintiff) answers that this action is not to recover the land, but for damages for the wrong which the husband can bring alone, and he asks for judgment. During the course of the argument Finch or Finchdeen, apparently the presiding judge, says:

"Also a man shall have a writ of champerty though he has lost nothing H and even while the suit is still pending so that the loss of the estate is not the only cause of action. By which it appears that who was tenant of the land at the time when the assise passed is not to the purpose in this action which is not given to recover the land but only for damages."

Goes on about relation of husband and wife. Tanke (takes the instance of an I attaint in which case he says there would be an abatement).

Finch: "You say truly" (and gives reasons). Tanke:

"Sir you see that his writ suggests 'quod cepit manutenendum et adhuc manutenet,' and by his declaration he suggests that the assise passed against Ralph, and that since this time we have bought the land of Thomas Winwike, therefore according to the matter which he shows the plea is determined and executed, since which time the plea cannot be maintained, therefore his word 'maintains' and his writ are false, for which reasons, &c., we demand judgment, &c."

Hasty:

"Let us suppose that Ralph was now in a position to bring a writ of attaint, it would be right to bring the writ against Richard Norton because he is the tenant, &c. This also is champerty. Therefore there is enough to satisfy this word 'maintains.' Wherefore, &c."

Finchdeen to the same effect:

"It might be that because of his doubt of Richard he would not dare to bring his writ of attaint. Therefore the word 'maintains' shall not abate his writ."

It is difficult, in my opinion, to get any clear principle from these passages.

In *Bradshaw* v. *Lowe* (24), decided in Michaelmas term 24 & 25 Eliz., there was an information against Lowe for maintaining a bill in the Duchy Chamber against Bradshaw to which exceptions were taken. The fourth exception was that the information stated that defendant maintained, and not that he unlawfully maintained. Counsel on the other side said that any maintenance should be intended to be unlawful, but the case was likened to an indictment and the defeat was held to be fatal. Except in so far as the passage in FITZHERBERT with its reference which cannot be traced and the two cases in the Year Books which I have translated may be held to support the proposition, I find no case that decided that it is unlawful to maintain a just cause or a just defence before *Wallis* v. *Duke of Portland* (6), and query as to that case. Wallis was an attorney who had acted for one Tierney, the unsuccessful candidate at the poll for election to Parliament. Wallis, on behalf of Tierney, presented an election petition praying that the sitting member might be unseated and claiming the seat. At the time when the Chancery proceedings were taken the proceedings in the election petition had come to a conclusion and Tierney had been successful. Wallis then filed a bill against the duke alleging that it was upon the duke's instructions and undertaking to be answerable for costs that he had presented the petition in the name of Tierney, but that the duke refused to pay, and further stating that he could not succeed in an action at law unless the duke was compelled by Chancery process to give him discovery. To this bill the duke demurred, and the demurrer was upheld by the Lord Chancellor and on appeal by your Lordships' House. In giving his judgment the Lord Chancellor spoke much about maintenance being malum in se and of the impropriety of granting any assistance to forward a claim based upon an alleged bargain, which could be contrary to public policy and unlawful. But there were, as he indicated, other objections to the bill which it seems to me might of themselves have been sufficient to support the demurrer. The report of the case in BROWN is like other reports in that series, not a report of the arguments at the Bar, or of the reasons which the noble Lords gave for their conclusions. It is a statement of the record as it reached your Lordships' House and of the cases filed for the appellant and for the respondent with the reasons given in support of either case which are treated as if they were a synopsis of the arguments at the Bar. The reasons given in the appellant's case profess to discuss the arguments for the other side under five heads and to meet them. From this it would appear that one point taken was that the alleged agreement could not be enforced because there was no note of it in writing as required by the Statute of Frauds. Another reason was that the discovery sought was immaterial, and the other reasons dealt in various forms with the point as to maintenance, one branch of it being that the alleged action on the part of the duke was an interference by a peer in the conduct of an election against the Standing Orders of the House of Commons. The one short reason as BROWN puts it, given on behalf of the respondent, was a compound reason, one half relying on the doctrine of maintenance, and the other half upon the rules of Chancery procedure. Dealing with the point of maintenance, it is not difficult to suppose that there may be a wide distinction between an action and an election petition. It can hardly be said that an unsuccessful candidate at a Parliamentary election, even though he be in a position to claim

the seat, has rights in the sense that a plaintiff with a good cause of action, or a defendant with a good defence, has rights, and it might well be held that all intermeddling by strangers in the matter of a Parliamentary election, more especially if that stranger was a peer, would be contrary to public policy, and so it might possibly be against public policy to maintain a common informer's action for damages.

From *Wallis* v. *Duke of Portland* (6) there is a long gap to *Bradlaugh* v. *Newdegate* (5), where LORD COLERIDGE, C.J., was prepared to hold (though in the result it was not necessary) that the maintainer of a successful plaintiff must recoup the unsuccessful defendant in respect of all the damages and costs he had to pay. There are some dicta to the same extent in other recent cases, but none to show any settled jurisprudence with which your Lordships should be unwilling to interfere.

There remain the institutional writers of the eighteenth century, HAWKINS and BLACKSTONE, whose language has been quoted by LORD SHAW. In their view the evil of maintenance lay in the stirring up of strife. I think this was bad archæology. Maintenance is on a par with a champerty, conspiracy and embracery. The doctrine was established to prevent injustice. These writers cite no other material cases than those which have been mentioned; and all that need be said is that, there being a good reason for the origin of an established rule of law, they supposed a wrong reason which would, if the case had arisen in their time, have led them too far. If the view which I have indicated be correct, the defendant company did no unlawful act. It did, indeed, maintain a suit, but the justification or excuse is to be found in the righteousness of the suit and the proof of its righteousness is its success. But even if it were otherwise the plaintiff, Neville, has yet to prove that he sustained any private injury, such as the law recognises as some invasion of his rights as a citizen by reason of the unlawful act of the defendant company. I conceive that there is still no private injury to be inferred therefrom, if it be an offence to promote a just action or support a just defence. Conceive of things otherwise? I take the case of a defence as, no doubt, the more striking. If the law were to be as suggested it would be the right of a bully to say: Keep out the way, form a ring, let me knock the other man down, if you interfere I shall send for the police. A close parallel can be drawn from the law of libel. It was (and still is subject to a statutory qualification) unlawful and indictable to publish in writing or print, defamatory matter of an individual. But if the defamatory matter be true the individual has no right of action. He cannot complain of that which he has brought upon himself by his own conduct. So a man who does not pay his just debts or make good his torts cannot complain that he has been compelled (howsoever) to pay or make good. Still less can he complain if he has been successfully resisted when he was making an unjust claim.

The case could be put on a lower, but still sufficient, ground. Your Lordships are all agreed that the plaintiff Neville cannot in this action recover either the costs which he had to pay or those which he had to bear in the Chancery action. A fortiori he cannot recover the damages which he was adjudged to pay. There are, then, no damages on which he can lay his finger, which he has suffered. And so it must be in every case where the suit or defence maintained has been right. No doubt, there are instances where a plaintiff may have a good cause of action, but in the particular result the damages will be nominal. But I know of no class of action where the damages must be always nominal. Our law gives no encouragement to such actions. I regret to find that upon this ground I am not in entire agreement with my noble and learned friend, the Lord Chancellor, as I am throughout with my learned friend, LORD SHAW. For the reasons which I have given I think that as to the part of the action which relates to maintenance judgment should be entered for the defendant company.

Solicitors: *Vaughan & Williams*; *Carter, Harrison & Armstrong.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

A

Re CLAY. CLAY *v.* BOOTH

[Court of Appeal (Swinfen Eady, M.R., Duke, L.J., and Eve, J.), October 17, 1918]

[Reported [1919] 1 Ch. 66; 88 L.J.Ch. 40; 119 L.T. 754; 63 Sol. Jo. 23]

B

Declaratory Judgment—Declaration that plaintiff not liable in possible action—No claim formulated by person against whom declaration sought.

In the ordinary case where no specific right has been asserted and no claim formulated, it is not open to a person, because he apprehends a claim against him, to serve a writ or other process upon another person in order to obtain a declaration that such claim cannot be made.

C

Where, therefore, the sole executor under a will had made no claim against the beneficiaries for repayment of certain costs which he had been ordered to pay to them, all he had done having been to reserve his right to claim such repayment under a deed of indemnity that the beneficiaries had executed in his favour,

D

Held: the court had no power to make a declaratory judgment under a rule of the Court of Chancery of the County Palatine of Lancaster corresponding with R.S.C., Ord. 54a, r. 1, on the application of the beneficiaries, their duty being to wait until they were attacked and then to raise their defence.

Notes. As to declaratory judgments, see 22 Halsbury's Laws (3rd Edn.) 746–751; and for cases see 30 Digest (Repl.) 165 et seq.

E

Cases referred to:

(1) *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242; 62 L.J.Ch. 294; 67 L.T. 238; 8 T.L.R. 717; 7 Asp.M.L.C. 195; 2 R. 23, C.A.; 30 Digest (Repl.) 172, *229*.

(2) *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (1904), 9 Com. Cas. 289; 30 Digest (Repl.) 178, *265*.

F

(3) *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 21 Com. Cas. 67, C.A.; 30 Digest (Repl.) 174, *239*.

(4) *Dyson* v. *A.-G.*, [1911] 1 K.B. 410; 80 L.J.K.B. 531; 103 L.T. 707; 27 T.L.R. 143; 55 Sol. Jo. 168, C.A.; 30 Digest (Repl.) 168, *193*.

G

Also referred to in argument:

North Eastern Marine Engineering Co. v. *Leeds Forge Co.*, [1906] 1 Ch. 324; 75 L.J.Ch. 178; 94 L.T. 56; 22 T.L.R. 178; affirmed [1906] 2 Ch. 498; 75 L.J.Ch. 720; 95 L.T. 178; 22 T.L.R. 724; 50 Sol. Jo. 650, C.A.; 30 Digest (Repl.) 169, *201*.

H

Appeal by the defendant, James Edward Booth, from an order of the Vice-Chancellor of the County Palatine of Lancaster.

The facts appear in the judgment of the learned Master of the Rolls.

Jenkins, K.C., and *Maberly* for the defendant.
Grant, K.C., and *C. E. R. Abbott* for the applicants.

I

SWINFEN EADY, M.R.—The order under appeal declares that upon the true construction of a deed of indemnity and in the events which have happened James Edward Booth has not the right to obtain repayment of certain costs. In administration proceedings an order was made that an affidavit, with certain accounts exhibited thereto, should be taken off the file, and he was ordered to pay the costs of those proceedings. They have been taxed and paid. He also issued in the same proceedings a summons to obtain certain remuneration, and that was dismissed and he was ordered to pay the costs of that application. It is

A the costs of those two matters which the order under appeal declares he is not entitled to obtain repayment of under the deed of indemnity.

The facts leading up to the dispute between the parties may be stated very shortly indeed for the purposes of this appeal. The defendant, James Edward Booth, was named as executor in the will of the testator, Robert Clay, jointly with the testator's wife. The wife predeceased the testator, and James Edward B Booth was desirous of renouncing probate under the trusts of the will. But upon pressure from all the beneficiaries—they being the four children who benefited under the will and the husband of one of the children, a daughter who was married —and upon their executing upon Mar. 5, 1915, a full deed of indemnity, James Edward Booth agreed to accept the office of executor, and proceeded to prove the will. Subsequently, there were proceedings of a lengthy character involving the C partial administration of the estate in the Chancery of the County Palatine, and it was in those administration proceedings that the two orders were made under which James Edward Booth, the party indemnified under the deed of indemnity, was ordered to pay certain costs. The applicants allege in their petition that when the first of the costs ordered to be paid were paid by James Edward Booth sending a cheque for the amount (those were the costs with regard to taking the D affidavit off the file), a covering letter contained this final passage:

> "In making this payment the executor reserves all rights he may have under the deed of indemnity of Mar. 5, 1915."

In any case these words seem to me to be mere surplusage and unnecessary. When he paid the costs which by the order now appealed from he was under an obligation to pay, it did not necessitate, in order to preserve any rights that he E might have, that he should expressly reserve those rights. The petition does not allege that he had purported to reserve any rights in respect of the second set of costs—that is, his application for remuneration which was dismissed. At that time those costs had not been paid. They had not been taxed. But the applicants appear to think that it would be unnecessary to tax, and with regard to that, after stating that his summons for remuneraion was dismissed with costs, the applicants F state in their petition as follows:

> "Your petitioners humbly submit that it is futile and unnecessary to proceed with the taxation of the said costs if the defendant James Edward Booth has, as he asserts, the right, notwithstanding the order, to recover the same if and when taxed . . ."

G It is only there that it is introduced by way of parenthetical allegation that he asserted that he had the right to recover the amount under the deed.

Having regard to the affidavits on both sides, I am quite satisfied that James Edward Booth never did claim that he was entitled to recover or to be repaid the two sets of costs, or either of them, under or by virtue of the deed. All that he did was to reserve his rights, whatever they may be. Not only did he never H formulate any claim to be repaid or ask for repayment, but he never in terms said that he had the right to be repaid. That was the position when the petition was presented. Later he was served with the petition with a view to compel him to say whether he made any and what claim. He considered his position, and then wrote on Nov. 30 that his claims, if any, had not been ascertained or formulated and probably could not be so until after the close of the action for administra- J tion. By that letter, his rights, if any, being reserved, he made no claim; he intimated that he was not in a position to say whether he would have a claim or would not have a claim, and, if he had, what that claim would be; he was going to wait until the end of the administration and see what costs were provided for in the course of the proceedings before he determined whether any claim would in fact arise under the deed.

That being so, the question arises: Had the court any jurisdiction upon the petition to make an order that under the deed the defendant James Edward Booth had no right to obtain repayment? The proceedings were taken under orders

and rules of the Palatine Court, corresponding with Ord. 54a and Ord. 25, r. 5, of the Rules of the Supreme Court, and it is claimed under those rules that, although no right of the applicants has been interfered with, although no claim has been made against them, and although in their view they have no claim against James Edward Booth, they are entitled to a declaration that James Edward Booth has no claim against them in respect of the matter in question. Are they entitled to come and have it determined that he has no claim? In my opinion, they are not. And none of the authorities to which reference has been made justifies the advancing of such a claim.

London Association of Shipowners and Brokers v. *London and India Docks Joint Committee* (1) ([1892] 3 Ch. at p. 258) was a case in which LORD LINDLEY pointed out that the position of the Peninsular and Oriental Co. was that it was entitled to have unappropriated berths unfettered by legal restrictions, and that "it was entitled to exercise its option to have such berths, or to have appropriated berths on terms which may be agreed upon." He then passed away from the question of the appropriated berths, and the declaration had reference to the unappropriated berths. But it was a case in which regulations had been made which, if valid, would have excluded the right of the Peninsular and Oriental Co. to the unappropriated berths in respect of which the court determined that they were entitled unfettered by legal restrictions and made a declaration to that effect. So that was where a regulation had purported to be made which would have excluded their enjoyment of a right which the court held that they had. The next case in order of date was in 1904, *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (2). But again that was a case in which the defendants alleged that by virtue of some agreement the plaintiffs were under an obligation to load their steamship. They were asserting a right to have their ship loaded by the plaintiffs under an alleged contract, and the plaintiffs were held entitled to bring the action to have it determined they were not bound to load the ship as claimed by the defendants. Reliance was mainly placed upon what was said by PICKFORD, L.J., in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (3). PICKFORD, L.J., there first came to the conclusion that there was no necessity, in order to invoke proceedings under the rules that we are now considering, that there should be an existing cause of action. Then he went on to consider whether the rule could only be invoked by the person claiming the right and intending to assert it. Again he negatived that. But no inference from that whatever can be drawn in favour of the respondents here that the proceedings can be invoked not only where there is no cause of action and the person instituting does not assert the right, but where there is no claim at all by anyone—by the plaintiff against the defendant or vice versa. Here the position is that no claim is made by James Edward Booth against the applicants, and the applicants have no claim against James Edward Booth. In fact, I think that the observations that were made by COZENS-HARDY, M.R., in *Dyson* v. *A.-G.* (4) may properly be referred to in which he said ([1911] 1 K.B. at p. 417):

> "I desire to guard myself against the supposition that I hold that a person who expects to be made a defendant, and who prefers to be plaintiff, can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The court may well say, 'Wait until you are attacked and then raise your defence,' and may dismiss the action with costs."

That is really the position in the present case. The applicants have not been attacked. No claim has been made against them, but they launched the proceedings to have it determined that someone who has not made a claim and who has not asserted any right has no claim and has no right. In my opinion, they are not entitled to do that.

As has been pointed out by DUKE, L.J., during the course of the argument, with regard to rights under contracts, there are certain statutory limitations which fix

A the time during which actions may be brought. In the case of a simple contract a person has the full statutory period to determine whether or not he will or will not bring an action, and it is not open to a person, certainly against whom no claim has been made, to cut the matter short by bringing an action at his own option and saying: "I wish to have it determined that you have no claim whatever against me." That really is the nature of the proceedings in the present case. B I am, therefore, of opinion that the order under appeal was one that ought not to have been made and should be discharged.

DUKE, L.J.—I am of the same opinion, and I agree entirely with the conclusion of the Master of the Rolls which he has stated in regard to the facts of this case. It is upon the findings of fact which the Master of the Rolls deduces from the evidence that my opinion of the case proceeds. I regard this defendant as a C defendant who had done nothing which warranted making him a defendant in an action. I do not believe that in the ordinary case of possible controversy between parties it is open to one of the parties, because he apprehends a claim against him, to serve a writ or other process upon the other party in order to get a determination that such a claim cannot be made. It seems to me to go so far beyond anything which has existed in the past history of litigation in this country as to open up D a vista—a great danger—of needless and costly controversy between parties fomented by persons who delight in litigation. I am referring to the grave prospect that there is of any citizen who supposes he may have litigation at some future time against him considering that he is entitled to safeguard himself and set his affairs right by making his supposititious antagonist the defendant to an action. That would tend to keep possible litigants in a very humble frame of mind. I do E not think that it is within the right of the subject to start legal proceedings in that state of things. In the cases which have been referred to by the Master of the Rolls there is no trace of this right of spontaneous litigation. I do not find any trace of it in the judgments in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (3). No doubt, if you detach expressions in the course of elaborate judgments from the context of those expressions you may arrive at some very startling results. F But I cannot doubt that either of the lords justices who were parties to that decision would have been greatly surprised to hear some of the arguments which are founded upon it here to-day. I have come to the conclusion that this order was wrong and ought to be reversed.

EVE, J.—I agree. So soon as it was demonstrated that no specific right had G been asserted and no claim formulated, the court had, in my opinion, no jurisdiction to deal with the petition in the way in which it has been dealt with. I think the appeal succeeds and ought to be allowed.

Appeal allowed.

Solicitors: *Rawle, Johnstone & Co.*, for *G. A. Booth*, Manchester; *Skelton & Younghouse*, Manchester.

H

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

HOOD *v.* ANCHOR LINE (HENDERSON BROS.), LTD.

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Dunedin and Lord Parmoor), June 7, 10, July 1, 1918]

[Reported [1918] A.C. 837; 87 L.J.P.C. 156; 119 L.T. 684; 34 T.L.R. 550; 62 Sol. Jo. 680] B

Carriage of Passengers—Condition limiting liability for injury—Reasonable notice to passenger—Onus of proof.

The appellant desired to travel from New York to Glasgow by one of the respondents' ships. He sent a clerk to the respondents' office in New York to buy his ticket, which was handed to the clerk in an envelope. On the face C of the envelope there was a hand pointing to the words in capital letters: "Please read conditions of the enclosed contract." On the face of the ticket was printed this notice: "This ticket is issued to and accepted by the passenger subject to the following conditions." No. 4 of the conditions was that the respondents were not liable in any case for injury to the passenger beyond the amount of £10. At the foot of the ticket were the words in capital letters: D "Passengers are particularly requested to carefully read the above contract." On being given the envelope containing the ticket by his clerk, the appellant put it in his pocket without reading it, and so he had no actual knowledge of its contents. On the voyage the appellant sustained personal injury which he alleged to be due to the negligence of the respondents' servants. He claimed to recover £10,000 as damages, and in defence the respondents pleaded that E their liability was limited to £10. On trial of the question whether the condition was binding on the appellant,

Held: the onus was on the respondents to prove that they had done what was reasonably sufficient to bring the condition to the attention of the appellant; in view of the conspicuous notice on the envelope, the notice in conspicuous type on the ticket stating that it was subject to the conditions, F and the notice in capital letters at the foot requesting passengers carefully to read the contract, they had discharged that onus; and, therefore, the liability of the respondents was limited to the £10 mentioned in the condition.

Decision of Second Division of Court of Session, 1916 S.C. 547, affirmed.

Notes. Considered: *Thompson* v. *London, Midland and Scottish Rail. Co.*, [1929] All E.R.Rep. 474; *Sugar* v. *London, Midland and Scottish Rail. Co.*, [1941] G 1 All E.R. 172. Referred to: *Gibaud* v. *Great Eastern Rail. Co.*, [1921] All E.R.Rep. 35; *Nunan* v. *Southern Rail. Co.*, [1923] 2 K.B. 703.

As to special conditions of a contract of carriage, see 4 Halsbury's Laws (3rd Edn.) 185–190; and for cases see 8 Digest (Repl.) 106–117.

Cases referred to: H

(1) *Henderson* v. *Stevenson* (1875), L.R. 2 Sc. & Div. 470; 32 L.T. 709; 39 J.P. 596, H.L.; 8 Digest (Repl.) 139, *898*.

(2) *Parker* v. *South Eastern Rail. Co.*, *Gabell* v. *South Eastern Rail. Co.* (1877), 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540; 41 J.P. 644; 25 W.R. 564, C.A.; 8 Digest (Repl.) 141, *909*.

(3) *Richardson, Spence & Co. and Lord Gough Steamship Co.* v. *Rowntree*, I [1894] A.C. 217; 63 L.J.Q.B. 283; 70 L.T. 817; 58 J.P. 493; 10 T.L.R. 335; 7 Asp.M.L.C. 482; 6 R. 95, H.L.; 8 Digest (Repl.) 114, *737*.

(4) *Grand Trunk Rail. Co. of Canada* v. *Robinson*, [1915] A.C. 740; 84 L.J.P.C. 194; 113 L.T. 350; 31 T.L.R. 395, P.C.; 8 Digest (Repl.) 115, *742*.

Also referred to in argument:

Watkins v. *Rymill* (1883), 10 Q.B.D. 178; 52 L.J.Q.B. 121; 48 L.T. 426; 47 J.P. 357; 31 W.R. 337, D.C.; 3 Digest (Repl.) 93, *224*.

A *Roe* v. *R. A. Naylor, Ltd.*, [1917] 1 K.B. 712; 86 L.J.K.B. 771; 116 L.T. 542; 33 T.L.R. 202, D.C.; retrial May 17, 1917, unreported; affirmed (1917), unreported D.C.; affirmed (1918), 87 L.J.K.B. 958; 119 L.T. 359, C.A.; 12 Digest (Repl.) 170, *1096.*

Oakbank Oil Co., Ltd. v. *Love and Stewart, Ltd.*, 1918 S.C. (H.L.) 54; 55 Sc.L.R. 179; 1 S.L.T. 111.

B **Appeal** by the pursuer in the action from an interlocutor of the Second Division of the Court of Session (reported, 1916, S.C. 547) affirming an interlocutor of the Lord Ordinary (LORD ANDERSON).

Clyde, K.C. (Lord Advocate and Dean of Faculty), and *MacRobert* (of the Scottish Bar) for the appellant.

C *H. P. Macmillan, K.C.*, and *Charles H. Brown* (both of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

July 1, 1918. The following opinions were read.

D **LORD FINLAY, L.C.**—The appellant in this case sued the respondents for damages in respect of injuries sustained by him through the alleged negligence of the respondents' servants. He was a passenger in the *California*, a steamship belonging to the Anchor Line, on a voyage from New York to Glasgow. The vessel grounded off the Irish coast, and the appellant with a number of other passengers was put on board the *Cassandra* for conveyance to Glasgow. It is alleged by the appellant that the servants of the respondents were guilty of E negligence in hoisting him on board the *Cassandra* from the lifeboat, with the result that he was thrown out and seriously injured. This action was brought in the Court of Session to recover damages. The defenders pleaded that by a condition on the pursuer's ticket he could not claim damages beyond £10. The appellant denied that this condition formed part of his contract with the respondents, and a proof was taken upon this point. The Lord Ordinary found that the F condition was binding upon the appellant, and he was affirmed by the Second Division. From their decision this appeal is brought to your Lordships' House.

The appellant had reserved accommodation for the voyage from New York in the *California*. A day or two before the steamship was to sail Mr. Newson, one of the respondents' clerks at New York, inquired of the appellant by telephone whether he was going by the vessel on that voyage, and, on hearing that he was, requested G that the passage money—150 dollars—should be sent. The appellant sent one of his clerks, Mr. Paul May, with a cheque to take the ticket. Mr. May handed the cheque to Mr. Newson and got from him in return the ticket enclosed in an envelope. Mr. May did not take the ticket out of the envelope, but kept it at the appellant's office. Neither the appellant nor Mr. May read the ticket, and neither had any actual knowledge of its contents. Mr. May brought Mrs. Hood to the H *California* on the day of sailing, and on board met the appellant, who put into his pocket, without reading it, the ticket which Mr. May had brought down from the office. The "ticket" was a document, partly printed and partly in writing, on yellow paper, in three portions, separated by perforations. The middle portion and that on the right-hand side were detached on going on board the ship by the representatives of the steamship and kept by them. The left-hand portion is that I which contains the condition relied on by the respondents, and it was retained by the passenger. This left-hand portion was headed with the name of the Anchor Line and signed by their agent. In its body it stated that the respondents engaged to provide passage, with certain accommodation, on a particular voyage, and that they had received the passage money. The conditions were printed below, and prefixed to them was this notice: "Notice.—This ticket is issued to and accepted by the passenger subject to the following conditions." The fourth condition is that which is material to the present case:

"Neither the shipowner nor the passage broker or agent is in any case liable

for loss of, or injury to, the passenger, or his luggage, or delay in delivery of luggage or personal effects of the passenger, beyond the amount of £10 in the case of each first class passage, or £5 in the case of each second class or steerage passage, unless the value of the passenger's luggage in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description, upon which 1 per cent. will be charged) is paid." A B

At the foot of the conditions were printed the following words:

"All questions arising on this contract shall be decided according to British law, with reference to which this contract is made."

At the foot of the document, in capital letters, were the following words: "Passengers are particularly requested to carefully read the above contract." It will be observed that this "ticket" really professes to be a memorandum of the contract. The ticket was handed to Mr. May in a white envelope which appears not to have been closed, although this is not expressly stated in the evidence. On the face of the envelope were given particulars of the ticket, voyage, &c., and at the top of it there was a hand pointing to the following words printed in capitals, "Please read conditions of the enclosed contract," while at the foot were printed some directions as to baggage to be carried in state room or in hold. C D

The Lord Ordinary (Lord Anderson) in his opinion held that the onus probandi as to this condition forming part of the contract was upon the respondents, and that they had failed in proving that the pursuer was aware of the condition in question. He then proceeded to deal with the question: "Did the defenders [the present respondents] do what was reasonably sufficient to give him notice of the conditions?" He set out the circumstances and stated in conclusion that he was unable to conceive what further or better means the defendants could have employed to bring to the knowledge of passengers the existence of the contract conditions. He, therefore, decided in favour of the respondents. The Lord Ordinary's decision was affirmed, on the same grounds, by the Second Division, consisting of the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie. E F

In my opinion, the courts below were right. Out of the many authorities bearing upon the point I think it is necessary to refer to three only: *Henderson* v. *Stevenson* (1); *Parker* v. *South Eastern Rail. Co.* (2); and *Richardson, Spence & Co. and Lord Gough Steamship Co.* v. *Rowntree* (3). The first of these cases is a decision of this House that a condition printed on the back of a ticket issued by a steamship packet company absolving the company from liability for loss, injury, or delay to the passenger or his luggage was not binding on a passenger who had not read the conditions and had not had his attention directed to the conditions by anything printed on the face of the ticket, or by the carrier when issuing it. The second and the third of these cases show that, if it is found that the company did what was reasonably sufficient to give notice of conditions printed on the back of a ticket, the person taking the ticket would be bound by such conditions. In the present case the Lord Ordinary and the Second Division found that the company had done what was reasonably sufficient to give the pursuer notice of the conditions. It appears to me that it is impossible to dissent from this conclusion. The contract was entered into on behalf of the appellant by Mr. May as his agent, and the case must be dealt with just as if the appellant in person had done what Mr. May did for him. The envelope in which the ticket was handed to Mr. May had a conspicuous notice upon its front asking the passenger to read the conditions of the enclosed contract. The ticket itself had on its face a notice in conspicuous type that it was subject to the conditions, and at the foot was printed very plainly in capital letters: "Passengers are particularly requested to carefully read the above contract." What more could have been done to bring the conditions to the notice of the passenger? It was argued that the clerk who issued it ought to have given the appellant verbal notice of the conditions. I cannot think that such G H I

a verbal notice in addition to the printed notice was necessary; indeed, a verbal notice would be much more likely to give rise to doubt and dispute than a printed notice on the envelope and the ticket itself. It was argued on behalf of the appellant that the contract was complete as soon as the cheque had been paid and the ticket had reached the hands of Mr. May, and that any knowledge subsequently acquired of the conditions could not vary the contract. It is quite true that, if the contract was complete, subsequent notice would not vary it, but when the passenger or his agent gets the ticket he may examine it before accepting, and, if he chooses not to examine it when everything reasonable has been done to call his attention to the conditions, he accepts it as it is. The law is settled by the cases I have quoted above, and the courts below appear to me to have been right in holding that the company had taken all reasonable steps to call attention to the condition. In my opinion this appeal should be dismissed with costs.

VISCOUNT HALDANE.—The question on this appeal is of the nature of those in which the boundary line between law and fact is not of an abstract or definite character. There is a large and varied class of cases where the legal duty of a member of society to his neighbour cannot be laid down a priori or without examining the special circumstances of the situation. The duty in these instances is ascertained by a standard which depends, not on mere general principles fashioned by the jurist, for no such general principles can provide for all the concrete details of which account must be taken, but on the opinion of reasonable men who have considered the whole of the circumstances in the particular instance and can be relied on to say how, according to accepted standards of conduct, a reasonable man ought to behave in the circumstances towards the neighbour towards whom he is bound by the necessities of the community to act with forbearance and consideration. When the law takes cognisance of duties imposed by such social standards it usually refers questions relating to them to a tribunal which is thus one of fact rather than of abstract legal principle. In cases where the question is whether there is alleged to have been negligence such as entitles the party injured by it to a remedy from a court of justice, we are familiar with this procedure, and I think that it is really embodied in the practice adopted by our jurisprudence in the other kind of case that is now before us. Where there is a jury the question is really one of fact for the jury, and the function of the judge is simply to see that the proper question is considered by them, a question which must, up to the point at which it is put, of course, to some extent depend on certain general principles which belong to jurisprudence.

I agree that the appellant here was entitled to ask that all that was reasonably necessary as matter of ordinary practice should have been done to bring to his notice the fact that the contract tendered to him when he paid his passage money excluded the right which the general law would give him, unless the contract did exclude it, to full damage if he was injured by the negligence of those who contracted to convey him on their steamer. Whether all that was reasonably necessary to give him this notice was done is, however, a question of fact in answering which the tribunal must look at all the circumstances and the situation of the parties. On this question even your Lordships sitting here are a tribunal of fact far more than of law, and what we have to do as lawyers is no more than to see that we have shaped for ourselves the question of fact to which I have referred. If this is borne in mind I think that it explains decisions which are not really divergent. In *Henderson* v. *Stevenson* (1) what this House seems to me to have considered was only the particular question of fact which arose in the circumstances of that appeal. In *Parker* v. *South Eastern Rail. Co.* (2) the only question was whether the question had been properly put to the jury. MELLISH and BAGGALLAY, L.JJ., thought that it had not. BRAMWELL, L.J., dissenting, thought that the facts were such that the jury ought to have been at once directed to find a verdict for the defendants. In *Grand Trunk Rail. Co. of Canada* v. *Robinson* (4) the Judicial Committee obviously thought that the question was in substance one of

fact, of the nature which I have indicated, and that no difficulty as to the law applicable arose. A

What happened in the transactions before us was very simple. The appellant, being desirous of being conveyed by one of the respondents' steamers from New York to Glasgow, sent his confidential clerk, Mr. May, to pay the fare and get the ticket at the respondents' office in the former city. Mr. May paid the money and was handed in exchange an envelope on which was printed prominently, "Please read conditions of the enclosed contract." The envelope contained a contract for carriage of the passenger, which included a condition that the respondents were not to be liable in any case for injury to the passenger beyond the amount of £10. No doubt the burden of proof lies on the respondents to show that they did all that was reasonably required in order to bring this condition to the notice of Mr. May, who represented the appellant in the transaction. Have they shown that they did all that could be required reasonably under the usages of proper conduct in such circumstances? I think the courts below, sitting as a tribunal of fact rather than of mere law, have properly decided that they have. It is true that Mr. May did not look at the envelope closely or refer to the condition. He took the contract away and put it in a safe, and ultimately gave it to the appellant, who did not read it either. But I am of opinion that the real question was, not whether they did read it, but whether they can be heard to say that they did not read it. If it had been merely a case of inviting people to put a penny into an automatic machine and get a ticket for a brief journey I might think differently. In such a transaction men cannot naturally be expected to pause to look whether they are obtaining all the rights which the law gives them in the absence of a special stipulation. But when it is a case of taking a ticket for a voyage of some days, with arrangements to be made, among other things, as to cabins and luggage, I think ordinary people do look to see what bargain they are getting and should be taken as bound to have done so, and as precluded from saying that they did not know. The question is not whether the appellant actually knew of the condition. I have no doubt that he did not. The real question is whether he deliberately took the risk of there being conditions in the face of a warning sufficiently conveyed that some conditions were made and would bind him. If he had signed the contract he certainly could not have been heard to say that he was not bound to look. The common sense of mankind which the law expresses here would not permit him to maintain such a position. And when he accepted a document that told him on its face that it contained conditions on which alone he would be permitted to make a long journey across the Atlantic on board the steamer, and then proceeded on that journey, I think he must be treated according to the standards of ordinary life applicable to those who make arrangements under analogous circumstances, and be held as bound by the document as clearly as if he had signed it. I am of the opinion that the appeal must fail. B C D E F G H

LORD DUNEDIN.—This is a class of case in which of citing of authorities there is no end, and yet it is, I think, quite possible to say: "Hear the conclusion of the whole matter." *Parker* v. *South Eastern Rail. Co.* (2), which has been approved in every case decided since its date, really stereotyped the question which the tribunal, be it jury or judge, must put to itself when such a question arises. The way in which such a question arises is in this class of cases nearly always the same. The action is founded on an allegation of negligence. Now, negligence presupposes a duty. Duty may arise from contract or it may arise from the rules of the common law, using the term common law in the non-technical sense. It has often been pointed out that in the case of carriage there is an admixture, or perhaps I should rather say an overlapping, of both these elements. The duty of a carrier by sea or land to carry a passenger safely may be ascribed to either of the two. But it is clear that when the carrier alleges an exception to that duty the exception must rest on contract. The question, therefore, always I

comes to this when such an exception is alleged: Was that the contract between the parties?

So far as the law is concerned, a contract of carriage may be constituted by writing or by parol, or may be inferred from the acquiescence of the carrier in the presence of the passenger on the conveyance. Contracts of carriage are not usually made by parol, nor are they usually embodied in signed writings. In so saying, I am proceeding on common knowledge as to railways, stage coaches, and steamers. But what is usual is, in truth, a question of fact. Accordingly, it is in each case a case of circumstance whether the sort of restriction that is expressed in any writing (which, of course, includes printed matter) is a thing that is usual, and that, being usual, it has been fairly brought before the notice of the accepting party. It was to put this question in the form of a convenient issue that the question in *Parker's Case* (2) was framed. How that question is to be answered depends not only on the circumstances of that particular case, but also on the circumstances of the class of cases of which it is one. It is vain to attempt to lay down general rules such as the learned counsel for the appellants sought to extract from the decided cases, e.g., that *Richardson's Case* (3) decided that a passenger was not bound to read his ticket. In the circumstances of this case the learned judges of the Court of Session, who in this matter exercised the functions of both judges and jurors, have found that the respondents did what was reasonably sufficient to bring to the appellant's notice the existence of the condition. I should not disturb such a finding unless I were very clear that it was wrong. As it is, it represents the conclusion at which I should have arrived unaided. I will only add that I had the advantage of reading the opinion of the noble viscount who preceded me, and I agree with the view he takes of cases which he cites.

LORD PARMOOR.—The only question involved in this appeal is whether the condition, on which the respondents rely, was a condition of the contract under which the respondents undertook to convey, and did convey, the appellant as a passenger in their ocean-going steamer from New York to Glasgow. [HIS LORDSHIP stated the facts.] The Lord Ordinary has found that the respondents did what was reasonably sufficient to give the appellant notice of the conditions. It appears to me that he could not have come to any other conclusion on the question of fact. It is not material that other or different steps might have been taken so long as the respondents did in fact take sufficient steps to give a reasonable notice. It is not really relevant to inquire whether the passenger can make suggestions for some different form of notice. The object of a notice is to call the attention of the intending passenger to the conditions of the proposed contract, and a clearly printed notice on the enclosing envelope, and on the face of the ticket, is as effective for this purpose as if the representative of the respondents had, at the time when he issued the ticket, verbally called the attention of the appellant to the conditions and asked him to read them. If an intending passenger either personally or through his agent has reasonable notice that the ticket or document handed to him by a carrier contains certain conditions, and accepts the document or ticket as handed to him without objection, and without taking the trouble to make himself acquainted with such conditions, he must be taken to have assented to them, and that they thereupon become evidence of the contract of carriage made between such passenger and the carrier. I cannot doubt that in the present case the conditions printed on the face of the ticket were part of the contractual relationship between the parties, and as such binding on the appellant.

Much weight was placed by the Lord Advocate in his argument on behalf of the appellant on the principle that the onus of proving that the appellant had assented to special conditions in the contract is placed upon the shipowner. This, no doubt, is a correct proposition, but I am unable to assent to the further proposition that to discharge this onus some exceptional standard of proof is required, based on the theory of the improbability of a passenger on an ocean-going steamer having assented to a contract containing any variation of the ordinary common law

obligation. In all cases in which a defendant relies for his defence on the conditions of a contract he must prove that such conditions form part of the contract bargain. It is, however, an extravagant assumption that a passenger by an ocean-going steamship from New York to Glasgow would expect to be carried without a contract containing some conditions, or that he would regard the ticket issued to him merely as a voucher or receipt for payment. Such an assumption might have been admissible in case of a passenger by railway in the early days of railway travelling, but the conditions have changed, and the appellant, in spite of his evidence, is not entitled to claim to be in a better position than other passengers who, in the exercise of ordinary intelligence and common sense, took care to become acquainted with the conditions of the contract, having had their attention called thereto by a reasonable notice. The position as stated by LORD HALDANE in *Grand Trunk Rail. Co. of Canada* v. *Robinson* (4) is applicable:

> "In a case to which these principles apply, it cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined."

In my view the appeal should be dismissed.

Solicitors: *Wm. A. Crump & Son*, for *G. H. Robb & Crosbie*, solicitors, Glasgow, and *Macpherson & Mackay*, S.S.C., Edinburgh; *Botterell & Roche*, for *Bannatyne, Kirkwood, France & Co.*, Writers, Glasgow, and *Webster, Will & Co.*, W.S., Edinburgh.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

PRATT AND OTHERS *v.* BRITISH MEDICAL ASSOCIATION AND OTHERS

[KING'S BENCH DIVISION (McCardie, J.), July 15, 16, 17, 18, 19, 22, 23, 24, 25, 29, 30, October 15, 1918]

[Reported [1919] 1 K.B. 244; 88 L.J.K.B. 628; 120 L.T. 41; 35 T.L.R. 14; 63 Sol. Jo. 84]

Tort—Interference with trade or profession—Infliction of damage by unlawful means—"Unlawful means"—Threats and coercion—Need for plaintiff to prove malice—Defence—"Just cause."

Either a single person or a body of persons will commit an actionable wrong if he or they inflict actual pecuniary damage on another person by the intentional employment of unlawful means to injure that person's business, even though such unlawful means may not comprise any specific act which is per se actionable.

In view of the infinite variations of oppressive conduct, no definition of "unlawful means" can be given which is at once satisfactory and exhaustive, but the term will include threats even though they do not amount to threats of personal violence, as, e.g., threats to boycott a man in regard to his trade

or profession or to inflict on him the slur of commercial or professional dishonour. A threat must be distinguished from a mere warning, and whether words amount to a threat or a warning is a question of fact to be decided on the general circumstances of the case. Threats may be conveyed by spoken or written words or by conduct. Coercion can be effected in many ways.

"Just cause" may be pleaded by a defendant against whom such an action is brought, but it is no defence merely to prove that the defendant acted honestly and bona fide in his own interests or in the interests of those with whom he is associated, and no justification will sanction the employment of violence and threats. Proof by the plaintiff of malice is not an essential ingredient in the cause of action.

Rules—British Medical Association—Avoidance as being against public policy —Restriction on freedom of medical practitioners.

The rules of the British Medical Association considered, and

Held: having regard to the severity of certain "boycotting" rules and of the restrictions which they involved on the freedom of medical practitioners, those rules were in restraint of trade and void as being against public policy.

Consideration of circumstances in which **held** that the British Medical Association had acted with malice in the steps they had taken to coerce and punish certain medical practitioners with the object, as they contended, of advancing the interests of the medical profession.

Corporation—Tortious liability—Liability for malice of servant.

A corporation may be liable for the actual malice of its servant acting within the scope of his employment, and, therefore, actual malice can be attributed to a corporate body with respect to the commission of any tort of which actual malice may constitute an ingredient.

Notes. Considered: *Ware and De Freville* v. *Motor Trade Association*, [1920] All E.R.Rep. 387. Referred to: *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *Davies* v. *Thomas*, [1920] 1 Ch. 217; *Hodges* v. *Webb*, [1920] All E.R.Rep. 448; *Said* v. *Butt*, [1920] All E.R. 232; *British Railway Traffic and Electric Co.* v. *C.R.C. Co. and L.C.C.*, [1922] 2 K.B. 260; *Sorrell* v. *Smith*, [1925] All E.R.Rep. 1; *De Jetley Marks* v. *Greenwood*, [1936] 1 All E.R. 863; *Camden Nominees, Ltd.* v. *Slack*, [1940] 2 All E.R. 1.

As to torts affecting a person in respect of his person and restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 171–173, 344 et seq.; as to the liability in tort of a corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 87–90; and for cases see 42 DIGEST 971–973, 43 DIGEST 15–18, and 13 DIGEST (Repl.) 317–327.

Cases referred to:

(1) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169*.

(2) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 42 Digest 971, *30*.

(3) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 42 Digest 989, *180*.

(4) *Petrie* v. *Lamont* (1841), Car. & M. 93, N.P.; 36 Digest (Repl.) 480, *499*.

(5) *Allen* v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 42 Digest 972, *35*.

(6) *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 19 T.L.R. 708, C.A.; 42 Digest 990, *192*.

(7) *Tarleton* v. *McGawley* (1794), Peake, 205; 170 E.R. 153, N.P.; 43 Digest 9, *39*.

(8) *Garret* v. *Taylor* (1620), Cro. Jac. 567; 2 Roll. Rep. 162; 79 E.R. 485; 34 Digest 169, *1317*.

(9) *Keeble* v. *Hickeringill* (1706), 11 East, 574, n.; Holt, K.B. 14; 3 Salk. 9; 11 Mod. Rep. 73, 130; 103 E.R. 1127; 43 Digest 8, *30.*

(10) *J. Lyons & Sons* v. *Wilkins*, [1896] 1 Ch. 811; 65 L.J.Ch. 601; 74 L.T. 358; 60 J.P. 325; 45 W.R. 19; 12 T.L.R. 278; 40 Sol. Jo. 372, C.A.; 43 Digest 111, *1167.*

(11) *National Phonograph Co., Ltd.* v. *Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335; 77 L.J.Ch. 218; 98 L.T. 291; 24 T.L.R. 201, C.A.; 42 Digest 988, *177.*

(12) *Conway* v. *Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 42 Digest 611, *122.*

(13) *Santen* v. *Busnach* (1913), 29 T.L.R. 214; 57 Sol. Jo. 226, C.A.; 43 Digest 117, *1208.*

(14) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51.*

(15) *Larkin* v. *Long*, [1915] A.C. 814; 84 L.J.P.C. 201; 113 L.T. 337; 31 T.L.R. 405; 59 Sol. Jo. 455, H.L.; 43 Digest 121, *1241.*

(16) *Kearney* v. *Lloyd* (1889), 26 L.R.Ir. 268; 42 Digest 986, *e.*

(17) *Huttley* v. *Simmons*, [1898] 1 Q.B. 181; 67 L.J.Q.B. 213; 14 T.L.R. 150; 42 Digest 985, *153.*

(18) *Sweeney* v. *Coote*, [1907] A.C. 221; 76 L.J.P.C. 49; 96 L.T. 748; 23 T.L.R. 448; 51 Sol. Jo. 444, H.L.; 42 Digest 984, *143.*

(19) *Scottish Co-operative Wholesale Society* v. *Glasgow Flesher's Trade Defence Association* (1898), 35 Sc.L.R. 645; 5 S.L.T. 263; 43 Digest 114, *1184 v.*

(20) *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K.B. 310; 78 L.J.K.B. 259; 100 L.T. 172; 25 T.L.R. 205, C.A.; 42 Digest 705, *1214.*

(21) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K.B. 88; 71 L.J.K.B. 634; 86 L.T. 593; 50 W.R. 619; 18 T.L.R. 577; varied on appeal, [1902] 2 K.B. 732; 71 L.J.K.B. 994; 87 L.T. 493; 51 W.R. 115; 19 T.L.R. 20; 47 Sol. Jo. 29, C.A.; 42 Digest 988, *176.*

(22) *Allbutt* v. *General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400; 58 L.J.Q.B. 606; 61 L.T. 585; 54 J.P. 36; 37 W.R. 771; 5 T.L.R. 651, C.A.; 34 Digest 544, *28.*

(23) *Leeson* v. *General Council of Medical Education and Registration* (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303, C.A.; 34 Digest 544, *30.*

(24) *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471; 58 J.P. 542; 42 W.R. 289; 10 T.L.R. 304; 9 R. 217, C.A.; 34 Digest 544, *24.*

(25) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, *139.*

(26) *Neville* v. *Dominion of Canada News Co., Ltd.*, [1915] 3 K.B. 556; 84 L.J.K.B. 2105; 113 L.T. 979; 31 T.L.R. 542, C.A.; 43 Digest 35, *306.*

(27) *Horwood* v. *Millar's Timber and Trading Co., Ltd.*, [1917] 1 K.B. 305; 86 L.J.K.B. 190; 115 L.T. 805; 33 T.L.R. 86; 61 Sol. Jo. 114, C.A.; 43 Digest 19, *127.*

(28) *Hilton* v. *Eckersley* (1856), 6 E. & B. 47; 25 L.J.Q.B. 199; 26 L.T.O.S. 314; 20 J.P. 196; 2 Jur.N.S. 587; 4 W.R. 326; 119 E.R. 789, Ex. Ch.; 43 Digest 10, *50.*

(29) *Hornby* v. *Close* (1867), L.R. 2 Q.B. 153; 8 B. & S. 175; 36 L.J.M.C. 43; 15 L.T. 563; 31 J.P. 148; 15 W.R. 336; 10 Cox, C.C. 393; 43 Digest 109, *1150.*

(30) *Old* v. *Robson* (1890), 59 L.J.M.C. 41; 62 L.T. 282; 54 J.P. 597; 38 W.R. 415; 6 T.L.R. 151, D.C.; 43 Digest 94, *981.*

(31) *Cullen* v. *Elwin* (1904), 90 L.T. 840; 20 T.L.R. 490; 48 Sol. Jo. 474, C.A.; 43 Digest 105, *1098.*

(32) *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421; 81 L.J.K.B. 619; 106 L.T. 433; 28 T.L.R. 276; 56 Sol. Jo. 342, H.L.; 43 Digest 94, *987.*

(33) *R.* v. *Munslow*, [1895] 1 Q.B. 758; 64 L.J.M.C. 138; 72 L.T. 301; 43 W.R. 495; 11 T.L.R. 213; 39 Sol. Jo. 264; 18 Cox, C.C. 112; 15 R. 192, C.C.R.; 32 Digest 198, *2464.*

(34) *Abrath* v. *North-Eastern Rail. Co.* (1886), 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 657; 2 T.L.R. 416, H.L.; 33 Digest 506, *492.*

(35) *Dickson* v. *Earl of Wilton* (1859), 1 F. & F. 419, N.P.; 32 Digest 156, *1881.*

(36) *Turnbull* v. *Bird* (1861), 2 F. & F. 508, N.P.; 32 Digest 145, *1755.*

(37) *Browne* v. *Dunn* (1893), 6 R. 67, H.L.; 32 Digest 126, *1579.*

(38) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352, C.A.; 32 Digest 128, *1592.*

(39) *Stuart* v. *Bell*, [1891] 2 Q.B. 341; 60 L.J.Q.B. 577; 64 L.T. 633; 39 W.R. 612; 7 T.L.R. 502, C.A.; 32 Digest 122, *1545.*

(40) *Clark* v. *Molyneux* (1877), 3 Q.B.D. 237; 47 L.J.Q.B. 230; 37 L.T. 694; 42 J.P. 277; 26 W.R. 104; 14 Cox C.C. 10, C.A.; 32 Digest 159, *1922.*

(41) *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588; 2 Nev. & M.K.B. 301; 3 L.J.K.B. 35; 110 E.R. 908; 33 Digest 486, *235.*

(42) *Bradford Corpn.* v. *Pickles*, [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 44 W.R. 190; 11 T.L.R. 555; 11 R. 286, H.L.; 42 Digest 972, *34.*

(43) *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K.B. 627; 75 L.J.K.B. 726; 95 L.T. 23; 54 W.R. 608; 22 T.L.R. 656, C.A.; 32 Digest 162, *1955.*

(44) *Smith* v. *Streatfeild*, [1913] 3 K.B. 764; 82 L.J.K.B. 1237; 109 L.T. 173; 29 T.L.R. 707; 32 Digest 155, *1876.*

(45) *Manchester Corpn.* v. *Williams*, [1891] 1 Q.B. 94; 60 L.J.Q.B. 23; 63 L.T. 805; 54 J.P. 712; 39 W.R. 302; 7 T.L.R. 9, D.C.; 33 Digest 95, *644.*

(46) *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q.B. 133; 63 L.J.Q.B. 293; 69 L.T. 844; 58 J.P. 196; 42 W.R. 322; 10 T.L.R. 110; 9 R. 240, C.A.; 32 Digest 148, *1795.*

(47) *Stevens* v. *Midland Counties Rail. Co.* (1854), 10 Exch. 352; 23 L.J.Ex. 328; 18 J.P. 713; 18 Jur. 932; 2 C.L.R. 1300; 156 E.R. 480; 13 Digest (Repl.) 322, *1290.*

(48) *Whitfield* v. *South Eastern Rail. Co.* (1858), E.B. & E. 115; 27 L.J.Q.B. 229; 31 L.T.O.S. 113; 4 Jur.N.S. 688; 6 W.R. 545; 120 E.R. 451; 13 Digest (Repl.) 321, *1288.*

(49) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 3 Digest (Repl.) 168, *254.*

(50) *Edwards* v. *Midland Rail. Co.* (1880), 6 Q.B.D. 287; 50 L.J.Q.B. 281; 43 L.T. 694; 45 J.P. 374; 29 W.R. 609; 13 Digest (Repl.) 317, *1261.*

(51) *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270; 48 L.J.P.C. 25; 40 L.T. 500; 43 J.P. 476; 14 Cox, C.C. 267, P.C.; 3 Digest (Repl.) 168, *253.*

(52) *Cornford* v. *Carlton Bank, Ltd.*, [1899] 1 Q.B. 392; 68 L.J.Q.B. 196; 80 L.T. 121; 15 T.L.R. 156; affirmed [1900] 1 Q.B. 22; 81 L.T. 415; 68 L.J.Q.B. 1020; 16 T.L.R. 12, C.A.; 13 Digest (Repl.) 324, *1311.*

(53) *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; 42 L.T. 194; 28 W.R. 677, H.L.; 13 Digest (Repl.) 324, *1314.*

(54) *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 1 Digest 595, *2284.*

(55) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A.C. 423; 73 L.J.P.C. 102; 90 L.T. 739; 53 W.R. 176; 20 T.L.R. 497, P.C.; 32 Digest 82, *1130.*

(56) *Glasgow Corpn.* v. *Lorimer*, [1911] A.C. 209; 80 L.J.P.C. 175; sub nom. *Glasgow Corpn.* v. *Riddell*, 104 L.T. 354, H.L.; 32 Digest 86, *1166.*

Action tried by McCardie, J., without a jury. A

The plaintiffs, Dr. Pratt, Dr. Burke and Dr. Holmes, were registered medical practitioners practising at Coventry. They claimed from the defendants, the British Medical Association and certain medical practitioners who were members of the Coventry division of the association, damages for conspiracy to injure them in their profession and to libel and slander them, and for libels and slanders. The plaintiffs were medical officers to the Coventry Provident Dispensary, an approved B institution under the National Health Insurance Act, 1911. The members paid a small subscription and in return they received from the dispensary medical attendance during illness. In 1917 five out of seven of the doctors resigned and started a rival institution, the New Dispensary. The plaintiffs said that from that date those who were connected with the old dispensary were ostracised by the British Medical Association so that no member of the association would have anything C to do with them and no consultant was allowed to attend their patients. It was proved that one or more of the plaintiffs lost patients in consequence of the boycott. The defendant association, which was founded in 1874, alleged that the plaintiffs had acted in a manner which was so contrary to the honour and interests of the profession as to call for bitter condemnation and continuous punishment. They did not dispute the boycott, but asserted a legal right to employ it to the D utmost extent against the plaintiffs.

Schwabe, K.C., and *Sir Hugh Fraser* for the plaintiffs.
McCall, K.C., *Hollis Walker*, K.C., and *A. Neilson* for the defendants.

The arguments appear sufficiently from the judgment.

Cur. adv. vult. E

Oct. 15, 1918. **McCARDIE, J.,** read a judgment in which he stated the facts and continued.—In support of the defendants' assertion their counsel raised a number of important contentions, and with these I must deal in the course of this judgment. The great importance of the case appears to call for a consideration of the law with respect to actionable conspiracy and the unlawful molestation of F another in his business or calling. It is necessary, I think, in dealing with actionable conspiracy, to distinguish at once the line of decisions which have established that an action will lie against a man who unlawfully and knowingly procures a person to commit a breach of his contract with another whereby the latter suffers actual pecuniary damage. That such conduct amounts to a well-recognised head of tort was settled in *Lumley* v. *Gye* (1). This decision is now G firmly rooted in our law: see per Lord Macnaghten in *Quinn* v. *Leathem* (2) [1901] A.C. at p. 510; and *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ltd.* (3). The latter decision also shows with clearness that malice in the sense of spite or ill-will is not an essential ingredient in such an action. A cause of action may exist under the *Lumley* v. *Gye* (1) principle independently of any question of conspiracy. An individual can commit the tort as effectively as an H aggregate of persons. The effect of a conspiracy to commit a wrong within *Lumley* v. *Gye* (1) is only of importance in considering the weight of the acts alleged and the extent of the resultant damage. Persuasion and inducement are more easily effected by many than by one, and the ensuing loss may be the greater. The observations I have just made with respect to the procurement of a breach of contract apply (in substance) to any agreement between two or more to commit I any other recognised head of tort such as trespass, libel, or assault. If such tort be committed, then all who have aided or counselled, directed or joined in the commission of it are joint tortfeasors: see per Tindal, C.J., in *Petrie* v. *Lamont* (4), Car. & M. at p. 96. The liability of each is, however, independent of the mere circumstance of combination. Such circumstance is, I conceive, only relevant to the question of the agency of one to bind the other by his acts, and to the point that greater damage may result where the wrongdoers are several or many. Conspiracy is not the gist of the matter.

When I use the words "actionable conspiracy" in this judgment, I exclude (for the sake of clearness) an agreement between two or more to commit, followed by the actual commission, of any of the well-known heads of tort such as those I have mentioned. The existing law as to actionable conspiracy appears to have sprung from the duty and the power of the courts to protect a man in the lawful exercise of his calling. The protection is necessarily limited inasmuch as the right of a man to follow his vocation must be co-ordinated with the wide sphere of rights existing in his fellow-men. To reconcile the two sets of rights has ever proved a task of difficulty. In the great majority of recent cases the molestation of another in his calling has been effected by a combination of persons. The reason for this is obvious. For molestation by one may yield but slight result, unless obviously actionable weapons, such as defamation or personal assault, be employed. But molestation effected by a combination of many may achieve grave results, even though no specific part of the conduct employed amount in itself to actionable tort: see, for example, per Lord Lindley in *Quinn* v. *Leathem* (2), [1901] A.C. at pp. 538 and 540. This element of combination, exhibited in many cases and dwelt upon in so many of the dicta of distinguished judges, has, in my humble view, tended perhaps to obscure the true basis of the rules of law which render actionable an unlawful interference with a man's calling. It has almost been assumed occasionally that such interference must spring from a conspiracy ere the law can give relief. The word "conspiracy" has been invoked as an epithet which may convert that which is lawful if done by one into a cause of action, if done by several in combination. But a juristic principle cannot rest on a mere appeal to the vocabulary of vituperation. Hence I must endeavour to ascertain the principles which were either discussed or which seemed to be involved in the leading case of *Quinn* v. *Leathem* (2) and to state with the utmost diffidence my views upon them. I realise fully the difficulties which face a judge of first instance in approaching such a task and in discussing the weighty and somewhat varying dicta which are to be found in the relevant decisions.

The basic right of every citizen has been well stated by Sir William Erle in his famous work on Trade Unions, p. 12, as follows:

> "Every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will."

But that right is subject to the rights of others and the limitations have been clearly stated not only in the continuation of the above passage in Sir William Erle's treatise, but also in the cogent judgment of Lord Lindley in *Quinn* v. *Leathem* (2). He there says ([1901] A.C. at p. 534):

> "As to the plaintiff's rights he had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful and is intended to damage a third person and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and

is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed, although indirectly, and the damage to him is not too remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances."

So far as I am aware, this passage is fully consistent with all the authorities both before and after *Quinn* v. *Leathem* (2). It states with cogency the right of every man to call upon others to refrain from unlawful interference with his calling, but it does not purport to define "unlawful interference." This serious question is dealt with elsewhere by LORD LINDLEY, and I will consider it later when I deal with the authorities, for I desire at present to point out that the passage I have cited from LORD LINDLEY'S opinion indicates that the "unlawful interference" may be effected by a single person as distinguished from a combination of persons. I will assume for a moment that a defendant inflicts pecuniary damage upon the plaintiff by a threat of personal violence directed against one who wishes to become a customer of the plaintiff, but who by reason of such threat abstains from dealing with him, whereby the loss contemplated by the defendant is imposed upon the plaintiff. In this illustration there will be no question of conspiracy or combination. But would not an action lie in such a case? The answer, I think, is clearly "Yes." So far as I am aware there is no authority to the contrary. *Allen* v. *Flood* (5) decides only that it is not actionable for a single person merely to induce another not to enter into a contract with a third person even though loss results to the third person from such inducement. In *Allen* v. *Flood* (5) there was no evidence whatever of intimidation or coercion or threat. This was made clear by the judgments of the majority in that case (see, for example, per LORD MACNAGHTEN, [1898] A.C. at p. 148), and still clearer by the opinions explanatory of that case pronounced by the House of Lords in *Quinn* v. *Leathem* (2). I may mention that in *Allen* v. *Flood* (5) there was no question of acts done by a combination of persons. I cite the following words of LORD MACNAGHTEN (ibid. at p. 153):

"In order to prevent any possible misconstruction of the language I have used, I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism, commonly known by the name of 'boycotting' and other forms of oppressive combination, seems to me to depend on considerations which are, I think, in the present case conspicuously absent."

Not only is there no authority against the view I have expressed as to the existence of a cause of action upon the illustration I gave, but there is weighty authority in its favour. The point was clearly put by ROMER, L.J., in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (6) when he said ([1903] 2 K.B. at pp. 619 and 620):

"But I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of. In my judgment, if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would-be employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered. The conduct of that person would be, in my opinion, such an unjustifiable molestation of the man, such an improper and inexcusable interference with the man's ordinary rights of citizenship, as to make that person liable in an action. And I think this view is borne out by the views expressed

by the members of the House of Lords who decided the case of *Quinn* v. *Leathem* (2)."

Romer, L.J.'s view seems amply justified when I turn to another passage in the opinion delivered by Lord Lindley in *Quinn* v. *Leathem* (2). He there says ([1901] A.C. at p. 537):

> "One man exercising the same control over others as these defendants had, could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action."

The opinion of Lord Lindley in *Quinn's Case* (2) is apparently supported by the judgment of Lord Watson (one of the majority) in *Allen* v. *Flood* (5), where he said ([1898] A.C. at p. 97):

> "Assuming that the Glengall Iron Co., in dispensing with the further services of the respondent, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it if he employed unlawful means of inducement directed against them."

The opinions already cited seem to be agreeable to the older cases which were cited in *Allen* v. *Flood* (5) and *Quinn* v. *Leathem* (2). I may mention two. Thus, in *Tarleton* v. *McGawley* (7) it was held that an action lay against the master of a ship for intentionally firing a cannon at negroes off the coast of Africa and thereby preventing them from trading with the plaintiffs. This decision was clearly approved by all the members of the House of Lords in *Allen* v. *Flood* (5), and was equally approved in *Quinn* v. *Leathem* (2). So, too, in *Garret* v. *Taylor* (8), it had been previously held that an action would lie against a defendant who by threats of corporal hurt and of vexatious litigation prevented customers from dealing with, and workmen from labouring for, the plaintiff. This decision was accepted as sound law by the members of the House of Lords, both in *Allen* v. *Flood* (5) and in *Quinn* v. *Leathem* (2). I need not further refer to the older decisions, the majority of which were cited in the judgments of the judges and of the members of the House of Lords in *Allen* v. *Flood* (5). Their accordance with the ancient principles of the common law is well indicated by Sir Frederick Pollock in his luminous work on the Law of Torts (10th Edn.) pp. 244 and 246. It is curious that the weighty judgments in *Quinn* v. *Leathem* (2) dwelt with such amplitude upon the points of conspiracy and combination. The element of conspiracy seems to have been a merely accidental feature of that case. It was not, I conceive, the gist of the matter. The true principle of the common law had, I think, already been indicated in *Garret* v. *Taylor* (8) and *Tarleton* v. *McGawley* (7), and the incident of conspiracy seems to add nothing of direct juristic relevance to such principle. In my opinion, the rule of law is reasonably clear that a single person or a body of persons will commit an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means to injure that person's business, even though such unlawful means may not comprise any specific act which is per se actionable.

The rule just stated at once invites and, indeed, requires a consideration of the meaning of the words "unlawful means." In view of the infinite variations of oppressive misconduct, no definition can be given which is at once satisfactory and exhaustive. Just as "fraud" cannot be fully defined, so "unlawful means" is unsusceptible of exhaustive definition. But the existing decisions indicate certain acts and heads of conduct which fall within the phrase. Other manifestations of conduct may in future days be also held to fall within it. Personal violence against a third person, in order to injure a plaintiff: see *Tarleton* v. *McGawley* (7); or threats of personal violence: see *Garret* v. *Taylor* (8); and *Keeble* v. *Hickeringill* (9), (11 East. at p. 575 n., per Holt, C.J.; or nuisance: see *J. Lyons & Sons* v. *Wilkins* (10); or fraud: see *National Phonograph Co., Ltd.* v. *Edison-Bell Consolidated Phonograph Co., Ltd.* (11) [1908] 1 Ch. at p. 360, per Buckley, L.J.,

and ibid. at p. 368, per KENNEDY, L.J.; or threats even though they do not amount to threats of personal violence: see *Quinn* v. *Leathem* (2), are recognised heads of unlawful means. This last head of the illustrations I have given as to unlawful means is the one which calls for attention in this case. Upon a sufficiently wide definition of the word "threats" depends to a vital extent the efficacy of the law which safeguards a man from unlawful molestation in his trade. In *Quinn* v. *Leathem* (2) the only threat established against the defendants was a threat to a customer of the plaintiffs that the servants of that customer would be instructed to cease work if the customer continued to deal with the plaintiff. There was no threat of actual personal violence, but a coercive notification to the customer that pecuniary loss would arise to him if he did not act on such intimation: see, too, the facts and the decision in *Giblan's Case* (6), and the opinion of House of Lords in the important case of *Conway* v. *Wade* (12). I can draw no distinction between a threat to cause a strike and a threat to inflict upon a man the slur of professional dishonour. Each may produce intimidation. I am bound by authority to recognise the distinction between a warning and a threat. The distinction may sometimes be subtle, but it exists. It was recognised by the majority of the Law Lords in *Allen* v. *Flood* (5). It was conceded by LORD LOREBURN in *Conway* v. *Wade* (12) (at p. 510). It formed the basis of the decision of the Court of Appeal in *Santen* v. *Busnach* (13). In every case, therefore, I must take it to be a question of fact whether or not the words used amount to a threat or constitute a mere warning. The answer to the question must depend on the general circumstances of the case. I desire most respectfully to cite the words of VAUGHAN WILLIAMS, L.J., in *Santen's Case* (13), when he said that a man may give a notice against the wording of which nothing can be said, but in such a manner and in such circumstances as to constitute a threat: see, too, per LORD JAMES OF HEREFORD in *Conway* v. *Wade* (12) [1909] A.C. at p. 514.

In the present case I can entertain no doubt that the defendants made their boycott of the plaintiffs effective, not by warnings only, but by the employment of actual threats. The medium by which a threat is conveyed can vary. It may be by spoken words, or by writing, or by general conduct, or by all three. Coercion is effected in many ways. The general circumstances must be considered in each case. It is, perhaps, useful to call attention to the varying phrases employed in many of the well-known judgments with respect to threats and the like unlawful means. In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (14) (23 Q.B.D. at p. 615), BOWEN, L.J., refers to "fraud," "intimidation, molestation or obstruction." FRY, L.J., says (ibid. at p. 626):

> "I do not doubt that it is unlawful and actionable for one man to interfere with another's trade by fraud or misrepresentation, or by molesting his customers, or those who would be his customers, whether by physical obstruction or moral intimidation."

In the same case when before the House of Lords, the following words were used by LORD HALSBURY ([1892] A.C. at p. 37):

> "Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful."

LORD WATSON (ibid. at p. 43) referred to "either misrepresentation or compulsion." LORD BRAMWELL said (ibid. at p. 44):

> "The plaintiffs do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort, or violation of any right of the plaintiffs."

LORD FIELD (ibid. at p. 52) referred to "violence or threats." In *Allen* v. *Flood* (5), many like expressions were used by the judges and the members of the House of Lords. I merely refer to LORD HERSCHELL ([1898] A.C. at p. 137), when he spoke of "violence, menaces of violence, false threats," and (ibid. at pp. 148 and

171), where Lord Macnaghten and Lord Davey alike refer to "intimidation or coercion." In *Quinn* v. *Leathem* (2) the phrases were equally varied. Lord Halsbury ([1901] A.C. at p. 507) referred to "conspiracy," "threats," and "threats carried into execution." Lord Macnaghten (ibid. at p. 520) refers to "conspiracy, intimidation, coercion, or breach of contract." Lord Lindley (ibid. at p. 525) refers to "conspiracy and unjustifiable interference," and (ibid. at p. 540) to "coercion by threats open or disguised, not only of bodily harm, but of serious annoyance and damage."

In *Conway* v. *Wade* (12), Lord Loreburn ([1909] A.C. at p. 510) refers to "violence or threats"; Lord James of Hereford (ibid. at p. 514) refers to "threatening language"; Lord Shaw (ibid. at p. 520) refers to "language of a threatening, coercive character," and (ibid. at p. 524) to the case of "coercive interference." In *Larkin* v. *Long* (15) ([1915] A.C. at p. 830) Lord Atkinson refers to "the wilful and malicious infringement in combination of the legal right of freedom of action." Lord Sumner (ibid. at p. 838) refers to "coercion." It is with respect to the question (inter alia) of coercion as a result of threats that the element of combination or conspiracy may assume importance. This aspect of the matter (which I have previously indicated) was forcibly put by Lord Macnaghten in *Quinn* v. *Leathem* (2), where he said ([1901] A.C. at p. 511):

> "A man may resist without much difficulty the act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord Fitzgerald observes) when one man has to defend himself against many combined to do him wrong."

The point was also made by Lord Lindley in the same case, when he said (ibid. at p. 538):

> "Numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce."

Again he says (ibid. at p. 540): "In considering whether coercion has been applied or not, numbers cannot be disregarded." The above citations will indicate the wide measure of protection which the law seeks to confer upon a man whilst in the lawful pursuit of his calling. I feel I should not omit to quote the following words of Lord Lindley in *Quinn's Case* (2) ([1901] A.C. at p. 538):

> "A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is primâ facie unlawful. Again, not to work oneself is lawful as long as one keeps off the poor rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification."

[Note. *Quinn* v. *Leathem* (2) was decided before the passing of the Trade Disputes Act, 1906, which did away with liability for interfering with another person's business (s. 3) and legalised peaceful picketing (s. 2): see 25 Halsbury's Statutes (2nd Edn.) 1269.]

These words of Lord Lindley's will lead me in a few moments to consider the question of "the justification" or "just cause" which may save a defendant from liability, although he has committed acts which are primâ facie actionable under the rule of law that I have stated. But before doing so it may be convenient to mention and distinguish several authorities which are connected with the question of actionable conspiracy. I take them in order. First, the *Mogul Case* (14). I shall not detail the well-known facts of that case. It will suffice to say that the decision in that case rested upon the footing that there was no element whatever of threat, intimidation, or coercion. This is clear from every judgment delivered

in the House of Lords, and was emphatically pointed out by LORD HALSBURY in *Allen* v. *Flood* (5) ([1898] A.C. at p. 76) and by LORD BRAMPTON in *Quinn* v. *Leathem* (2) ([1901] A.C. at p. 527). So, too, in *Kearney* v. *Lloyd* (16), there was no element whatever of coercion. The defendants, moreover, in that case, although they agreed with each other to abstain from contributing to the plaintiff's sustentation fund, did not even combine to coerce other parishioners not to contribute: see the observations of LORD LINDLEY on *Kearney* v. *Lloyd* (16) in *Quinn* v. *Leathem* (2) (ibid. at p. 540). In *Huttley* v. *Simmons* (17) (a case tried before DARLING, J., with the aid of a jury) it did not appear that any threat of coercion was established. Had such element been proved, I most respectfully venture to think that the decision of DARLING, J., could not be supported. See the comments on that case by LORD LINDLEY in *Quinn* v. *Leathem* (2) (ibid. at p. 540). In *Sweeney* v. *Coote* (18) there was again no evidence of coercion. As LORD ROBERTSON put it ([1907] A.C. at p. 324):

> "I see no evidence whatever of any pressure or inducement, or any interference with the choice, liberty, or will of any given person."

As to *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (19), I need only say two things. First, it illustrates the difficulty of this branch of law with which I am dealing, and, secondly, the sound application of that case seems to be that given by LORD LINDLEY in *Quinn* v. *Leathem* (2) ([1901] A.C. at p. 539). The Scottish case appears to rest on the same footing as the *Mogul Case* (14).

I now deal with the question of "just cause." The defendants in the present case asserted that they exercised their coercive acts with the legitimate object of advancing their professional interests, and that, therefore, they were freed from liability. This is a point of vital importance. The question of "just cause" has arisen in cases within the *Lumley* v. *Gye* (1) rule, that is to say, where the defendant had knowingly induced a breach of contract between a plaintiff and a third person. All the decisions in which *Lumley* v. *Gye* (1) has been considered appear to recognise that "just cause" may be pleaded by a defendant: see, for example, per LORD MACNAGHTEN in *Quinn* v. *Leathem* (2) (ibid. at p. 510). There is constant recurrence of that phrase in many judgments, but no clear opinion has been expressed as to the facts or circumstances which will constitute "just cause": see the observations of SIR FREDERICK POLLOCK in his TREATISE ON TORTS (10th Edn.) p. 345. In the *Glamorgan Case* (3), when in the Court of Appeal, ROMER and STIRLING, L.JJ., declined to attempt a definition of the phrase, "sufficient justification": see [1903] 2 K.B. at p. 577. A father, I assume, can interfere to prevent his daughter from "marrying a man of criminal character": see STIRLING, L.J., ibid. at p. 577 of the same case. This, indeed, would be the fulfilment of a clear duty. So, too, a defendant who held a prior contract with a third person inconsistent with the plaintiff's contract with that person may, I assume, be justified in inducing a breach of the latter contract: see per BUCKLEY, L.J., in *Smithies* v. *National Association of Operative Plasterers* (20) ([1909] 1 K.B. at p. 337). But whatever may be the difficulty of definition, it is settled that certain facts will not amount to "just cause" for inducing a breach of contract. The matter was strongly put by DARLING, J., in *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (21) ([1902] 2 K.B. at p. 96):

> "No one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage."

These words received the full concurrence of CHANNELL, J., in the Divisional Court, and they were, I think, in substance approved by the judgment of COLLINS, M.R., in the same case on appeal ([1902] 2 K.B. at p. 732): see, too *Smithies' Case* (20) ([1909] 1 K.B. at p. 310). The soundness of the view expressed by DARLING, J.,

as already cited was shown by the decision of the House of Lords in the *Glamorgan Coal Case* (3). There, the South Wales Miners' Federation was held liable in damages for procuring a breach of contract by certain miners, although the federation acted honestly, and without malice or ill-will towards the employers, and with the object only of keeping up the price of coal by which the wages were regulated. It is clearly settled, therefore, in cases within *Lumley* v. *Gye* (1), first, that malice in the sense of spite or ill-will is not an ingredient of the action, and, secondly, that no justification exists by reason of the fact that the defendants acted either for the advancement of their own trade interests or for the advancement of the interests of those with whom they were associated.

If such, then, be the rule when the facts are within *Lumley* v. *Gye* (1), can any different rules exist where the defendant has caused injury to another's trade by the employment of unlawful means such as threats, intimidation, or violence, although no breach of actual contract has thereby been caused? To this question I conceive the answer is clearly, no. Honesty or disinterestedness of motive cannot justify the employment of illegal means. That "just cause" may exist even in cases within *Quinn* v. *Leathem* (2) appears to be indicated by several of the opinions in that case. It will suffice to refer to the words of Lord Brampton ([1901] A.C. at p. 520), and to the words of Lord Lindley (ibid. at p. 538). But I respectfully confess my inability to discover any head of justification which will sanction the employment of violence or of threats. How can mere self-interest be such a justification? To so hold would appear to negative the line of decisions ranging from *Garret* v. *Taylor* (8) in 1620 to *Quinn* v. *Leathem* (2) in 1901. If Lord Shand in *Quinn* v. *Leathem* (2) (ibid. at p. 514) meant to indicate a view contrary to that which I have just suggested, I venture, with most profound respect, to express my doubt. It is inconsistent with the dicta of other judges to which I hereafter refer. In *Tarleton* v. *McGawley* (7), the object of the defendant was the advancement of his own trade interests, for he had expressed his intention not to permit trade with the plaintiffs until a debt due from the plaintiffs to himself was satisfied. I may also take the illustration given by Holt, C.J., in *Keeble* v. *Hickeringill* (9), of a schoolmaster who prevents by threats of violence the passage of scholars to the rival school of the plaintiff. How could self-interest afford an answer in such a case? In *J. Lyons & Sons* v. *Wilkins* (10) the injunction was granted, although the object of the defendants was clearly to advance the interests of their trade union. In *Quinn* v. *Leathem* (2) the defendants were subject to heavy damages, although the substantial object of the defendants was the advancement of their trade interests. I observe that Lord Macnaghten says ([1901] A.C. at p. 511):

> "But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants who were not members of the union."

I respectfully point out, however, that there was no finding of the jury to that effect, and I venture to refer to the view expressed by Lord Lindley when he said (ibid. at p. 536):

> "That they (the defendants) acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them."

He then proceeds to refer to the conduct of the defendants and says:

> "What is the legal justification for such conduct? None is alleged and none can be found."

In the *National Phonograph Case* (11) it was the clear view of Buckley, L.J., and Kennedy, L.J. ([1908] 1 Ch. at pp. 360 and 371) that the defendants were not excused in their employment of illegal means by the fact that they acted with the object of advancing their own trade interests rather than for the purpose of gratify-

ing an ill-will towards the plaintiffs. Finally, in *Larkin* v. *Long* (15), LORD ATKINSON uttered the following words, in which LORD HALDANE, L.C., concurred ([1915] A.C. at p. 830): A

> "The fact that members of a trade union are merely acting in obedience to a rule of their own believed by them to be for their benefit is no defence to an action for the breach of any contract they have entered into (*Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (21)), and still less is it a defence to the wilful and malicious infringement in combination of that legal right of personal freedom of action which they claim for themselves, but which others are entitled to, quite as fully and absolutely as they are." B

In view of the above citations, and as a matter, moreover, of legal principle, I conceive that the employment of illegal means for the purpose of injuring another's trade or calling is not excused by proof on the part of a defendant that his conduct was based on the intention to advance the trade interests either of himself or his colleagues. C

It may be convenient here to consider the position of the present defendants, and particularly of the defendant association, in connection with their contention of "just cause" ere I deal with the further questions which arise as to malice and as to the liability of a corporation for the malicious acts of its agents. The defendant association was, as I have previously stated, a body of persons incorporated in 1874 under the Companies Acts. They possess no special statutory rights. They hold no charter from the Crown. They are merely a company with limited liability. The following, as already stated, is the first object in their memorandum of association: D E

> "To promote the medical and allied sciences and to maintain the honour and interests of the medical profession."

The succeeding objects stated in the memorandum need not be set out, save the last, which is as follows: F

> "To do all such other lawful things as may be incidental or conducive to the promotion or carrying out of the foregoing objects or any of them."

Upon the words "to maintain the honour and interests of the medical profession" has been erected a powerful scheme and machinery throughout and beyond the United Kingdom. I have indicated its substance in the earlier part of this judgment. The coercive force of the defendant association rests primarily upon what are called the Ethical Rules, of which r. 7 and rr. F. and G., or their equivalent, are the relevant examples. These rules have behind them, not merely the local bodies, but the weight and power of the British Medical Association. It is clear, and it is admitted, that the aim of the defendants is to inflict professional ruin upon any medical man who breaks a rule of the local body or any rule which may be made by the head body itself. This grave power is used not only against members of the defendant association, but also against those who have never belonged to it. The weapons of condemnation and punishment are employed against both. It follows that the defendants claim to enforce by boycott and by the infliction of ruin their own standard of medical honour and interest throughout the country. This point is momentous; it touches the vital interests of every medical man. He may be exposed to degradation and dishonour at the will of a body which is void of the slightest statutory sanction in that behalf. The character of the medical profession is clearly of the greatest importance. Hence, Parliament deemed it well to enact the Medical Act, 1858 [largely repealed by the Medical Act, 1956, for which see 36 HALSBURY'S STATUTES (2nd Edn.) 567]. A medical council was created with statutory powers. They maintain the medical register. A doctor whose name is erased from that register is denuded of all professional status. Section 29 of that Act is as follows: G H I

"If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall, after due inquiry, be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register" [see now s. 33 of Act of 1956].

This power of erasure is a grave one. The doom of a medical man may be pronounced by the council if they think that infamous conduct is proved. Hence, the legislature has enacted (see the Medical Act, 1886 [repealed, and now ss. 2, 3, and 4 of the Act of 1956]) that the general council shall be a weighty and widely representative body of responsible men, including five persons nominated by the Crown, upon the advice of the Privy Council. The powers of this body must be exercised after due inquiry and after adequate notice to the person charged. The powers of the council and the limitations thereof have been indicated by the Court of Appeal in the three well-known cases of *Allbutt* v. *General Council of Medical Education and Registration* (22); *Leeson* v. *General Council of Medical Education and Registration* (23); and *Allinson* v. *General Council of Medical Education and Registration* (24). There must be evidence on which the council could fairly act and there must be absolute bona fides on their part: see *Leeson's Case* (23) and *Allinson's Case* (24). The phrase "infamous conduct" is one which has called for consideration, and in *Allinson's Case* (24) the following formula was framed by the Court of Appeal:

"If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct' in a professional respect."

The breadth of this formula is somewhat striking, and I respectfully think that it is desirable to attach full weight to the word "reasonably" therein. If that word receive full effect, then the formula may provide a good working rule for the General Medical Council.

A statutory body thus exists to safeguard the honour of the medical profession. But the British Medical Association has taken to itself a jurisdiction more far-reaching and perhaps more potent than that of the General Medical Council. It entrusts to a large extent the standard of "the honour and interest of the medical profession" to a number of scattered bodies throughout the kingdom, which vary in numbers, inclination, views, and self-interest. A branch or division may make a rule to suit its own local pecuniary interest. If such a rule be broken by a medical man, be he a member of the defendant association or not, then he becomes subject to a declaration that he has acted against the honour and interests of the medical profession. Upon this declaration there follows a local condemnation, and from this local condemnation there may result a malicious boycott with the resultant ruin of the person against whom it is directed. The position created by the defendant association is well shown by the following brief extract from the cross-examination of Dr. Cox (the secretary and chief witness of the association), by counsel for the plaintiffs:

"Q: In your view, is there a different standard of ethics in relation to holding appointments in different parts of England?—A: Yes. Q: So that in one part of England it would be contrary to the honour of the profession to hold the appointment, and in another part it would not?—A: Yes, as judged by the only way we know how to judge it, by the opinion of the medical men of the neighbourhood. Q: Do you think that is an answer?—A: I do. Q: I will take your answer. Judging it in the only way you are able to judge it, there are different standards of ethics in different parts of the country?—A: Yes."

I give this extract from the evidence of Dr. Cox, not only because it is a neat summary of the position, but also because he was a witness of great ability and wide experience. I need scarcely point out the grave consequences which follow. A fixed standard for the profession as a whole is absolutely destroyed. The words "medical honour" become a phrase of varying and wholly uncertain significance. Each of the three plaintiffs, and also the now dead plaintiff, Dr. Cairns, have been free from professional stain, I think, in the minds of an ordinary and just-minded man. The following appears also in the cross-examination of Dr. Cox:

> "Q.: Are the plaintiffs perfectly honourable members, so far as you know, of their profession?—A.: I know nothing against them except their taking this appointment. Q.: That means this. If Coventry adopts these rules, then to take or hold such an appointment at Coventry is contrary to the honour and interests of the profession?—A.: Yes, that is so. Q.: And the man who does it has to be ostracised?—A.: Yes, that is so. Q.: Whereas, if it is not a rule, he is not?—A.: Yes."

It will be remembered that neither Dr. Burke nor Dr. Pratt had been a party to making the Coventry rules and that Dr. Holmes was not even a member of the defendant association. Yet each was condemned and boycotted in the same way and for the same reasons. That the defendants realised the grave nature of a declaration that a doctor has been guilty of conduct detrimental to the honour of his profession is clear again from the evidence of Dr. Cox:

> "Q.: Do you consider it a serious thing to say about a medical man that he has done something detrimental to the honour of his profession?—A.: I do. Q.: Very serious?—A.: I do."

What had the plaintiffs in fact done? They had merely accepted posts as the medical officers of a highly respectable and well-managed dispensary upon terms which gave them ample remuneration, adequate leisure, and a full opportunity of private practice, and a right to claim and exert all the honourable requirements of professional men. Their only fault lay in the fact that their acceptance of the posts prevented the local medical men from achieving their wish, either to capture or to destroy the Coventry Dispensary. The alleged sin was financial rather than moral in its character. This was frankly admitted by several of the defendants' witnesses. The pecuniary interests of the Coventry doctors lay at the root of the matter. The question of ethics, as that word is ordinarily understood, had nothing to do with the case. The plaintiffs were punished because they defeated the intended overthrow of the Coventry Dispensary. If the Coventry Dispensary had been destroyed as a lay organisation, then the local doctors could obviously have taken such steps as would have increased their area of private practice, and their emoluments would have gained a corresponding expansion. This was the fundamental object of the defendants. The non-participation in such aim by the plaintiffs was the head and front of their offending. I may point out here that there is no rule of the profession as to the fees which an ordinary medical practitioner may charge. They may be very high or very low. They vary infinitely. They depend on locality, competition, the status of the patient, the wishes of the doctor and the particular circumstances of the case. They may be paid at such times and in such instalments as may be agreed, and either as specific charge for attendance, or by way of salary or inclusive sum. There is no rule or etiquette whatever on the matter which binds the ordinary medical man. The General Medical Council has established no standard on the point, nor has it indicated any requirement whatever as to the duty of a practitioner with respect to remuneration. The assertion that the plaintiffs had been guilty of conduct against the "honour" of the profession cannot, in my view, be supported. The honour of the profession is amply protected, I think, by the wide powers entrusted by Parliament to the General Medical Council. I personally cannot view with favour the assumption by the British Medical Association of a co-ordinate jurisdiction and the enforcement of varying views of medical honour with the deliberately framed

weapons of ostracism, intimidation and threat. The results of such an assumption are indicated with painful clearness in the present case, and the sufferings which the plaintiffs have undergone are not, I think, explained or mitigated by the phrase quoted by Sir John Tweedy (a witness for the defence): "It is the lot of minorities to suffer." The British Medical Association may exercise a great and beneficial influence in moulding medical opinion. It may exert the powers of persuasion. It may wield the weapon of moderate argument. If its views be sound they will doubtless be followed in due time by the profession. But the association will surely gain nothing in the end by the methods of oppression or the utterance of threats. In my view the plaintiffs were boycotted, punished, and pecuniarily damaged without just cause in law, and I deem it my duty to say also that, in my opinion, the plaintiffs did not sin against the "honour" of the medical profession, within any fair meaning of that significant word. I may point out that the defendants had a full opportunity of raising as a definite defence to the claim for defamation that the plaintiffs had in fact been guilty of conduct detrimental to the "honour and interests of the profession." Yet they omitted to place any such contention on the record. The plea of justification to the claim for defamation is absent. I several times pointed this out in the course of the trial, but the defendants did not ask for any amendment in that respect.

The observations I have made upon the defendants' rules have not hitherto referred to the question of their validity. But having regard to the singular severity of the boycotting rules and of the restrictions which they involve on the freedom of medical men, it is, perhaps, desirable that I should briefly deal with this point. The guiding authority on the broad principles to be considered is still *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (25). The public interests must be regarded conjointly with the interest of individuals, when restraint of trade is in question. Recent illustrative decisions will be found in *Neville* v. *Dominion of Canada News Co., Ltd.* (26), and *Horwood* v. *Millar's Timber and Trading Co., Ltd.* (27). The doctrine of "restraint of trade" has been applied in many directions. The restraint may exist in a contract between two parties, or in rules purporting to bind many individuals: see, for example, *Hilton* v. *Eckersley* (28); *Hornby* v. *Close* (29); *Old* v. *Robson* (30); and *Cullen* v. *Elwin* (31). Many decisions were considered in the well-known case of *Russell* v. *Amalgamated Society of Carpenters and Jointers* (32). Upon considering the rules in question I have arrived at the conclusion that they are in restraint of trade and are void on the ground of public policy. They gravely, and in my view unnecessarily, interfere with the freedom of medical men in the pursuit of their calling, and they are, I think, injurious to the interests of the community at large. It may well be that the opinion I have just expressed will (if upheld) destroy the cogency of the defendants' scheme of boycott. But it leaves them with the safer and more kindly weapons of legitimate persuasion and reasoned argument.

I now consider the question of malice. It has caused me deep anxiety. Two points arise. The first is: What is malice?, and, secondly: Is malice essential to a cause of action based on the pecuniary injury inflicted by the employment of unlawful means to molest a man in his trade? I take the questions separately. (i) What is malice? It is desirable, I think, at once to exclude that meaning of the word which indicates a merely conventional phrase of lawyers. It is common in libel cases, even where no question of privilege can possibly arise, to allege that the defendant published the defamatory matter maliciously. The word in such a case adds nothing to the allegation of publication. It is a formal assertion only. *R.* v. *Munslow* (33) illustrates the superfluous use of the word "malicious" in many cases, whether the pleading be civil or criminal. Lord Bramwell spoke aptly when in *Abrath* v. *North-Eastern Rail. Co.* (34) (11 App. Cas. at p. 253) he referred to "that unfortunate word 'malice.'" For the purposes of the present case, therefore, I exclude the purely formal significance (whatever that may be) of the word "malice." But there yet remains the meaning of the word when it is used to indicate the actual state of mind of a defendant when he commits an

alleged tort. It is a matter of regret that a full explanation of the meaning of the word "malice" when employed in other than a formal sense is not to be found. Perhaps the word is incapable of complete definition. There appear, however, to be at least two distinct heads of actual malice when that word is used to indicate a state of mind in such actions as defamation or malicious prosecution. The first head is indicated by the words "spite or ill-will." This head is well understood by juries, and the proof of a prior insult to and the resultant vindictive feeling of a defendant frequently disposes of the plea of privilege. LORD MACNAGHTEN was perhaps alluding to this aspect of the words when in *Quinn* v. *Leathem* (2) he said ([1901] A.C. at p. 511):

> "The defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants who were not members of the union."

But the second head is equally important. "Malice" in the actual sense may exist even though there be no spite or desire for vengeance in the ordinary sense. The jurist has enlarged the layman's notion of malice. This is observable both in defamation and in malicious prosecution. In the defamation cases the dicta and decisions are broad in their scope. Thus in *Dickson* v. *Earl of Wilton* (35) LORD CAMPBELL said: "Any indirect motive, other than a sense of duty, is what the law calls 'malice.'" In *Turnbull* v. *Bird* (36) ERLE, C.J., said: "'Malice' in law means any corrupt motive, any wrong motive, or any departure from duty." In *Browne* v. *Dunn* (37) LORD HERSCHELL said that "malice means making use of the occasion for some indirect purpose." "Unreasoning prejudice" may, as shown by the *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (38), justify a jury in a finding of malice. In *Stuart* v. *Bell* (39) the point was stated by LORD LINDLEY as follows ([1891] 2 Q.B. at p. 351):

> "Malice, in fact, is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of BRETT, L.J., every feeling in a man's mind (*Clark* v. *Molyneux* (40), 3 Q.B.D. at p. 247)."

Upon passing from the defamation cases to malicious prosecution, I find that a useful illustration of the above dicta is to be found in *Mitchell* v. *Jenkins* (41). That decision shows that a prosecution may be malicious, in the full sense, if it is instigated by a motive which the law does not approve, as, for example, the extortion of money. If such motive exists, then the defendant may be liable, although he honestly believed in the guilt of the person accused.

(ii) Is, then, actual malice, as indicated by the dicta and decisions I have cited, an essential ingredient in the present cause of action for molestation? In my opinion, the answer is No. The word "maliciously" has been employed often in many of the cases cited in this judgment, but I feel that it obscures the gist of the action. If the plaintiff proves his pecuniary damage, and also proves that illegal means such as violence or threats have been used, he has established, I think, all that the law requires. What would it have availed the defendant to prove in *Tarleton* v. *McGawley* (7) that he did not act maliciously? So too may the same question be asked with respect to *Garret* v. *Taylor* (8), *J. Lyons & Sons* v. *Wilkins* (10), *Giblan's Case* (6), and the *National Phonograph Case* (11). I deem it, therefore, reasonably clear from those and other relevant decisions referred to in this judgment, that the absence of actual malice does not justify the employment of unlawful means to injure a man in his calling. I abstain from considering the effect of actual malice in a case where no illegal means at all have in fact been employed, but where the facts causing injury to the plaintiff have been carried out by a combination of persons in pursuit of no other object than maliciously to injure him. This point was left open in the *Mogul Case* (14) and also in *Allen* v. *Flood* (5). A careful consideration of *Bradford Corpn.* v. *Pickles* (42) might suggest that the point had actually been settled by that case. But the question, which is a grave one, seems to be still left for judicial determination, as appears

from the observations delivered by Lord Macnaghten and Lord Shand in *Quinn* v. *Leathem* (2) ([1901] A.C. at pp. 510 and 512).

It may be, however, that, contrary to my own view, actual malice will be held by an appellate tribunal to be essential to the maintenance of this cause of action now under consideration. Hence I am unable to avoid the most distasteful and painful duty of deciding whether or not such malice has here been proved against the defendants. I profoundly regret that I am without the assistance of a jury on the point. I must myself fulfil the task which I deeply wish could have been discharged by another body. I will assume for the moment that a corporation may be liable for the malice of its agents acting within the scope of their authority. In considering whether the defendants have been guilty of actual malice, I do not forget that the motives, feelings and objects of the defendants were mixed. Their conduct was doubtless instigated to a large extent by the desire to protect the local pecuniary interests of Coventry doctors, and the general interests of the profession. But, on the other hand, it is unhappily clear that the defendants were angrily hostile to the plaintiffs, and unceasingly bitter in their feelings towards them, that they sought every opportunity of inflicting humiliation, and that they admittedly wished to render the lives of the plaintiffs and their families unbearable. I am further satisfied that the defendants desired to achieve far more than the mere protection of their interests. They desired to punish the plaintiffs as a separate end in itself, and they meant to make that punishment bitter to the last degree. This, in my opinion, was in any event unjustifiable. Upon the question of punishment I extract the following question and answer from the evidence of Dr. Cox. "Q.: Was one of the objects of the ostracism to punish these doctors?—A.: Undoubtedly." It is admitted, moreover, that the defendants desired not only to punish but to ruin the plaintiffs. The complete professional ruin of the dispensary doctors was the essence and aim of the boycott scheme and of the steps taken by the defendants. This aim, in my opinion, was a wrong motive or purpose, and constituted an unjustifiable intention to inflict injury. I must regard the whole history of the case, and the total body of facts, incidents, documents, and the evidence given before me. I do not feel called upon to pursue a psychological inquiry as to the precise or varying meanings of the words "motive," "purpose," "intention," "object," or the words "indirect," "wrong," or "unjustifiable." I must act as a fair-minded jury would act. In my opinion, there is, as a matter of law, evidence on which a jury could properly find that the defendants acted with actual malice. As a judge of fact I feel compelled, with the deepest reluctance and with abiding distress, to come to the conclusion upon the whole material before me that the plaintiffs have established actual malice against all the defendants. I may incidentally add that had it been necessary to decide the point, I should hold that where persons are acting in combination to achieve such a purpose as that which is shown in the present case, then the proved malice of one or more may be attributed to the other participants in the combination: see the rule established in cases of defamation by *Thomas* v. *Bradbury, Agnew & Co., Ltd.* (43); and *Smith* v. *Streatfeild* (44).

I must now consider briefly the contention raised by the defendants, namely, that actual malice cannot, as a matter of law, be attributed to the defendant corporation. He cited *Manchester Corpn.* v. *Williams* (45) in support of his submission. There the statement of claim alleged that the defendants had charged the plaintiff corporation with corrupt practices. It was held by Day and Lawrance, JJ., that, inasmuch as a corporation as distinguished from the individuals composing it, cannot be guilty of corrupt practices, the statement of claim disclosed no cause of action. But, in my view, that decision has no relevance to the facts of the present case. It is, therefore, unnecessary to consider whether it be consistent with the *South Hetton Coal Co.* v. *North-Eastern News Association* (46). The plaintiffs here seek to make the defendants liable upon the ordinary principle that a man is responsible for the acts of a servant when done within the scope of that servant's employment. The defendant association admits that the acts of

their agents here fell within such scope, and the contention of the defendants amounts in substance to a plea that the malice of a servant or agent cannot in law be attributed to his master. But the rule of law is now well established that a master, whether a corporation or not, may be liable for the actual malice of his servant. For malice as a state of mind rests on the same juristic footing as any other state of mind, and a servant's state of mind may, in appropriate cases, be attributed to his principal. In 1854 it was apparently thought that an action for malicious prosecution would not lie against a corporation aggregate: see *Stevens* v. *Midland Counties Rail. Co.* (47). So, too, it was doubted whether the malice of a servant could, in an action of libel, be attributed to a corporate defendant: see *Whitfield* v. *South Eastern Rail. Co.* (48), E.B. & E. at p. 121. But the old doubts have passed away, and *Barwick* v. *English Joint Stock Bank* (49), established a principle the soundness of which has been fully recognised, and the logical consequences whereof have now been completely established. In *Edwards* v. *Midland Rail. Co.* (50) FRY, J., held that an action for malicious prosecution would lie against a corporation. In *Bank of New South Wales* v. *Owston* (51), Mr. Benjamin, Q.C., for the appellant bank, expressly abandoned the point that the action would not lie against a corporation, whilst in *Cornford* v. *Carlton Bank, Ltd.* (52), the very able counsel then appearing for the defendants (with the assent of LORD RUSSELL OF KILLOWEN, C.J., and A. L. SMITH and VAUGHAN WILLIAMS, L.JJ.) conceded that an action for malicious prosecution would lie against a corporation aggregate. The basis of *Barwick* v. *English Joint Stock Bank* (49) was pointed out by LORD SELBORNE in *Houldsworth* v. *City of Glasgow Bank* (53) (5 App. Cas. at p. 326). The principle is one which is independent of the particular head of tort. It is a principle of the law of agency, and the express decision of FRY, J., in *Edwards* v. *Midland Rail. Co.* (50) seems to accord fully with the views of the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (54). As with malicious prosecution, so with libel. For it is now clear that in such an action a corporation may be held responsible for the actual malice of a servant acting within the scope of his employment: see *Citizen's Life Insurance Co.* v. *Brown* (55). The decision in *Glasgow Corpn.* v. *Lorimer* (56) rested on the footing that the agent in that case was acting beyond the sphere of his employment. I should like to express my appreciation of the clearness and the force of the note appearing at p. 64 of the sixth edition of CLERK AND LINDSELL ON TORTS upon the point I have just dealt with. I agree with the view there indicated that "actual malice" can be attributed to a corporate body not only with respect to defamation and malicious prosecution, but with respect also to any other head of tort of which actual malice may constitute an ingredient.

It follows from what I have said that, in my view, the plaintiffs have established a cause of action against the defendants and each of them for unlawfully molesting the plaintiffs in their profession. I must, therefore, consider the question of damages. [HIS LORDSHIP then assessed the damages on the conspiracy claim at £1,000 to Dr. Burke and £700 each to Dr. Holmes and Dr. Pratt; reviewed the evidence on the allegations of libel; and held that on that part of the case also the plaintiffs were entitled to succeed.]

Judgment for plaintiffs.

Solicitors: *S. B. Cohen, Dunn & Co.*; *Hempsons.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

KIMBER *v.* GAS LIGHT AND COKE CO., LTD.

[Court of Appeal (Pickford, Bankes and Scrutton, L.JJ.) February 9, 1918]

[Reported [1918] 1 K.B. 439; 87 L.J.K.B. 651; 118 L.T. 562; 82 J.P. 125; 34 T.L.R. 260; 62 Sol. Jo. 329; 16 L.G.R. 280]

Negligence—Creation of dangerous conditions—Creation by contractor's workmen on private premises belonging to third person—No warning given to plaintiff—Injury to plaintiff—Liability of contractor.

If a person creates a dangerous condition of things (something in the nature of a trap), whether on his own premises or on those of some other person in which he has no proprietary or possessory interest, and he sees some person who to his knowledge is unaware of the danger lawfully exposing himself, or about to expose himself, to the danger which he has created, he is under a duty to give that person a warning.

The defendants contracted with the landlord of an unoccupied house to do therein certain work, in the course of which their workmen made a hole in an upper floor of the house, which they left unguarded. The plaintiff, a prospective tenant of part of the house, came with an order to view the premises and was admitted by the defendants' workmen, who failed to warn her of the existence of the hole. The plaintiff went upstairs, put her foot into the hole, and was injured. The workmen did not know beforehand that the plaintiff was coming; they did not invite her to enter, but merely allowed her to enter to view.

Held: that the defendants' workmen were guilty of negligence in not warning the plaintiff of the danger they had created, and, therefore, the defendants were liable to the plaintiff in damages.

Notes. Considered: *Howard* v. *Farmer & Son, Ltd.*, [1938] 2 All E.R. 296; *Canter* v. *Gardner & Co.*, [1940] 1 All E.R. 325; *Buckner* v. *Ashby & Horner, Ltd.*, [1941] 1 K.B. 321; *Buckland* v. *Guildford Gas Light and Coke Co.*, [1948] 2 All E.R. 1086. Referred to: *Stein* v. *Gates* (1935), 79 Sol. Jo. 252; *Burnham* v. *Boyer and Brown*, [1936] 2 All E.R. 1165; *Duncan* v. *Cammell Laird & Co.*, *Craven* v. *Cammell Laird & Co.*, *Duncan* v. *Wailes Dove Bitumastic, Ltd.*, *Craven* v. *Wailes Dove Bitumastic, Ltd.*, [1943] 2 All E.R. 621; *Hartwell* v. *Grayson Rollo and Clover Docks, Ltd.*, [1947] K.B. 886; *Hawkins* v. *Coulsdon and Purley U.D.C.*, [1954] 1 All E.R. 97; *A. C. Billings & Sons* v. *Rider*, [1957] 3 All E.R. 1.

As to liability for dangerous conditions created by defendant, see 28 Halsbury's Laws (3rd Edn.) 14–16; and for cases see 36 Digest (Repl.) 12 et seq.

Cases referred to:

(1) *Corby* v. *Hill* (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 4 Jur.N.S. 512; 6 W.R. 575; 140 E.R. 1209; 36 Digest (Repl.) 67, *370*.

(2) *Penny* v. *Wimbledon U.D.C.*, [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 63 J.P. 406; 47 W.R. 565; 15 T.L.R. 348; 43 Sol. Jo. 476, C.A.; 26 Digest (Repl.) 436, *1354*.

(3) *Bolch* v. *Smith* (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 8 Jur.N.S. 197; 10 W.R. 387; 158 E.R. 666; sub nom. *Bolett* v. *Smith*, 6 L.T. 158; 36 Digest (Repl.) 66, *358*.

Also referred to in argument:

Heaven v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10*.

Lowery v. *Walker*, [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674; 27 T.L.R. 83; 55 Sol. Jo. 62, H.L.; 2 Digest (Repl.) 332, *232*.

Gautret v. *Egerton*, *Jones* v. *Egerton* (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gantret* v. *Egerton*, *Jones* v. *Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, *247*.

Appeal by defendants from an order of SHEARMAN, J., made on further consideration of a case tried by him with a jury.

The facts appear in their LORDSHIPS' judgments.

Thorn Drury, K.C., and *Doughty* for the defendants.
Holman Gregory, K.C., and *Ellis Hill* for the plaintiff.

Feb. 9, 1918. The following judgments were read.

PICKFORD, L.J.—The facts of this case are substantially not in dispute, and the only question is whether, on the facts and the finding of the jury, there is any legal liability on the defendants.

The Underground Electric Railway Co., of London, let a house to a tenant, and undertook to put it in repair for him. For this purpose they employed a firm of builders, to whom they gave instructions to convert the house into a pair of maisonettes. They also instructed the builders to employ the defendants to do the necessary work connected with the gas which was required for these purposes. In the course of the work the defendants' workmen removed a board on the upstairs landing, leaving a hole described by the plaintiff as about 3 ft. long and 6 in. wide a little distance from the head of the stairs. The learned judge, under a power to draw inferences of fact, had found, as I think rightly, that this hole, if left unfenced, would be dangerous to anyone who did not know and was not warned of it, and that owing to the insufficient lights at the time this accident happened it would be a hidden and concealed danger. The tenant intended, when the repairs and alterations were completed, to occupy the lower part of the house himself and to let the upper part, and for the latter purpose he put the house into the hands of a house agent. The plaintiff, who wanted a flat or maisonette, applied to the house agent for an order to view. With this she went to the house, and when she knocked at the door it was opened by two of the defendants' workmen who were employed on the work for which the hole was made. She asked them what part of the house was to be let, and they said the upper part. She then went upstairs, went into one room on the right, in doing which she did not go to the hole, then crossed the landing to the room on the other side, and in crossing back to the staircase put her foot in the hole and was badly injured. There was no evidence that the defendants' workmen had any knowledge that persons were likely to come to view the house, but they saw that the plaintiff went upstairs and knew that she went to inspect the upper part. It was about 3.30 to 4 p.m. on Mar. 3, the day was wet, and the landing was dark and badly lighted. The learned judge left these questions to the jury, and their answers were as follows: (i) Were the gas company's servants negligent in failing to protect the hole?—No. (ii) Were the gas company negligent in not warning the plaintiff of the existence of the hole?—Yes. (iii) Was the plaintiff guilty of contributory negligence?—No. (iv) Amount of damages?—£275. He also found the hole was dangerous, as I have before mentioned. No objection was taken to the direction to the jury, except that it was said that the learned judge ought to have asked them whether it was negligent in the plaintiff to go into the house or upstairs at all considering the darkness. I do not think any case was made as to darkness which required such a question, and I think the summing up cannot be attacked.

The real point made by the defendants is that, as there was no negligence in making the hole and leaving it unfenced, they were under no duty to the plaintiff to warn her of its existence, as they were not occupiers of the house, and did not invite or license her to enter it, and that, therefore, the second finding of the jury cannot be supported. The defendants by their servants were not in occupation of the house, but they had sufficient control of it by the licence or invitation of the owner and tenant to justify them in making a hole in the flooring for the purposes of their work. I do not think that they invited or licensed the plaintiff to come upon the premises, and I attach no importance to the fact that the defendants' workmen opened the door and told the plaintiff which part of the house was to be

let, except that it informed them that she had come by the licence of the tenant to inspect the premises, and that she was going directly to the landing in which they had made the hole. They, of course, knew the conditions as to lights and otherwise which existed on the landing. If they had known that persons were likely to come to the premises for lawful purposes I think they would have been negligent in making and leaving a hole which, in the circumstances, would be a concealed danger to such persons unfenced and without warning: see per WILLES, J., in *Corby* v. *Hill* (1), where the obstruction was in a private, not a public road. In this case they had no reason to expect such persons to come, and, therefore, the making of the hole was found by the jury not to be negligent, nor was the leaving of it unfenced up to a point negligent. But when the workmen let the plaintiff in and knew that she was there lawfully by the licence of the tenant, and was going to the very landing where the dangerous hole was, I think that the same principle applies. They knew that what in the other case would have been anticipated had in fact happened with her, and I think that the same duty then arose towards the plaintiff, and that it was negligence any longer to have the hole unfenced and without warning. As this was done in the ordinary course of their duty the defendants are responsible for their actions, and the appeal must be dismissed with costs.

BANKES, L.J.—This is an appeal from SHEARMAN, J. The facts are not in dispute. Some workmen in the employ of the defendants were engaged in making alterations in an unoccupied house. In the course of their work they removed a board on the first floor landing, and left the hole so made unfenced and unguarded. The landing was badly lighted, and existence of the hole rendered the place dangerous to anyone who was unaware that it was there. The plaintiff, who had obtained an order to view the house from a house agent, was admitted into the house by one of the defendants' workmen. As a result of the verdict of the jury it must be taken that the man who so admitted the plaintiff was one of those who removed the board, and that he knew that the landing in its then condition was dangerous, and that the plaintiff, if allowed to go upstairs, would pass across the landing. He gave the plaintiff no warning of the existence of the hole. SHEARMAN, J., put certain questions to the jury including a question whether the workmen had been guilty of negligence (a) in not fencing or guarding the hole, or (b) in not warning the plaintiff. The jury answered the first question in the negative and the second in the affirmative. They also found that the plaintiff had not been guilty of contributory negligence. Upon these findings the defendants claimed that they were entitled to judgment, upon the ground that the defendants' workmen were under no duty to warn the plaintiff. SHEARMAN, J., decided against this contention. It is from this decision that the present appeal is brought.

In my opinion, the appeal fails. To test the defendants' contention, I will take a case to which the same rule of law must apply as in the present case, though the answers may seem more obvious than in the present case. A lift in a private house is out of order. It is stationary at the fifth floor. A workman is sent for to put it right. In order to get at part of the lift which requires attention he disconnects the brake. In its then condition he knows that if anyone enters the lift it will fall to the bottom of the house. While standing by the door of the lift he sees a maidservant approaching the lift obviously intending to enter it. He gives her no warning. She enters, the lift falls, and she is seriously injured. Was the workman under no duty to warn the maidservant? Our law would be indeed inhuman if he was not. In my opinion the rule of law applicable to that case, and to the present, is at least as wide as this, namely, if a person creates a dangerous condition of things (something in the nature of a trap) whether in a public highway, or on his own premises, or on those of any other, and he sees some other person who to his knowledge is unaware of the existence of the danger, lawfully exposing himself, or about to expose himself, to the danger which he has created, he is under a duty to give such person a warning. There may be cases in

which the duty exists though actual knowledge of the danger may not be brought home to the person charged with negligence. It is not necessary for the purpose of the present case to discuss the rule except in its simplest form. The duty arises quite independently of the occupation of premises. It does not arise out of any invitation or licence. It is not a case of mere omission. The duty arises out of the combination of all the circumstances to which I have referred. In my opinion the appeal fails.

SCRUTTON, L.J.—Two workmen of the Gas Light and Coke Co. were altering the gas fittings in a house which had been let to a tenant, who was converting it into two flats, one of which he proposed to let. In doing this the workmen had taken up a board on a dark landing. While the workmen were still in the house, and the board was up, a lady, to whom the tenant had given an order to view the top flat, knocked at the door. One of the workmen opened it; she showed her order to view and passed in up the stairs. The workman did not tell her of the hole where the board was up. She passed it once, but fell into it on her return, and damaged her knee. She sued the gas company. The jury found that there was no negligence in leaving the hole open, but that there was negligence in not warning the plaintiff that the hole was there, and that the plaintiff was not guilty of contributory negligence. The judge, to whom other questions were left, found that the hole was a trap—namely, a danger which could not be avoided by a person previously ignorant of it, but who used reasonable care, and he entered judgment for the plaintiff. The gas company appealed. I leave out of question any liability of the gas company based on invitation; for I think it is clear that the workmen had no authority from the gas company to invite people to walk about the house. The case is, in my view, the same as if the door had been open, and the workmen had seen a person lawfully on the premises going towards the hole and had not warned him, and had known that persons lawfully there might be passing along the landing and had given no warning.

It is clear that persons lawfully doing a work which interferes with a public right, as contractors opening the highway, must use reasonable care not to injure persons lawfully using the highway, which would include taking reasonable precautions to warn such persons of dangers created by the contractor, which the passer-by could not with reasonable care discover; but it is said the case is different when the work is done on private premises in which the contractor has no proprietary or possessory interest, and on which he is only a licensee of the owner. The contractor's duty it was said was only not actively and negligently to injure other persons on the premises, as by carelessly dropping hammers on their heads, and included no duty to warn them of dangers, even hidden ones, which the contractors' work had created, as holes in dark passages. There are, of course, cases where there is moral culpability but no legal liability. A. sees a blind man walking along the highway straight into a pond, and gives him no warning; A. is not legally liable, for he is under no legal duty to B. But if A. has himself made the hole in the highway he is under legal liability at once: *Penny* v. *Wimbledon U.D.C.* (2). I cannot see that it makes any difference that B. is a person lawfully on private premises where A. has made the hole, or that A. is under a duty as to his acts towards B., such as not hitting him by his tools, different from his duty to warn B. of dangers A. has created, which are not discernible by reasonable care on the part of B. It is A.'s duty to carry on his work with due precautions for the safety of those whom he knows, or might reasonably know, may be lawfully in the vicinity of his work; and the most obvious precaution would be to warn B., who is going towards a hidden danger which A. has created. It was said there was no authority for this proposition, but, as Lord Macnaghten has said, the plainer a proposition is, the harder it often is to find judicial authority for it. In my view, however, the facts in *Corby* v. *Hill* (1) raised the question. A person licensed to use a private road sued a person licensed in course of doing repairs to place materials in the road for negligence in not protecting the materials,

and succeeded. The declaration suggested by WILLES, J., (4 C.B.N.S. at p. 567) appears to me to cover this case. In *Botch* v. *Smith* (3), where one licensee failed to recover against another licensee who had placed an obvious danger in his way, WILD, B., reserved the question whether if the danger had been a trap he would not have been liable. I think he would, and that is this case. The appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *A. E. Pratt*; *Monier Williams, Robinson & Milroy.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

ERTEL BIEBER & CO. *v.* RIO TINTO CO., LTD.

[HOUSE OF LORDS (Lord Dunedin, Lord Atkinson, Lord Parker of Waddington and Lord Sumner), November 22, 23, 26, 27, 29, 1917, January 25, 1918]

[Reported [1918] A.C. 260; 87 L.J.K.B. 531; 118 L.T. 181; 34 T.L.R. 208]

Trading with the Enemy—Contract rendered illegal—Executory contract—Public policy—Suspensory clause—Operation of contract suspended in event of war—Fulfilment of contract after war beneficial to enemy.

A state of war between Great Britain and another country abrogates and puts an end to all executory contracts which for their further performance require intercourse between one contracting party, a subject of the Sovereign, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. Such an executory contract is not kept alive by a suspensory clause suspending the operation of the contract, if, owing to war, the parties are unable to fulfil their obligations under it.

Where, therefore, a contract for the sale by a British company to a German company of a quantity of cupreous ore to be delivered in certain quantities in the years 1915, 1916, 1917, 1918, and 1919, contained such a suspensory clause,

Held: the clause did not operate to suspend the valid operation of the contract until after the end of the war between Great Britain and Germany, but was rendered void as being against public policy on the outbreak of war on Aug. 4, 1914, because, on the one hand, it increased the resources of the enemy, for, if he knew that he would get the ore when the war was over, he could the better denude himself of his stocks during the war for purposes connected with the war, and he also could realise a present asset by assigning his rights under the contract to a neutral country, while, on the other hand, if the British seller had to make provision for a large future liability, he would be hampered either in the way of commerce or in placing his stocks of ore at the disposal of the British government for war purposes.

Esposito v. *Bowden* (1), (1857), 7 E. & B. 763, and observations of LORD ALVANLEY, C.J., in *Furtado* v. *Rogers* (2) (1802), 2 Bos. & P. 191, applied.

Decision of Court of Appeal (1917), 116 L.T. 810, affirmed.

Notes. Applied: *Naylor, Benzon* v. *Krainische Industrie Gesellschaft*, [1918] 2 K.B. 486. Considered: *Fried. Krupp Act.* v. *Orconera Iron Ore Co.* (1919), 120 L.T. 386; *Schering, Ltd.* v. *Stockholms Enskilda Bank*, [1946] 1 All E.R. 36; *Boissevain* v. *Weil*, [1948] 1 All E.R. 893. Referred to: *Blackburn Bobbin Co.* v. *Allen* (1918), 87 L.J.K.B. 1085; *Central India Mining Co.* v. *Société Coloniale Anversoise*, [1920] 1 K.B. 753; *Re Badische Co., Bayer Co., etc.*, [1921] 2 Ch. 331; *Larrinaga* v.

Société Franco-Américaine des Phosphates de Médulla, [1923] All E.R.Rep. 1; *Jebara* v. *Ottoman Bank*, [1927] 2 K.B. 254; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Morris, Ltd.* v. *Gilman, Ltd.*, (1943), 60 R.P.C. 20; *The Steaua Romana, The Oltenia*, [1944] P. 43; *Boissevain* v. *Weil*, [1949] 1 All E.R. 146; *Arab Bank, Ltd.* v. *Barclays Bank*, [1954] 2 All E.R. 226; *Kuenigl* v. *Donnersmarck*, [1955] 1 All E.R. 46; *Bevan* v. *Bevan*, [1955] 2 All E.R. 206; *Re Helbert Wagg & Co., Re Prudential Assurance Co.*, [1956] 1 All E.R. 129.

As to contracts void as being against public policy generally, see 8 HALSBURY'S LAWS (3rd Edn.) 130–136; and for cases see 12 DIGEST (Repl.) 269 et seq.

Cases referred to:

(1) *Esposito* v. *Bowden* (1857), 7 E. & B. 763; 8 State Tr.N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur.N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex. Ch.; 12 Digest (Repl.) 440, *3352*.

(2) *Furtado* v. *Rogers* (1802), 3 Bos. & P. 191; 127 E.R. 105; 2 Digest (Repl.) 254, *550*.

(3) *Robson* v. *Premier Oil and Pipe Line Co., Ltd.*, [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 31 T.L.R. 420; 59 Sol. Jo. 475, C.A.; 2 Digest (Repl.) 258, *573*.

(4) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 276, *639*.

(5) *Porter* v. *Freudenberg, Kreglinger* v. *S. Samuel and Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R.P.C. 109, C.A.; 2 Digest (Repl.) 213, *270*.

(6) *British and Foreign Marine Insurance Co., Ltd.* v. *Samuel Sanday & Co.*, [1916] 1 A.C. 650; 85 L.J.K.B. 550; 114 L.T. 521; 32 T.L.R. 266; 60 Sol. Jo. 253; 13 Asp.M.L.C. 289; 21 Com. Cas. 154, H.L.; 29 Digest 276, *2236*.

(7) *Hugh Stevenson & Sons* v. *Akt. für Cartonnagen Industrie*, post, p. 600; [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 34 T.L.R. 206; 62 Sol. Jo. 290, H.L. 2 Digest (Repl.) 274, *637*.

(8) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 277, *646*.

(9) *Halsey* v. *Lowenfeld*, [1916]2 K.B. 707; 85 L.J.K.B. 1498; 115 L.T. 617; 32 T.L.R. 709, C.A.; 2 Digest (Repl.) 274, *635*.

(10) *Mersey Steel and Iron Co.*, v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, *2966*.

(11) *Zinc Corpn., Ltd.* v. *Hirsch*, [1916] 1 K.B. 541; 85 L.J.K.B. 565; 114 L.T. 222; 32 T.L.R. 232; 21 Com. Cas. 273, C.A.; 12 Digest (Repl.) 446, *3377*.

(12) *Brewster* v. *Kitchel* (1698), Holt, K.B. 175; Carth. 438; Comb. 466; 1 Ld. Raym. 317; 12 Mod. Rep. 166; 1 Salk. 198; 90 E.R. 995; 12 Digest (Repl.) 334, *2582*.

(13) *Potts* v. *Bell* (1800), 8 Term. Rep. 548; 101 E.R. 1540; 12 Digest (Repl.) 256, *562*.

(14) *The Panariellos* (1915), 84 L.J.P. 140; 112 L.T. 777; 31 T.L.R. 326; 59 Sol. Jo. 399; 13 Asp.M.L.C. 52; affirmed (1916), 85 L.J.P. 112; 114 L.T. 670; 32 T.L.R. 459; 60 Sol. Jo. 427; 13 Asp.M.L.C. 484, P.C.; 2 Digest (Repl.) 251, *522*.

(15) *The Cosmopolite* (1801), 4 Ch. Rob. 8; 2 Digest (Repl.) 278, *653*.

(16) *Ex parte Baglehole* (1812), 18 Ves. 525; 1 Rose, 271; 34 E.R. 417; 2 Digest (Repl.) 279, *669*.

(17) *Horlock* v. *Beal*, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp.M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, *3322*.

(18) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1, H.L.; 12 Digest (Repl.) 456, *3410.*

(19) *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Gt. Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 2 Digest (Repl.) 219, *315.*

(20) *The Rapid* (1812), 1 Gall. 295.

(21) *Griswold* v. *Waddington* (1819), 16 Johns. Rep. 438.

Also referred to in argument:

Scott v. *Avery* (1856), 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest (Repl.) 465, *290.*

Caledonian Insurance Co. v. *Gilmour*, [1893] A.C. 85; 57 J.P. 228; 9 T.L.R. 146; 1 R. 110, H.L.; 2 Digest (Repl.) 473, *332.*

F. A. Tamplin Steamship Co., Ltd. v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 32 T.L.R. 677; 21 Com. Cas. 299; 115 L.T. 315; 13 Asp.M.L.C. 467, H.L.; 12 Digest (Repl.) 442, *3361.*

Andrew Millar & Co., Ltd. v. *Taylor & Co., Ltd.*, [1916] 1 K.B. 402; 85 L.J.K.B. 346; 114 L.T. 216; 32 T.L.R. 161; 60 Sol. Jo. 140, C.A.; 12 Digest (Repl.) 445, *3371.*

Jacobs v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589; 53 L.J.Q.B. 156; 50 L.T. 194; 32 W.R. 761, C.A.; 12 Digest (Repl.) 444, *3370.*

Re Missouri Steamship Co. (1889), 42 Ch.D. 321; 58 L.J.Ch. 721; 37 W.R. 696; sub nom. *Re Missouri Steamship Co., Monroe's Claim*, 61 L.T. 316; 5 T.L.R. 438; 6 Asp.M.L.C. 423, C.A.; 11 Digest (Repl.) 424, *728.*

Santos v. *Illidge* (1860), 8 C.B.N.S. 861; 29 L.J.C.P. 348; 3 L.T. 155; 6 Jur.N.S. 1348; 8 W.R. 705; 141 E.R. 1404, Ex. Ch.; 11 Digest (Repl.) 444, *846.*

Appeal by the plaintiffs in the action from an order of the Court of Appeal, reported 116 L.T. 810.

The fact and arguments appear in their Lordships' opinions.

Compston, K.C., and *August Cohn* for the appellants.

Alexander Grant, K.C., and *Micklethwait* for the respondents.

Their Lordships took time for consideration.

Jan. 25, 1918. The following opinions were read:

LORD DUNEDIN.—The respondents, whom I shall hereafter allude to as the plaintiffs, taking advantage of the provisions of the Legal Proceedings Against Enemies Act, 1915, have raised this action to obtain a declaration as against the appellants, whom I shall hereafter call the defendants, that by the existence of a state of war between Great Britain and Germany on Aug. 4, 1914, two contracts of dates June 27, 1910, and Oct. 9, 1913, with endorsements on the first mentioned of Mar. 15 and Oct. 8, 1912, were abrogated and avoided, and that they were relieved from any duties or obligations under the contracts, without prejudice to liabilities already incurred at the aforesaid date of Aug. 4, 1914.

The plaintiffs are an English company owning extensive mines of cupreous ore situate in Spain. The defendants are a German firm who deal in such ore and re-sell to various customers in Germany. Both contracts were for a very large quantity of ore. The first was for 1,280,000 tons, 15 per cent. more or less in buyer's option, a quantity which by two endorsements was increased to 1,592,750 tons. The ore was to be delivered in approximately equal quantities between Feb. 1 and Nov. 30 in the years 1911 to 1914. It was to be shipped from Huelva in Spain and delivered ex ship at Rotterdam, Hamburg, Stettin, and/or other European Continental ports except ports in Great Britain, France, Belgium, Spain, and Portugal. There were minute arrangements as to quality and price, and various other clauses, to some of which I shall presently advert. The second contract was for 2,200,000 tons, 15 per cent. more or less in buyer's option, to be delivered in equal portions from Feb. 1, 1915, up to Nov. 30, 1919, at same ports

as in the first contract. When war broke out between Great Britain and Germany on Aug. 4, 1914, all deliveries had been made under the first contract except about 200,000 to 300,000 tons. Obviously no deliveries had begun under the second contract. No deliveries have been made since the war begun. SANKEY, J., gave the plaintiffs the declaration they asked, and his judgment was affirmed by the Court of Appeal. Against these orders the present appeal is brought. The proposition of law on which the judgment of the courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as is often phrased, commercial intercourse between the one contracting part, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression "often phrased commercial intercourse" because I think the word "intercourse" is sufficient without the epithet "commercial." As to this I agree with the judgment of the Court of Appeal in *Robson* v. *Premier Oil and Pipe Line Co., Ltd.* (3), where PICKFORD, L.J., delivering the judgment of the court (COZENS-HARDY, M.R., himself, and WARRINGTON, L.J.), said ([1915] 2 Ch. at p. 136):

> "The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction."

That, so expressed, it is an incontrovertible proposition admits, I think, upon the authorities of no doubt. There are many cases, but what may be termed the landmarks of the law on the subject will be found in the judgment of LORD STOWELL in Admiralty, in *The Hoop* (4) in 1799; in LORD ALVANLEY's judgment in 1802, in *Furtado* v. *Rogers* (2); and still more explicitly in the judgment of the King's Bench in 1857, in *Esposito* v. *Bowden* (1), where the members of the court were JERVIS, C.J., POLLOCK, C.B., ALDERSON, B., and CRESSWELL, CROWDER and WILLES, JJ. In recent decisions the proposition has been recognised in many cases. I would refer especially to the very learned and careful inquiry into the subject by LORD READING, C.J., in *Porter* v. *Freudenburg*, *Kreglinger* v. *S. Samuel and Rosenfeld*, *Re Merten's Patents* (5) ([1915] 1 K.B. at p. 866). And in your Lordships' House the proposition was at the root of the judgment in *British and Foreign Insurance Co., Ltd.* v. *Samuel Sanday & Co.* (6), and was directly applied in *Hugh Stevenson & Sons* v. *Akt. für Cartonnagen Industrie* (7).

The defendants' counsel made an attack, not perhaps on the authority of *Esposito* v. *Bowden* (1), but rather on its application to any contract but a contract of affreightment on a voyage policy; and it was urged that to treat the case as of general application to executory contracts which had such a natural life as might outlive the war, was to run counter to a dictum of LORD HALSBURY in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (8) ([1902] A.C. at p. 493). Now *Esposito* v. *Bowden* (1) has been cited by learned judges in many cases, and no doubt has even been cast on its authority. Nor has it ever been taken as dealing with any particular contract, but it has been held as dealing with contracts in general. So far as *Janson's Case* (8) is concerned the only matter there decided was that there must be an actual state of war to determine a contract—a mere imminence of war is not enough. It is true that LORD HALSBURY's dictum, if applied as a universal proposition, would be counter to the doctrine of *Esposito* v. *Bowden* (1). But I am satisfied not only that the dictum was obiter and not binding, but that LORD HALSBURY was not dealing with or thinking of executory contracts, but of contracts under which rights had already accrued. There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected, though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are

not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in *Halsey* v. *Lowenfeld* (9). In other words, the executory contract which is abrogated must either involve intercourse or its continued existence must be in some other way against public policy, as that has been laid down in decided cases. I shall revert to the cases, but in the meantime I rest with the proposition I have stated above.

Taking the legal proposition alone, and supposing that the contracts in question had contained no other clauses than those which I have set forth as to dates of delivery, it would at once follow that the first contract so far as unimplemented is avoided, for the dates of delivery under it, so far as not performed, extend from Aug., 1914, to Feb., 1915, during which time a state of war prevailed. It is also obvious that all dates of delivery under the second contract, from Feb. 1, 1915, up to the present time, have been rendered illegal by the war. The only matter left would be this. The defendant's counsel argued that, as it was possible that the war would end before Nov. 30, 1919, there might still be a duty to deliver such instalments as are appropriate to the remanent period from the end of the war to November, 1919. But that would be to turn a contract for two million tons into a contract for far less. To meet this the defendants said that each monthly shipment was essentially a separate contract. The answer is to be found in what was said by Lord Selborne in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (10) (9 App. Cas. at p. 439). That was the case of a contract for 5,000 steel blooms with delivery 1,000 tons monthly commencing on January next. His Lordship said the subsidiary terms as to time of delivery and as to payment did not split up the contract into as many contracts as there shall be deliveries, but there was one contract for the purchase of that quantity of iron.

The real defence to the action is to be found in a clause which I have not yet mentioned. There is a clause in practically identical terms in both contracts. I will therefore take that in the later contract. It is cl. 15, which is in the following terms:

> "If, owing to strikes, war, or any other cause over which the sellers have no control, they should be prevented from shipping the ore from Huelva, or delivering same to the buyers, the obligation to ship and/or deliver shall be suspended during the continuance of such impediment, and for a reasonable time afterwards, to allow the sellers time to resume shipments and/or deliveries, and if one or more works of buyers' clients should be destroyed or materially damaged by fire, or should war or any other cause, over which the buyers, or their clients, have no control, prevent their receiving such ore, the obligation to receive under this contract shall be reduced in proportion, or suspended during the continuance of such impediment, and for a reasonable time afterwards, to allow the buyers time to recommence receipts."

The defendants argue that the effect of this clause is to remove from the contract all necessity for the forbidden thing—intercourse during the war—and that the ratio decidendi of *Esposito* v. *Bowden* (1) is, therefore, gone, and that there is no reason why the contract to deliver after the war should not be good. The learned judges of the courts below have treated this clause by the method of what may be termed confession and avoidance. The clause only purports to suspend deliveries—nothing else. But, say they, there were other duties under the contract beside deliveries. These duties still remain and entail intercourse, so that again the case is brought within the principle of *Esposito* v. *Bowden* (1). In particular, they cite cll. 12, 18 and 19, and they say that the case in respect of these clauses falls directly within the decision of the Court of Appeal which binds them, in *Zinc Corpn., Ltd.* v. *Hirsch* (11). To which the defendants before your Lordships' House reply that the clauses are not analogous, and, further, that the *Zinc Corpn. Case* (11) was ill decided.

I do not think it can be gainsaid that *Esposito* v. *Bowden* (1) being, as I have already said, good law, then, if there are duties which remain unaffected by the

suspensory clause, and these duties involve intercourse, then the contract must be avoided. In so far as the *Zinc Corpn. Case* (11) laid down this proposition, it was, in my opinion, right, and it is useless to examine the clauses in that case. It is necessary, however, to examine what the duties are under this contract. In order to make cl. 12 intelligible it is necessary first to quote cl. 2, which is in these terms:

> "One-fifth of the above 2,200,000 tons—namely, 440,000 tons, 15 per cent., more or less—is to be shipped in each year during the period between Feb. 1 and Nov. 30, and spread as nearly as sellers can arrange uniformly over this period. The sizes of cargoes for Rotterdam, Hamburg, and Stettin shall be in sellers' discretion, but for other ports sellers shall arrange as far as possible for such reasonably-sized cargoes, but not exceeding 3,000 tons, as buyers desire. About one-half of the ore is to be lumps and about one-half is to be fines—viz., ore which has passed through a half-inch square mesh screen."

Clause 12, so far as material, is as follows:

> "The buyers are to declare in writing, not later than Jan. 1 of each year, the total quantity of fines and lumps separately which they desire delivered during the year, and what quantity of each size is to be delivered at each port."

The defendants contend that there is here no duty, but a mere option on their part. If they do not declare, all that ensues is that the ore falls to be divided equally between fines and lumps. I do not agree with the defendants' view. It is not alone the proportion as between fines and lumps, but the total quantity, that has to be determined, i.e., the decision as to the 15 per cent. more or less. Moreover, evidence has been led, which there is no reason to disbelieve, by which it is shown that from the sellers' point of view it is necessary to have these two matters fixed in order to settle the programme for working the mine during the ensuing year. This yearly duty seems to me quite independent of delivery. I am, therefore, prepared to agree with the Court of Appeal on this ground of judgment. As regards cll. 18 and 19 I confess I am doubtful. Clause 18 is an arbitration clause. Now, though I agree with the learned judge who says that arbitration cannot be conducted without intercourse, it seems to me that arbitration is not a necessary, nor indeed a usual part of the performance at a time when ex hypothesi all deliveries under the contract are suspended. There is nothing, for the time being, to arbitrate about. So also as regards cl. 19. This is a very special matter, providing, in the event of a Mr. Julius Ertel ceasing to be a member of the firm of Ertel Bieber & Co., that his place in the active administration should be filled in a certain way. But Mr. Julius Ertel has not, so far as known, ceased to be a member of the firm, and active administration on the aforementioned hypothesis of suspended deliveries is at a standstill.

While the construction which I put on cl. 12 affords, as I have said, sufficient ground to enable me to say that the judgment of the Court of Appeal should be affirmed, it is, I think, desirable that our judgment should be also based on rather broader grounds. I confess I cannot read cl. 15 without coming to the conclusion that, although war is mentioned eo nomine in that clause, it is not war between Great Britain and Germany with the legal consequences thereon ensuing that is envisaged, but war between other Powers, of whom Great Britain or Germany may be one, and which acts as a practical impediment via facti in stopping the possibility of delivery. It is not necessary, in my view, to decide this question, for the simple reason that the respondents seem to me to be involved in a dilemma. Either the war which is to suspend delivery does not include a war between Great Britain and Germany, in which case the clause does not apply, or if it does mean such a war with the legal consequences following thereon, then, in my view, the clause is void as against public policy. I apprehend that in saying this I am not inventing a new head of public policy. I respectfully subscribe to the remarks made on this subject by the Earl of Halsbury in *Janson* v. *Driefontein* (8). I

take my view of what is against public policy from what has been said in a series of cases which have certainly become the law of England.

Let me revert to the leading cases which I have already cited. *The Hoop* (4) was a case where the goods from an enemy country which had been consigned to British subjects and under contract became their property were confiscated by capture by a British ship. The contract with the enemy subject by which the property in the goods passed was made pendente bello. The ground of judgment was that all trading with the enemy is unlawful at common law as against public policy. Why? Not because of the terms of the particular contract, but because contact in general might enhance the resources of the enemy or cripple those of the subjects of the King. *Furtado* v. *Rogers* (2) advanced the application of the rule a step further. Here the contract which was one of insurance to indemnify for losses by war was entered into when the countries were at peace. It was held that to allow such a contract, if war meant war between the insurer's country and this country, was unlawful. The ground on which this is put is very important. LORD ALVANLEY said (3 Bos. & P. at p. 198):

> "We are all of opinion that on the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his country; and that such contract is as much prohibited as if it had been expressly forbidden by an Act of Parliament. It is admitted that if a man contracts to do a thing which is afterwards prohibited by an Act of Parliament he is not bound by his contract. This was expressly laid down in *Brewster* v. *Kitchel* (12). And on the same principle when hostilities commence between the underwriter and the assured the former is forbidden to fulfil his contract."

He then cites a passage from BYNKERSHOEK'S QUÆSTIONUM JURIS PUBLICI:

> "Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere"

and another from VALIN who, speaking of the conduct of the English during the war of 1756, who, at that time permitted these insurances, said:

> "The consequence was that one part of the nation restored to us by the effects of insurance what the other took from us by the rights of war."

He goes on to deal with another argument in a way which seems to apply directly to some of the arguments used in this case (ibid. at p. 199):

> "But it is said that the action is suspended and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy, however, is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter."

Then came *Esposito* v. *Bowden* (1) which applied the doctrine to a contract executory and as yet unfulfilled.

From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (i) gives opportunities for the conveyance of information which may hurt the conduct of the war or (ii) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law. I do not quote the recent dicta of learned judges in the cases already cited of *Porter* v. *Freudenburg* (5), *Robson* v. *Premier Oil and Pipe Line Co.* (3), and *Zinc Corpn., Ltd.* v. *Hirsch* (11) because, although they are to the same effect and I agree with them, the recent cases are in one sense submitted in this case to the review of your Lordships' House. Let me now apply this rule to cl. 15 on the hypothesis that it does suspend delivery during the war. But for it the contract would immediately end, by it the contract is kept alive, and that not for the purpose of making good rights already accrued, but for the purpose of securing rights in the future by the maintenance of the commercial relation in the present. It hampers the trade of the

British subject, and through him the resources of the kingdom. For he cannot in view of the certainly impending liability to deliver (for the war cannot last for ever) have a free hand as he otherwise would. He must either keep a certain large stock undisposed of, and thus unavailable for the needs of the kingdom; or, if he sells the whole of the present stock he cannot sell forward as he would be able to do if he had not the large demand under the contract impending. It increases the resources of the enemy for, if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stocks, but it represents a present value which may be realised by means of assignation to neutral countries. For these reasons I come to the conclusion that cl. 15 is void as against public policy and cannot receive effect. Without cl. 15 there is an obvious necessity for intercourse, and the contract is, therefore, avoided as a whole. I am of opinion that the appeal should be dismissed with costs.

LORD ATKINSON.—The facts have already been fully stated, and it is unnecessary to repeat them. SANKEY, J., and the Court of Appeal, following the general lines of the decision in *Zinc Corpn., Ltd.* v. *Hirsch* (11), held that the above-mentioned provisions of this contract, as well as those contained in several other of its clauses, especially the fifth, sixth, eighth, tenth, twelfth, eighteenth, and nineteenth clauses, would involve, and, indeed, necessitate, frequent communications between the appellants and the respondents on their commercial concerns and dealings—and that communications of that character between a British subject and an enemy subject being admittedly illegal during the continuance of a state of war between the countries of the respective parties to those communications, the contract of Oct. 19, 1913, was rendered illegal and void, and the respondents were entitled to the relief they claimed. The chairman of the respondent company was examined, and proved that those communications as above mentioned took place almost daily between the two companies during the currency of their business under the first agreement, and were absolutely necessary for the proper conduct of that business, and that similar communications would be necessary for the carrying out of the second agreement and the conduct of their business under it. I am far from disagreeing with either SANKEY, J., or the learned lord justices as to the grounds on which they respectively based their judgments. I agree with them in thinking that the terms of this second agreement required that in order to carry out the commercial transaction which was its subject-matter, frequent communication touching its details should necessarily take place between the appellants and respondents, and, if that be so, it is well established by many authorities that those communications would, under the circumstances, be illegal, and would vitiate and make void the contract that involved and required them. It is only necessary to refer to *The Hoop* (4), *Potts* v. *Bell* (13), *Esposito* v. *Bowden* (1), and *Janson* v. *Driefontein Consolidated Mines, Ltd.* (8) as authorities on the point.

The illegality of these communications does not in the slightest degree depend on the triviality of the business details communicated. The danger to the State involved in them lies probably to the greater extent in this, that, if permitted, they would afford easy opportunities for the communication of information most useful to the hostile belligerent State, and, therefore, injurious to the State of which the person making the communication was the subject. In *Potts* v. *Bell* (13) SIR JOHN NICHOLL (8 Term Rep. at p. 555), in an argument approved of, and, indeed, apparently adopted, by LORD KENYON and the court, put this objection most forcibly. The decisions in *The Panariellos* (14) and *Robson* v. *Premier Oil and Pipe Co., Ltd.* (3) following the decision of SIR WILLIAM SCOTT in *The Hoop* (4) and in *The Cosmopolite* (15), show that the prohibition, at common law, extended to intercourse of all kinds which could tend to the detriment to this country or the advantage of the enemy.

Owing to some observations which were made in argument, it is, I think, well

to point out that the illegality of any transaction as amounting to trading with the enemy does not at all depend upon whether it is profitable either to the British citizen or to the enemy subject who engages in it or the contrary. Trading with the subject of an enemy State, or with persons resident in that State, is assumed to be beneficial to the enemy State. It helps the enemy's trade and commerce, and so far defeats one of the objects of this country in going to war, which is to cripple that commerce, in order to force the enemy to come to peace. It may be that the trading would benefit this country as well; that, however, is not for the individual trades to decide. It is for the State to decide, and the State can, if it so desires, grant licences to trade to particular persons for particular commodities and so secure that benefit. In *Ex parte Baglehole* (16) LORD ELDON said (18 Ves. at p. 529):

> "Though it might be a very beneficial act in a subject of this country to purchase corn in France and send it to this country at the present period, yet if he was there without licence to reside and trade, such commerce would be clearly illegal."

That, I presume, was based on this ground, that, though beneficial to this country, it would also, presumably, be beneficial to the then enemy, France, and, because of that, necessarily detrimental to higher interests of England. LORD ALVANLEY, in the well-known passage of his judgment in *Furtado* v. *Rogers* (2), lays it down (3 Bos. & P. at p. 198)

> "that on the principles of English law it is not competent for any subject to enter into a contract to do anything detrimental to the interest of his own country, and such a contract is as much prohibited as if it had been expressly prohibited by an Act of Parliament."

LORD ALVANLEY was no doubt in that case dealing with the case of a policy of insurance, but he laid down this principle in general terms, and his decision was approved of without qualification in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (8). LORD ALVANLEY further says (ibid. at p. 199):

> "But it is said that the action [to recover on the policy] is suspended and the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy, however, is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter."

This remark applies to the suspensory clause in the special agreement.

I think, however, that in this case, a wider and equally important question arises for determination. SCRUTTON, L.J., refers at some length to it in his judgment. It is this, whether the outbreak of the war does not by itself make illegal the contract contained in cl. 15 of the second agreement. That clause provides that if the respondents should be prevented owing to strikes, war, or any other cause over which they have no control, from shipping from Huelva, or delivering to the appellants the ore purchased, the obligation of the respondents to ship and deliver the same during the continuance of the impediment and for a reasonable time thereafter to allow the respondents to resume shipments and deliveries should be suspended. There is a corresponding provision that should war or any other cause over which the appellants or their clients have no control prevent them from receiving the ore, the obligation to receive under the contract should be reduced in proportion or suspended during the continuance of the impediment and a reasonable time thereafter to allow the appellants time to recommence receipts. It will be observed that this clause only deals with the shipment, delivery, and receipt of the ore and save, so far as the suspension of those things may affect the other clauses of the contract, leaves those latter untouched. Many of the obligations these clauses impose still rest upon the parties, and it is because of this result that I concur in the conclusion at which the Court of Appeal have arrived.

As regards cl. 15, it is necessary in the first place to ascertain what is its precise

meaning. Do the words "war or other cause over which the sellers have no control" cover and embrace the present war between Great Britain and Germany? If they do not embrace it, the agreement is clearly illegal and void, inasmuch as it would bind a British subject to deliver goods to an alien enemy irrespective of that war, just as if the two countries were at peace. In my view, the clause clearly covers the existing war between this country and Germany. Next, does the prevention by war mean not only prevention by physical warlike operations, such as capture and blockade, for instance, but also prevention by the legal principles applicable to trading during a state of war—the prohibition of English subjects from engaging in commercial intercourse with alien enemies? I see no reason whatever for confining these words to the first of the results of a state of war. I think they include both results. Next, what is the meaning of the words the "obligation to deliver the ore shall be suspended"? Do they mean that the entire amount of ore contracted to be delivered, 2,200,000 tons less 15 per cent., are to be delivered as soon as the war shall have ended or within a reasonable time thereafter, or do they mean that the respondents are relieved for ever from the obligation to deliver each year while the war lasts the 440,000 appropriate to that year, so that at the end of the war they shall only be obliged to deliver the latter amount for every year between the termination of the war and Nov. 30, 1919? If the first, the agreement purports to secure, as far as an agreement of the kind with a company whose solvency has not been impeached, can secure great and immediate benefits to the appellants, and through them for their country. It will have secured for them the certainty that their trade and commerce with the appellants will be resumed immediately on the termination of the war, that a vast stock of ore will then or within a reasonable time thereafter be available for them, ready for delivery to them on their order, enabling them during the war to make forward contracts with their customers, and to raise money on the security of this agreement, and thus to keep alive to a considerable extent during the war their trade and commerce to their own gain with the resulting benefit to their country, since the trade and commerce of its residents during a state of war is indisputably presumed to be for its benefit, while it would, at the same time work to the detriment of England in that it would prevent this vast mass of ore being made available for English manufacture. Well, if it be the second, benefits, the same in kind though less in degree, would be secured to the appellants and their country, and the same injury in kind, though less in degree, inflicted on the respondents and their country. If this cl. 15 were deleted from the agreement it could not, I think, be contended for a moment that the contract was not illegal and void. I cannot think that a clause which does not deprive the appellants of the full enjoyment of all benefits of the contract, but merely postpones that enjoyment for an uncertain time, leaving it ultimately certain and secure, can change the nature of the contract and make it legal and binding. On this ground, therefore, as well as that I have first dealt with, I think this agreement has by the outbreak of war with this country and Germany become illegal and void, that the decision of the Court of Appeal was right and should be upheld, and this appeal dismissed with costs.

LORD PARKER OF WADDINGTON (read by LORD SUMNER).—I agree. To determine the effect of the war upon the rights and liabilities of the parties to a contract, it is obviously necessary to examine the contract itself and to determine what rights and liabilities it creates. It is not disputed that the interpretation of both contracts and the rights and liabilities of the parties thereunder are governed by English law. I will, in the first instance, deal with the contract of Jan. 27, 1910. This contract, as amended by its two endorsements, provides for the sale by the respondents to the appellants of a large quantity of cupreous sulphur ore to be shipped by the respondents from Spain to and delivered to the appellants at Rotterdam, Hamburg, Stettin, or other continental ports named by the appellants, during the years 1911, 1912, 1913, and 1914. Some part of the ore contracted to

be sold remained undelivered at the commencement of the war. Clause 15 of the contract provides that if owing to strikes, war, or any other cause over which the respondents had no control, the respondents were prevented from shipping or exporting the ore from Spain or delivering it to the appellants, the obligation to ship or deliver is to be suspended during the continuance of such impediment, and for a reasonable time afterwards to allow the respondents time to recommence shipments, and similarly, if war or any other cause over which the appellants have no control, prevents the appellants receiving the ore, the obligation to receive it is to be suspended during the continuance of said impediment, and for a reasonable time afterwards to allow the appellants time to recommence receipts. It seems reasonably clear that the effect of the clause is not to diminish the quantity of ore to be delivered under the contract, but merely to postpone deliveries until after the impediment in question is removed. Indeed, the contrary was not suggested in argument on either side. The important point of construction is whether the expression "war" as used in the clause covers war between the United Kingdom and Germany, its effect being to postpone deliveries under the contract during and for a reasonable time after the present war, leaving the respondents under an obligation to complete the deliveries contemplated by the contract as soon as possible after the conclusion of peace.

It appears to me that the clause is contemplating war as a physical impediment to the performance of what would otherwise be possible and lawful, and not as so changing the status of the parties as to render the performance of any part of the contract in fact illegal. Further, if the clause be construed as covering or providing against the effects of a war between this country and Germany, it is, in my opinion, void as contravening a well-known rule of public policy. It is not permissible by English law for a subject of the Crown to contract with a foreigner that in case of war between this country and the State of which the foreigner is a subject, the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise suffer by reason of the war or of anything done in the prosecution of the war. This is the principle which underlies LORD ALVANLEY'S judgment in *Furtado* v. *Rogers* (2). It is true that in that case the actual decision turned on the true construction of the contract, which was for insurance against capture at sea. It was held that such a contract impliedly excluded capture by His Majesty's naval forces. But the really important point is the reason for this conclusion. It was because otherwise the contract would have been altogether void as against the public policy of the realm. In *Janson* v. *Driefontein Consolidated Mines Co., Ltd.* (8) the same principle is recognised, though the decision itself turned on different considerations. An attempt was there made to extend the principle to a seizure of goods of the insured by his own government during peace, but at a time when war was anticipated, but this attempt failed. It is to be remembered that the question whether cl. 15 of the contract was or was not void ab initio as against public policy is not the same as the question how the war itself affected the rights and liabilities of the parties to the contract. The two questions are quiet distinct, though they were somewhat confused in the course of the argument. The latter question could only arise on the actual outbreak of war between this country and Germany; the former question might arise even if no such a war occurred. Clause 15 would clearly be applicable if the present war had been between Germany and France only, but if, according to its true construction, it covered war between Germany and this country, it could only be enforced to the extent to which what was legal in it could be severed according to well-known principles from what was illegal, and such a severance might be held to be impossible.

It follows from what I have said that in considering the rights and liabilities of the parties when the war broke out, cl. 15 of the contract must be ignored either because, according to its true interpretation, it does not apply at all, or because, if it does apply, it is invalid on grounds of public policy. The respondents were, therefore, at the commencement of the war liable to ship and deliver to

the appellants during the year 1914 the undelivered portion of the ore contracted to be sold. The effect of the war on this liability was clearly to abrogate it altogether. It could not be performed without trading with the enemy. The war made it illegal. *Esposito* v. *Bowden* (1) is clearly in point, and the decision appealed from is right.

Passing to the second contract, which is dated Oct. 9, 1913, your Lordships will find that it also was a contract for the sale of a large quantity of cupreous sulphur ore. The ore was to be shipped by the respondents from Spain and to be delivered to the appellants at Rotterdam, Hamburg, Stettin, or other Continental ports to be nominated by the appellants, during the years 1915, 1916, 1917, 1918 and 1919. The contract contains a clause (namely, cl. 15) for all practical purposes identical with the clause of the earlier contract. In determining the rights and liabilities of the parties to the contract when the war broke out, this clause must be ignored either because according to its true interpretation it does not cover the present war or because if it does cover the present war it is void on grounds of public policy. So far as deliveries under the contract fall to be made during the war, the liability of the respondents to make such deliveries is abrogated by the war on the principle of *Esposito* v. *Bowden* (1).

The only remaining question is as to the liability of the respondents in respect of the deliveries, if any, which, according to the contract, fall to be made after the war is over. In my opinion, the liability of the respondents in respect of these deliveries, if any, is also gone. It would be contrary to your Lordships' decisions in *Horlock* v. *Beal* (17) and *Metropolitan Water Board* v. *Dick, Kerr & Co.* (18) to saddle the respondents with a contingent liability to deliver ore the quantity of which must during the war remain uncertain when their real contract was for delivery of a large and definite quantity of ore at fixed dates for the delivery of which they could prepare beforehand and at a price presumably fixed with reference to the quantity to be ultimately delivered. It may be that a contract for the sale of goods to be delivered at a future date is abrogated by a war which begins and is brought to a conclusion between the date of the contract and the date fixed for delivery. I prefer, however, not to express an opinion on this now.

In the court below, the learned lords justices based their decision on somewhat narrower grounds. They assumed the applicability of the suspensory clauses in the contracts to the present war and their validity in law. But, in their opinion, the contracts contained other clauses which involved communication with the enemy during the war, and they held that, having regard to these clauses, the effect of the war was to abrogate the contracts altogether. In the view I take of the suspensory clauses, it is unnecessary to consider this point. I prefer to rest my opinion on the broader ground that the suspensory clauses cannot, for the reasons I have given, apply to the present war and upon the consequences which necessarily follow, if they do not apply. Your Lordships were invited by counsel for the respondents to go still further. He maintained that the war abrogated every executory contract with an enemy, or, at any rate, every executory contract of a commercial nature whether or not it involved trading with the enemy during the war. He argued alternatively, that any contract which in the opinion of the court was beneficial to the enemy was abrogated by the war. It appears to me inadvisable to consider these points unless or until they arise in some concrete form. I may perhaps add this. Some stress was laid in argument on certain passages of my judgment in *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Gt. Britain), Ltd.* (19). I entirely fail to see what bearing these passages have on any question which your Lordships have now to decide. They dealt with certain suggestions made in argument to the effect that certain specified acts, otherwise lawful, might during the war be rendered unlawful, merely because of their tendency to enrich the enemy when the war was over. They certainly did not go to any question of public policy or to any question as to the effect of war on contracts between a British subject and a person who became an enemy on

the outbreak of hostilities. In my opinion, the appeal fails and should be dismissed with costs.

LORD SUMNER.—There are two contracts to which this appeal refers. Under the first, as enlarged by two endorsements, the last shipment was to be made by Nov. 30, 1914. This contract was in course of execution when the present war began, and a substantial quantity still remains undelivered. Under the second, deliveries were not to begin till Feb. 1, 1915, and nothing has been done under it. Clause 21 provided that "all former contracts are to be considered as expired on Mar. 1, 1915." Accordingly, I do not propose to distinguish the first contract from what I have to say about the second.

The appellants have raised two contentions, both of which are, I think, of the essence of their argument: (i) that the effect of the outbreak of war depends on the particular terms of the contract in question and not upon the general character of the class of contracts to which it belongs; and (ii) that the outbreak of war discharges further performance only where those terms necessarily involve commercial intercourse with the enemy. If the first proposition is not true, the particular terms of the contract are immaterial. If the second should be read "involves naturally or ordinarily" instead of "necessarily," then, on the mere construction of this contract, I think the argument fails. Even if cl. 15 has full effect as a suspension, still it only suspends the sellers' obligation to ship and deliver, and does not cancel it. Clause 12 is left unaffected throughout, and under it declarations in writing would naturally be given by the buyers as soon as the end of the suspension drew near, even if there were not an annual obligation on them to do so, which I believe to be the better construction.

The rule of law which forbids a British subject to trade with the King's enemies is very ancient. Its effect upon trading contracts which, like the present, are executory on both sides, was already well settled by the middle of the last century. *Esposito* v. *Bowden* (1) finally answered the last of the questions which had been raised down to that time. The Court of Queen's Bench held that the charter was only dissolved on the outbreak of war, if it could not possible be performed without trading with the enemy, and in supporting this decision in the Court of Exchequer Chamber, Mr. Manisty argued that the mere declaration of war did not rescind the executory contract in question, but "it only suspends it and renders it illegal when it cannot be performed in any legal manner." The Court of Exchequer Chamber first of all made it plain that the question was a general one, not dependent on the mere possibilities of the particular case, and that the occlusion of Odessa to Englishmen generally, by force of law, for an indefinite and presumably protracted time, could not be done away with by suggesting some possibility of a British ship loading cargo in that enemy port, while somehow or other avoiding all contact with any enemy. Secondly, the court decided in express terms that illegality does not suspend; it dissolves. What the law forbids is impossible of performance to those who owe obedience to that law, and this higher public obligation discharges any private obligation to the contrary. Before 1914 I do not think that the theory, upon which this dissolution is held to occur, had been the subject of actual decision. The common law rule is much older than the development of overseas commerce, and during last century the practical question raised was: "How does the rule affect commercial contracts?" and not: "How is that effect to be stated and justified in terms of general jurisprudence?" It occurred, however, within recent years, to some ingenious mind, obviously with the desire to prefer private commerce to public principle, that a clause of suspension might secure to particular contracts that continued existence during the war which the Exchequer Chamber had denied generally. To negotiate towards the end of a war for the conclusion of a contract to sell and deliver goods as soon as peace should be signed would be a crime, but to stand bound to do so by a contractual tie throughout the war might possibly be lawful, if only the contract was concluded

before the war with a provident eye to the possibility of its occurrence. Hence the disputes, of which the present appeal is a type. A

Does a suspensory clause oust the application of the general rule? Public policy, though a clue to the principle involved, is not in itself the key to the difficulty. The rule as to the dissolution of trading contracts on the outbreak of war, when they are executory on both sides, is said to exist for the purpose of assisting to cripple the enemy's commerce and of closing an avenue to illicit and traitorous correspondence. These are, however, the practical advantages of the rule, not its basis in theory. Courts of law are not at liberty to apply the rule and dissolve a contract merely because they think its continuance disadvantageous to this country's belligerent policy. I think that public policy is a separate ground for deciding this particular case, but, so far as trading with the enemy goes, I wish to keep within what I conceive to be implicit in the old decisions upon the question. If upon public grounds the law interferes with private executory contracts on the outbreak of war by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, to suspend merely where the law dissolves? The prohibition, which arises at common law on the outbreak of war, has, for this purpose, the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the contract is said to be only suspended, or a court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war. B C D

An appearance of authority to the contrary is sometimes found to be in truth a misreading of the language of a decision. Thus Lord Halsbury's use of the word "affected" in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (8) ([1902] A.C. at p. 493) is due to the fact that, by consent, the case had been tried as if the then war had terminated, and the question was one of a cause of action, which had accrued one day before the outbreak of war and thereupon had been suspended as to the remedy only. Of course, if the war was treated as over, neither contract nor remedy was "affected." The policy was not an executory contract after war broke out, so far as concerned the gold seized at Vereeniging at all. There can be no doubt that the matter must have been considered. To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of Willes, J., in *Esposito's Case* (1) (7 E. & B. at p. 792): E F G

> "In all ordinary cases the more convenient course for both parties seems to be that both should be at once absolved, so that each on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage and the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well-known rule, to meet cases of ordinary occurrence." H I

To his mind, I think it is clear that the rule was one made to provide certainty at the outbreak of war where in itself everything is uncertain; that it was one made to apply in all cases, although taking its form from the need of ordinary cases, and that for the purpose of applying it the case must be looked at as things stood when war broke out, and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action. In the abstract, discharge of a contract by reason of the outbreak of war between the countries to which the parties respectively belong should be effected simply by

operation of law independently of their arrangements. The rule sets the public welfare above private bargain. It does so for the safety of the State in the twofold aspect of enhancing the nation's resources and crippling those of the enemy. To hold that the parties may be allowed to make their own arrangements for attaining these ends and to set their private judgment, not untinged by considerations of their future interest, above the prescriptions of the public law would be anomalous. To say that for the purpose of preventing such intercourse the law generally determines stipulations which involve commercial intercourse between enemies, but, when the parties have agreed not to hold any such intercourse, is content to leave it to them, would indeed be rash. True, there is the criminal law against holding commercial intercourse with the enemy, but the offence is one not always easy to detect. In a matter of national safety the State cannot surely rely on the bare integrity and good faith of persons whose commercial interest may so strongly conflict with their public duty.

Though the contracts now in question are elaborate in form and grandiose in scale they are not in their nature distinguishable from such a contract as that in *Esposito* v. *Bowden* (1). The latter was a charter; the former are contracts to sell goods and deliver them overseas under many charters. STORY, J., in *The Rapid* (20) said (1 Gall. at p. 309):

> "It was nowise important whether the property engaged in the inimical communication be bought and sold or merely transported and shipped."

Nor is it material that these contracts provide for a series of shipments and for deliveries by instalments. CHANCELLOR KENT puts the very case of a contract to ship in instalments in *Griswold* v. *Waddington* (21) (16 Johns. Rep. at p. 489) and dismisses it as indistinguishable from a contract for a single shipment. It is not for this purpose that each instalment can be treated as if it were the subject of a separate contract, or that instalments, which in point of date might fall to be delivered after the conclusion of peace, could be severed from the rest. The whole contract so far as it is mutually executory is dissolved. Again the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace is not an argument in favour of substituting suspension by agreement for discharge by operation of law. Whether it sounds in debt or in damages such a cause of action implies a present obligation to pay simultaneous with its coming into existence. Suspension of the remedy implies no continuance of the contract during the war, but only a recognition of its existence before the war as the basis or origin of a right, which, when it has accrued, is a chose in action, a form of property. In my opinion discharge by operation of law upon the outbreak of war operates upon trading contracts as a class, by reason of their common characteristic of international intercourse, and is not prevented by special stipulations between the parties. It is not necessary for present purposes to define the term "trading" or the word "enemy." The class affected is not such contracts as contemplate a continuance of trading during war, but trading contracts as such, which are in being as mutually executory contracts at the outbreak of war, and which as such would in ordinary course and circumstances import commercial intercourse. LORD LINDLEY, in *Janson's Case* (8), said ([1902] A.C. at p. 509):

> "War prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading."

As the present case is one of such executory trading, I think the rule that such contracts are discharged upon the outbreak of war must apply.

There is another and independent ground on which this appeal may be disposed of. LORD ALVANLEY, C.J., in *Furtado* v. *Rogers* (2), speaking of a commercial contract operating after the outbreak of war though made before it, said (3 Bos. & P. at p. 198):

"We are all of opinion that on the principles of English law it is not competent to any subject to do anything which may be detrimental to the interests of his own country."

If the principle of this decision be applied to the construction of these contracts, the suspensory clauses must be read as if they contained the words "an Anglo-German war always excepted"; in that case under *Esposito* v. *Bowden* (1) the contracts became discharged. If the above passage be applied and the suspensory clauses be read as the appellants contend, then, in my opinion, the contracts never were valid. They were void from the outset on grounds of public policy. It is incidental to the conduct of war that the Sovereign should be free to bring pressure to bear on the enemy by crippling his commerce and exhausting his resources; it is incidental to the conduct of war that the resources of the Sovereign's subjects should be free to be employed lawfully in preserving and extending the resources of the realm. It is further important to its conduct that there should be no clog on the Sovereign's power to impose his will on the enemy through fear of the inclusion of unfavourable economic conditions in any treaty of peace. The present contract involves large sums. Your Lordships were told that its future performance represents £10,000,000 to the buyers, and it well may be so. Multiply these contracts, say, a hundredfold—no extravagant hypothesis—and what is the result on the conduct of the war? If these suspensory clauses are valid, the enemy knows three things: the first, that he may expend certain of his material resources without stint, for his right to replenish them in enormous quantities is assured at or shortly after the conclusion of peace; the second, that the present employment of these raw materials as British resources during the war, whether in the way of commerce or in the actual supply of combatant needs, is hampered by the existence of huge future commitments, performable at an uncertain, and, perhaps, not distant, date; the third, that he may rest assured that the imposition of commercial disadvantages in the treaty of peace is pro tanto neutralised, and that military resistance may be prolonged in proportion. I think it plain, as it was thought by the courts below, that such suspensive clauses as are in question here tend to defeat the successful conduct of the war on His Majesty's part, and are, therefore, contrary to public policy and render the contracts void.

I do not forget how limited is the extent to which courts of law can guide their decision by their views of public policy, nor am I insensible to the fact that in given circumstances, perhaps in circumstances as they are now, more profits may be lost by British than by enemy subjects, if all mutually executory trading contracts are discharged on the outbreak of war. How this may be, in my opinion, a court of law is not competent to inquire or decide. Is it to be guided by the sums involved, the profits in prospect, or the economic value of the particular commodity to the general commerce and industry of the nation? Is it to call upon private parties to give evidence of the existence of the contract (probably jealously concealed), to which others are parties and they are strangers? It is for the executors to investigate and for the legislature to provide for such possibilities. All that judges can do is to adhere to established rules, to ascertain their logical foundations, and to apply them impartially to disputed cases.

The declaration adjudged for the respondents was, in my opinion, right, and the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. A. Crump & Son*; *Slaughter & May.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

REIGATE *v.* UNION MANUFACTURING CO. (RAMSBOTTOM), LTD., AND ANOTHER

[COURT OF APPEAL (Pickford, Bankes and Scrutton, L.JJ.), January 14, 15, 1918]

[Reported [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479]

Agent—Termination of agency—Voluntary liquidation of principal—Inability to continue business save at a loss—Right of principal to terminate agency—Need to prove continuance of inability during term of contract—Right of agent to damages—Measure.

By an agreement made on Dec. 27, 1915, between the plaintiff and the defendant company, in consideration of the plaintiff taking up 1,000 shares in the company and introducing certain lines of goods, the company appointed the plaintiff sole agent in certain countries for the sale of those goods for seven years (if he should live so long) and thereafter until the agency should be determined by either party on six months' notice. The plaintiff was to use his best endeavours to obtain orders, and orders obtained were to be communicated to the company, who were to carry out such orders as were confirmed or accepted without undue delay. Confirmation or acceptance of the orders was not to be unreasonably withheld. Commission was payable to the agent on goods delivered by the company when paid for. The company, having failed to raise further capital, became insolvent, went into voluntary liquidation, and ceased to carry on business.

Held: the inability of the company to carry on business except at a loss would provide a reasonable ground for withholding acceptance of orders, but in the absence of evidence that that inability would continue during the seven years of the contract the company was not entitled to cease to carry on business and prevent the plaintiff from earning his commission; therefore, the company were in breach of the contract, and the plaintiff was entitled to recover the actual loss sustained by him, which would depend on what was proved as to the probable financial position of the company and its right for good reason to reject orders during the remainder of the term of the contract.

Rhodes v. *Forewood* (1) (1876), 1 App. Cas. 256, distinguished.

Notes. Considered: *Fowler* v. *Commercial Timber Co., Ltd.*, [1930] All E.R.Rep. 224. Followed: *Re Gramophone Records, Ltd.* (1930), 69 L.Jo. 201. Referred to: *Thomas* v. *Todd*, [1926] All E.R.Rep. 564; *Livock* v. *Pearson* (1928), 33 Com. Cas. 188; *Broome* v. *Pardess Co-operative Society of Orange Growers (Established 1900), Ltd.*, [1940] 1 All E.R. 603; *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] 1 All E.R. 33; *Leak* v. *Charles & Sons* (1948), 92 Sol. Jo. 154; *General Publicity Services, Ltd.* v. *Bestis Brewery Co.*, [1951] 2 T.L.R. 875.

As to the rights of an agent against his principal, see 1 HALSBURY'S LAWS (3rd Edn.) 201, 202, 240 et seq.; and for cases see 1 DIGEST 488 et seq., 688 et seq.

Cases referred to:

(1) *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; 47 L.J.Q.B. 396; 34 L.T. 890; 24 W.R. 1078, H.L.; 1 Digest 540, *1944.*

(2) *Midland Counties District Bank, Ltd.* v. *Attwood*, [1905] 1 Ch. 357; 74 L.J.Ch. 286; 92 L.T. 360; 21 T.L.R. 175; 12 Mans. 20; 9 Digest (Repl.) 566, *3734.*

(3) *Lazarus* v. *Cairn Line of Steamships, Ltd.* (1912), 106 L.T. 378; 28 T.L.R. 244; 17 Com. Cas. 107; 56 Sol. Jo. 345; 1 Digest 540, *1945.*

(4) *Re English and Scottish Marine Insurance Co., Ex parte Maclure* (1870), 5 Ch. App. 737; 39 L.J.Ch. 685; 23 L.T. 685; 18 W.R. 1123, C.A.; 1 Digest 542, *1953.*

(5) *Re Newman, Ltd., Raphael's Claim*, [1916] 2 Ch. 309; 85 L.J.Ch. 625; 115 L.T. 134; 60 Sol. Jo. 585; H.B.R. 129, C.A.; 1 Digest 543, *1957.*

(6) *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (1876), L.R. 3 Ind. App. 200, P.C.; 1 Digest 541, *1949*.

(7) *Northey* v. *Trevillion* (1902), 18 T.L.R. 648; 7 Com. Cas. 201; 1 Digest 541, *1947*.

(8) *Turner* v. *Goldsmith*, [1891] 1 Q.B. 544; 60 L.J.Q.B. 247; 64 L.T. 301; 39 W.R. 547; 7 T.L.R. 233, C.A.; 1 Digest 541, *1946*.

(9) *Measures Bros.* v. *Measures*, [1910] 2 Ch. 248; 79 L.J.Ch. 707; 102 L.T. 794; 26 T.L.R. 488; 54 Sol. Jo. 521; 18 Mans. 40, C.A.; 9 Digest (Repl.) 558, *3692*.

Also referred to in argument:

Hamlyn & Co. v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266*.

Re Havana Exploration Co., Ltd., Nathan's Claim, [1915] 1 H.B.R. 187; reversed, [1916] 1 Ch. 8; 85 L.J.Ch. 174; 114 L.T. 16; [1916] H.B.R. 37, C.A.; 10 Digest (Repl.) 995, *6838*.

Re Fairbairn Engineering Co., Ladd's Case, [1893] 3 Ch. 450; 63 L.J.Ch. 8; 69 L.T. 415; 42 W.R. 155; 1 Mans. 100; 8 R. 16; 9 Digest (Repl.) 444, *2908*.

Bateman & Co. v. *Ball* (1887), 56 L.J.Q.B. 291; 10 Digest (Repl.) 1054, *7312*.

Re Patent Floor Cloth Co., Ltd., Dear and Gilbert's Claim (1872), 41 L.J.Ch. 476; 26 L.T. 467; 1 Digest 542, *1956*.

Ogdens, Ltd. v. *Nelson, Ogdens, Ltd.* v. *Telford*, [1905] A.C. 109; 74 L.J.K.B. 433; 92 L.T. 478; 53 W.R. 497; 21 T.L.R. 359, H.L.; 10 Digest (Repl.) 973, *6708*.

Appeal from an order of BAILHACHE, J.

By an agreement, dated Dec. 27, 1915, and entered into between the plaintiff, Albert Maurice Reigate, and the first defendants it was provided:

"1. In consideration of the said Albert Maurice Reigate [the agent] applying for 1000 £1 shares in the capital of the company and paying the same up in full on allotment and also in consideration of the agent having introduced and suggested certain lines of goods to the company, the company hereby appoints the said Albert Maurice Reigate, and the agent hereby accepts the position of, sole agent for Great Britain and Ireland, India, and the colonies (save and except for the sale of molletons for the city of Manchester) for the sale of cotton and union rugs, cotton and union shawls, cotton and union blankets, cotton sheets, table covers, curtains and molletons, either made up or in piece, for the term of seven years from the date hereof (if the agent shall so long live), and thereafter until these presents shall be determined by either party giving to the other six calendar months' notice in writing of such intended determination. 2. The agent shall use his best endeavours to obtain orders for the company's said goods at prices to be from time to time agreed upon between the parties hereto, and all orders obtained by the agent shall be at once communicated to the company, who upon approving or rejecting the same shall inform the agent that the same have been either accepted or rejected as the case may be, and shall carry out such orders as are accepted without any undue delay and in accordance with the terms thereof. 3. The company shall pay or allow to the agent so long as he shall continue to be their agent under these presents a commission of 4 per cent. upon the invoiced prices of all goods delivered by the company under the terms of these presents and duly paid for by the respective purchasers thereof. The agent hereby undertakes and agrees to indemnify the company up to an amount of 50 per cent. upon all bad debts incurred in reference to goods sold by the agent under the terms of this agreement. . . . 6. The agent shall during the continuance of his agreement give such portion of his time and services to the obtaining of orders for and on behalf of the company as aforesaid as may be necessary for the purpose, and shall be at liberty to carry on his usual trade and business as manufacturers' agent, &c., as hitherto. 7. The company hereby agrees

during the continuance of this agreement not to appoint any other agent for the sale of the goods the subject-matter of these presents, and will not directly accept orders from any other person, but will refer such other persons to the agent for the orders to be carried out and executed through him. 8. The agent shall not during the continuance of this agreement act as agent for any other firm for goods made by the company and the subject-matter of this agreement so far as such goods shall be manufactured by the company. . . . 10. The agent shall not definitely accept orders for and on behalf of the company, but shall only accept such orders subject to confirmation and acceptance by the company, but such confirmation or acceptance shall not be unreasonably withheld."

The second defendants, the Elton Cop Dyeing Co., Ltd., guaranteed to the plaintiff the due performance of the above agreement. The first defendants were unable to get the capital which was necessary for them to carry on, and they became insolvent and went into voluntary liquidation. BAILHACHE, J., held that, whether the reason for the voluntary liquidation was insolvency, or whether it was to wind-up the company's affairs and dispose of its assets, in either case the liquidation put an end to the contract, and was a breach of it. The plaintiff, therefore, was entitled to damages, the assessment of which the learned judge referred to an official referee. The defendants appealed.

Ashton, K.C., and *J. D. Crawford* for the first defendants.
Cyril Atkinson, K.C., and *Spafford* for the second defendants.
Schwabe, K.C., and *Farleigh* for the plaintiff.

PICKFORD, L.J.—This case arises out of an agreement made between the plaintiff and one of the defendants, the Union Manufacturing Co. (Ramsbottom), Ltd., who were guaranteed by the other defendant, the Elton Cop Dyeing Co., Ltd. In my opinion, the whole question turns upon the construction of the contract. We have had a discussion as to the circumstances in which terms may be implied into a contract in which they do not appear expressly, but I do not think that it is necessary to consider that question.

The plaintiff had done a considerable business in some sort of goods manufactured or prepared in Germany. When the war broke out that business could not be carried on. The first defendants, the Union Manufacturing company, thought that they could manufacture the goods. Consequently, they made an agreement by which the plaintiff was to act as their agent for seven years and be paid a commission on all the orders he brought. In about a year it was discovered by the first defendants that they could not fulfil orders got by the plaintiff except at a considerable loss. The plaintiff could not help them to find capital, and they went into voluntary liquidation, the business being ultimately sold to another company.

The first question is this: Were these defendants by this contract bound, subject to the right of reasonable refusal, to accept the plaintiff's orders during the period of seven years for which the agreement was made, or were they at liberty at any moment to say: "We are not going to carry on our business any longer. You were to be our agent for seven years for the business which we did. We have carried that out. We have given you all the business we have done, but we are going to do no more"? In other words, were these defendants entitled to take the position of the defendant in *Rhodes* v. *Forwood* (1)? That depends upon the agreement. [HIS LORDSHIP read cll. 1, 2, 3, and 10 of the agreement.] If there were only cll. 1 and 3 and the remaining clauses in the contract, it seems to me there would be a good deal to be said for this being what is called a *Rhodes* v. *Forwood* (1) agreement. But when you read cl. 2, qualified, as it is, by cl. 10, it seems to me that it is not a contract of that kind at all. Suppose that cl. 2 were to be read without the words as to approval at all, it would then read: "The agent will use his best endeavours to obtain orders for the goods, such goods to be at prices to be from time to time agreed upon between the parties, and all orders

obtained by the agent shall be at once communicated to the company, who shall carry out and execute such orders without any undue delay and in accordance with the terms thereof." If it ran in that way, I cannot entertain any doubt that the plaintiff would be an agent during the term of seven years stipulated in the clause, and that cl. 3 is only providing for the terms of remuneration upon the obtaining of such orders. If the words as to approval were unqualified, as they stand now in cl. 2, there would be an absolute right of approving or rejecting given to the company, and, therefore, they need not accept any order at all. At any rate, they might have that right; I would not say they would. But that is qualified by cl. 10, which provides that they shall not withhold their approval except on reasonable grounds. Reading all that together, it seems to me to come to this: "You shall be our agent for seven years; you must get all the orders you can; we will accept and carry out these orders subject to this: that we shall have a right of reasonable refusal." In my opinion, that is not a *Rhodes* v. *Forwood* (1) agreement. I do not think we have to go to any doctrine of implied term; there is an express contract that during the term of the agency these defendants will carry out the orders obtained by the plaintiff, which he is bound by agreement to obtain, subject to a right of reasonable refusal. That is an express, and not an implied, term.

I think that there was a breach of that term. I do not at all understand *Midland Counties District Bank, Ltd.* v. *Attwood* (2) before WARRINGTON, J. It seems to me it may very well be that in certain contracts and under certain circumstances a voluntary winding-up may not be a termination to an employment or a breach of a contract, but I do not think that WARRINGTON, J., meant to decide that under no circumstances whatever can a voluntary winding-up create such a state of things that there is a breach of contract by the company that has been wound-up. This company was wound-up because it was insolvent. BAILHACHE, J., has so found, and I think he was right; but before the winding-up the company had intimated to the plaintiff that they could not and would not go on unless they got additional capital, and that, unless he could find additional capital, they would have to find it elsewhere, and he would have to "stand down," at any rate so far as Manchester was concerned—a very important part of this agreement. Having intimated that to him in the plainest terms, they proceeded to carry it out by going into voluntary liquidation and afterwards selling their business. I cannot look at these matters as anything but a breach of that contract. It was an intimation to him that they no longer had any intention to carry out their contract with him. To my mind, it matters little whether that was carried out by voluntary liquidation or otherwise; the voluntary liquidation is only part of the history of the repudiation of the contract; therefore, I am of opinion that there was a breach of contract.

This further question arises. I agree with BAILHACHE, J., that an inability to carry out the orders obtained by the plaintiff, except by such a loss that it would make the company insolvent, is a reasonable ground for not carrying them out, but I do not think the fact that they could not at the moment they went into voluntary liquidation carry them out except at a loss shows that they would have had that reasonable ground for refusing all orders for the remainder of the seven years. I do not think an inability at that time to carry them out except at a loss justifies them in saying at once: "We will not consider anything more; we will carry out no more orders at all." I think BAILHACHE, J., was right in saying that inability to carry out except at a loss would be reasonable ground for refusing, but I think he is also right in saying that he did not know and we do not know the circumstances sufficiently well to say whether they were such as would justify an entire repudiation of the contract in the way that the defendants repudiated it. Therefore, he took the right view; he was not asked to investigate these facts, and we cannot investigate them, because we have not got the material. I think he was right in taking the view that there was a breach, and that on the inquiry as to damages the official referee would have to look very carefully to see whether

A the circumstances were or were not such that there was no reasonable probability of any business being done during the remainder of the seven years at a reasonable profit or except at a considerable loss to the defendants. If the official referee were to come to the conclusion that the circumstances were such that in all human probability throughout the rest of the seven years the defendants would have had a right to reject each order that came on the ground that they could not carry it B out except at a loss, the damages would be affected. It does not follow that because the circumstances were as they were at the date of the liquidation they would so continue. I think I can support BAILHACHE, J.'s judgment on that. If the official referee comes to the conclusion that in all human probability the circumstances would continue such that the company throughout the rest of the seven years would be entitled to say: "We cannot carry out these orders at C the prices at which you can get them without bringing ourselves into bankruptcy," so that they would have the right, even if they carried on their business throughout the whole of the seven years, to reject every order, there would be very little damages indeed. But if he came to the conclusion that, although the times were very bad, prices might go up or the market might alter or something might happen which would make it possible to carry on business at a profit, he would estimate D the damages the plaintiff would be entitled to recover. This appeal should be dismissed with costs.

BANKES, L.J.—I agree. I do not think it would be of any assistance to go through the cases and to try and find any principle upon which they can all be considered to have been decided. I am content myself to adopt the sentiments E of SCRUTTON, L.J.'s judgment in *Lazarus* v. *Cairn Line of Steamships, Ltd.* (3). I ask myself whether this contract gives the plaintiff the right to a continuing benefit. The answer which I find on the face of the document itself is that it does, and quite shortly I will give my reasons.

First, I wish to say that I do not attach the same importance to that part of the agreement which provided that the plaintiff should invest some of his own F money in the company as BAILHACHE, J., did, because where a man buys shares in a company I think it is more correct to describe it, as the plaintiff described it in a letter of Nov. 27, 1914, as "taking a financial interest in the venture" rather than buying an agency for a term of years. But, taking the agreement as a whole, I find this. There is an appointment for a term of years. I agree that that in itself would not be sufficient; but I am only indicating these matters as being G matters which, taken as a whole, lead me to the conclusion at which I have arrived. Secondly, without the necessity for doing so, it is provided in the agreement that the death of the plaintiff will put an end to the agreement; but there is no corresponding provision in reference to the corresponding event—namely, the closing down by the company of its business. Thirdly, there is the fact that the plaintiff is paid by a commission calculated, not upon the profits of the company H and not upon the sales of the company—matters over which he has got no control —but upon the result of his own labours; and I do think that a distinction can be drawn between this case and some of the cases to which we have been referred on that ground. I only mention the fact that in *Re English and Scottish Marine Insurance Co., Ex parte Maclure* (4) the plaintiff was to be paid by a commission on profits, and in *Re Newman, Ltd. Raphael's Claim* (5) by a commission on the I sales of the company. The importance which is attached to that kind of payment, I think, is well indicated by what SIR ROBERT COLLIER said in an Indian case, *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (6) (L.R. 3 Ind. App. at p. 206), where he is drawing a distinction between a man paid by salary—and, of course, the salary may be arrived at by commission on the results of the agent's work. He says he is not necessarily affected by the prosperity or adversity of the company or even by its dissolution. The person who is paid, as this particular plaintiff was paid, by a commission upon the orders he obtains is not speculating at all upon the results of the business of the company. I think all the remaining clauses

in the agreement point to a continuance of the existence of the agreement for the full period. By far the strongest provision in the plaintiff's favour is the defendants' obligation to receive and accept the orders which the plaintiff obtains. That must, upon the face of the agreement, apply to the whole period of the agreement, but there is, very reasonably and naturally, introduced the provision that the company shall not be compelled to accept every order that is brought to them. Clause 2 provides that they may accept or reject as they please; but in cl. 10 comes the qualification that that acceptance shall not be unreasonably withheld. I agree that the words which follow might be read as applicable to the whole period of the agreement or so long as it continues, but, at the same time, when you find all the earlier clauses pointing, as I think they do, to a provision by the parties for what is to happen during the whole period of the agreement, one also finds that all the remaining clauses are entirely consistent with that—clauses that provide for rendering the agency accounts quarterly and that the agent shall not during the continuance of the contract act for any other firm, and so forth. Taking the agreement as a whole, the conclusion I come to is that it does in terms provide that the plaintiff shall have the right to the continuing benefit for the full period.

There are two other matters. It is said that the facts here indicate that the company were not really repudiating the agreement, but that they were merely taking advantage of the provision which entitled them to refuse to accept orders with regard to which it could be said that their refusal was reasonable. Of course, if the company had taken up that position and had indicated to the plaintiff, not that they were going to repudiate the agreement or close down the business, but that for the time being, owing to existing conditions, they could not accept orders from him at the prices, it would be a different matter. But they never did that or anything approaching it. What they did, as I read the facts and as BAILHACHE, J., read them, was to repudiate the agreement on the ground that their financial position was such that it was impossible for them to carry on business any longer. In those circumstances the voluntary liquidation is not the matter upon which the plaintiff is relying. That is some evidence of the condition of things, but what he is really relying upon are the events which preceded the voluntary winding-up—namely, the intimation by the company to the plaintiff that their financial condition was such that unless money was produced by him forthwith they would close the business and he would have to stand down. In those circumstances, in my opinion, the question of the effect of a voluntary liquidation pure and simple (if I may use that expression), without any surrounding circumstances, does not arise here, nor does the question arise as to what the position of the company would have been had they taken up the attitude: "We cannot at the moment, nor indeed possibly for some time to come, accept orders at the prices at which you are offering them; when conditions alter and times become better no doubt you will be able to offer us at prices we can accept." That does not seem to meet the point taken, nor intended to be taken, by the company at the time of the liquidation. In these circumstances I think the judgment was right.

SCRUTTON, L.J.—This case adds another to the long line of cases in which the courts have had to consider whether, where a contract such as that in this case has been made with a business firm or company, it is possible to terminate the carrying on of the business by the firm or company and so terminate the contract. A very large number of cases have been decided and a great amount of time has been taken up in endeavouring to see whether any principle can be extracted from these cases which will guide the courts in future cases. I had to consider all these cases as judge in the court below in *Lazarus* v. *Cairn Line of Steamships, Ltd.* (3), and I have been endeavouring to formulate such principles as I thought would guide me in dealing with the matter. After listening to the arguments in the present case and the remarks of my learned brothers, I see no reason to alter

anything I said in that case with this exception—that it has become quite clear to me in the course of this case that the further propositions I endeavoured to lay down in *Lazarus* v. *Cairn Line of Steamships, Ltd.* (3) may shape into each other, because the variety of agreements and facts are so infinite that you may get cases where it is very difficult to say whether they fall within one class or another. I am quite sure that any impartial mind considering *Northey* v. *Trevillion* (7) and *Turner* v. *Goldsmith* (8) would be satisfied that it would be very difficult to draw a hard-and-fast line between one case and another.

But I think these principles have been clearly established. Before you consider what has been decided in other cases, the first thing is to see what the parties have agreed to in the case under consideration; and, secondly, before troubling about seeing what you are to imply into the contract, the first thing is to see what the parties have expressed in the contract; and, when you have understood what the parties have expressed in the words there used, you are not to add implications because you think it would have been a reasonable thing to have put in the contract, or because you think you would have insisted on such a term being in the contract. You must only imply a term if it is necessary in the business sense to give efficacy to the contract—that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: "What will happen in such a case?" they would have both replied, "Of course, so-and-so. We did not trouble to say that; it is too clear." Unless you can come to some such conclusion as that, we ought not to imply a term which the parties themselves have not expressed when they have expressed other terms.

Turning to this contract, what have the parties expressed? In consideration of Reigate's investing £1,000 in the Union company, the company appoint him as sole agent for certain goods for seven years, payment being by commission on goods delivered and paid for on his orders. The company are to accept and execute all orders sent by Reigate unless they have reasonable grounds for refusal. To use the language of KENNEDY, L.J., in *Measures Bros., Ltd.* v. *Measures* (9) ([1910] 2 Ch. at p. 258), is there an implied condition

> "that the contract is to remain in force only so long as a certain state of things continues to exist,"

and, if so, what state of things is to exist which is the condition of the contract remaining in force? As I understand, it is suggested that the contract is only to remain in force so long as the company carry on their business. Is that a necessary implication? Supposing that the parties had been asked this: "You have not said so, but I suppose if the company ceases to carry on business this contract is at an end," would they both have said, "Yes, of course"? I should be very much surprised if they would. I expect they would immediately have found that they disagreed as to what the position was; and, unless I am satisfied that it is a necessary implication which must have been in the minds of both of them, I have no business to imply a term which they themselves have not expressed, particularly when I find they have thought sufficiently about the matter to express the conditions on which the agreement was to be determined—first, the obvious one that it was to be determined if the agent died; secondly, they assumed it might be determined after seven years if a particular notice was given. For these reasons I find an express condition that the contract is to continue for seven years, subject to the company refusing orders that they had reasonable ground to refuse, and no ground for implying a term that the seven years shall be subject to the implied condition that the company is carrying on business.

It has been argued that there has been no breach in this case, because all that happened was voluntary liquidation, and voluntary liquidation can never be a breach. In support of that I understand the decision of WARRINGTON, J., in *Midland Counties District Bank, Ltd.* v. *Attwood* (2) is relied on. The headnote of that is: "A resolution for the voluntary winding-up of a limited company does

not operate as a notice of discharge to the servants of the company." If that means to decide that the resolution for voluntary winding-up is never to discharge the servants of the company, I cannot agree. It appears to me it may be or may not be a discharge of the servants of the company according to the facts of the particular case. The reason given is that, whereas in the case of compulsory winding-up there is a change in the personality of the employer, in the case of voluntary liquidation there is no change. I am afraid I do not understand that reasoning. It appears to me that both in a compulsory and a voluntary winding-up the personality of the company continues till it is dissolved. A different person is managing the affairs of the company. In the case of compulsory winding-up he is appointed by the court; in the case of voluntary winding-up he is appointed by the company. The company is still in existence until its existence has been determined; and so far as the argument rests on a change of personality I do not understand it, and I cannot appreciate it.

I had some little doubt about the legal position in this case. A resolution to wind-up voluntarily was passed and confirmed, and five days afterwards the writ was issued, no order having been sent in the meanwhile. But having looked at the evidence again, and the correspondence, and especially having listened to the argument, I think it is clear that the defendant company by that resolution did intend to stop business with the agent; they treated that resolution as terminating the agreement with him. I think, for the reasons I have given, that they were wrong in that. There was, therefore, a repudiation of the contract accepted by the issue of the writ claiming damages for the breach, but I desire to express my entire agreement with what has been said by BAILHACHE, J., and PICKFORD, L.J.—that it by no means follows that there are damages on the assumption that a flourishing business is going to be carried on for seven years. The official referee, in my view, will still have to consider what was the probability, during the remaining term of the contract, that orders could be obtained at a price which would be profitable to the company, and which, therefore, the company must reasonably accept; or, if the price which was profitable to the company was such that no orders could be obtained, the official referee would again have to take that into account in considering what the agent has really lost by the fact that business has not gone on. The price was to be agreed, and no order need have been accepted at that price if there was reasonable ground for refusing it. It may be that the profitable price was so large that no orders could be got. I gather that that is a suggestion about the question of prices. On the other hand, it might be that, although they were ready to fix that price, the orders would turn out unprofitably, and, therefore, no further orders would be taken. It may be, therefore, that the referee will find the damages are extremely small, and it is quite possible we may hear of this case again, which I regret, but I cannot see that we know enough about the matter to decide it for ourselves. The official referee will have carefully to consider that aspect of the case which was indicated by BAILHACHE, J., and in the judgment of PICKFORD, L.J. For these reasons I agree with the judgment of BAILHACHE, J.

Appeal dismissed.

Solicitors: *Ralph Raphael*; *Grundy, Kershaw, Samson & Co.*; *Pritchard, Englefield & Co.*, for *Butcher & Barlow*, Bury.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

GUARANTY TRUST CO. OF NEW YORK *v.* HANNAY & CO.

[Court of Appeal (Pickford, Warrington and Scrutton, L.JJ.), March 22, 25, 26, April 10, 11, 12, May 6, 1918]

[Reported [1918] 2 K.B. 623; 87 L.J.K.B. 1223; 119 L.T. 321; 34 T.L.R. 427]

Bill of Exchange—Presentment for acceptance—Presentment with bill of lading attached—Implication of warranty of validity of bill of lading, representation as to such validity, and indemnity against loss through invalidity—"Unconditional order to pay"—Payment for purchase of cotton—"Charge the same to account of 100 bales of cotton" with identification marks—Marginal reference to date of sale and grade of cotton—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 3 (1).

The plaintiffs were the endorsees for value and in good faith of a draft drawn by K., Y. Co., of Decatur, Alabama, upon the Bank of Liverpool pursuant to a contract between the drawers and the defendants for the sale and purchase on credit of certain cotton. The draft ended with the words "and charge the same to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton," being part of that included in the contract, and there was a reference in the margin to the date of sale and the grade of cotton. Documents purporting to be a bill of lading and certificate of insurance relating to the cotton were attached to the draft. The draft was presented to the bank by the plaintiffs for acceptance in the ordinary course and in no special circumstances. It was accepted by them, and the bill of lading and certificate of insurance were detached and initialled by them. It was subsequently negotiated by the plaintiffs, and ultimately found its way into the hands of the London City and Midland Bank as holders in good faith and for value. It became due on Apr. 27, and was paid by the Bank of Liverpool. It was afterwards discovered that the so-called bill of lading was a forgery, and that no cotton had been shipped as represented by it. In January, 1911, the defendants commenced a suit in the United States District Court of New York against the plaintiffs, claiming payment by them of the amount of the bill on the ground, among others, that the plaintiffs had, by presenting the draft for acceptance in the circumstances mentioned, warranted the genuineness of the bill of lading. The present plaintiffs demurred, and on May 23, 1911, their demurrer was overruled by Noyes, J., the circuit judge (187 Fed. 686), on the ground that the draft was a conditional order, and, therefore, not a negotiable instrument, the judge further holding that in this case there was a cause of action. The suit came on for trial before Holt, J., district judge, in February, 1913, and resulted in a verdict and judgment for the present defendants, Holt, J., expressing the opinion that he was bound by the judgment of Noyes, J., on demurrer upon the points decided by him. The case was taken to the United States Circuit Court of Appeals, where it was heard in December, 1913, with the result that the appeal was allowed and a new trial directed to be had (210 Fed. 810), but the case was not re-tried in America, and in October, 1914, the plaintiffs issued the writ in the present action claiming from the defendants a declaration negativing the liability alleged by the defendants. The defendants counterclaimed for the amount paid on the draft, alleging that the question of negotiability must be determined by American law, that by that law the draft was not a negotiable instrument, and that, in those circumstances, there arose an implied warranty such as that referred to.

Held: no warranty by the plaintiffs of the genuineness of the bill of lading, nor any representation that it was genuine, nor any undertaking to indemnify the defendants if the bill of lading were not genuine, was to be implied from

the presentment by the plaintiffs of the bill of exchange for acceptance, and, therefore, the plaintiffs were entitled to the declaration they claimed and the defendants failed on their counterclaim.

Held, further: the draft was an unconditional order requiring the persons to whom it was addressed to pay a sum certain to specified persons, and so was a bill of exchange within s. 3 (1) of the Bills of Exchange Act, 1882; assuming, however, that it was a conditional order to pay, the condition being that the bill of lading was genuine, and, therefore, not negotiable, the holder could not require payment unless he gave the acceptor the goods, but that did not lead to the inference of an implied warranty that the drawer had performed or would perform his obligation, or an agreement to indemnify the acceptor if he had not.

Notes. Referred to: *Re Comptoir Commercial Anversois and Power, Son & Co.*, [1919] All E.R.Rep. 661; *Jaeger* v. *Jaeger Co.* (1927), 44 R.P.C. 437; *Sassoon* v. *International Banking Corpn.*, [1927] A.C. 711; *Greenwood* v. *Martin's Bank, Ltd.*, [1932] All E.R.Rep. 318; *Plein & Co.* v. *I.R.Comrs.* (1946), 175 L.T. 453.

As to presentment of bills of exchange and need for order to pay being unconditional, see 3 HALSBURY'S LAWS (3rd Edn.) 152, 153, 193–201; for cases see 6 DIGEST 14–19, 221 et seq.; and for Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

(1) *Leather* v. *Simpson* (1871), L.R. 11 Eq. 398; 40 L.J.Ch. 177; 24 L.T. 286; 19 W.R. 431; 1 Asp.M.L.C. 5; 6 Digest 161, *1035*.

(2) *Baxter* v. *Chapman* (1873), 29 L.T. 642; 2 Asp.M.L.C. 170; 6 Digest 161, *1036*.

(3) *Smith* v. *Mercer* (1815), 6 Taunt. 76; 1 Marsh. 453; 128 E.R. 961; 6 Digest 107, *733*.

(4) *East India Co.* v. *Tritton* (1824), 3 B. & C. 280; 5 Dow. & Ry.K.B. 214; 3 L.J.O.S.K.B. 24; 107 E.R. 738; 6 Digest 312, *2082*.

(5) *Sheffield Corpn.* v. *Barclay*, [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 54 W.R. 49; 21 T.L.R. 642; 49 Sol. Jo. 617; 3 L.G.R. 992; 10 Com. Cas. 287; 12 Mans. 248, H.L.; 26 Digest (Repl.) 237, *1820*.

(6) *Bank of England* v. *Cutler*, [1908] 2 K.B. 208; 77 L.J.K.B. 889; 98 L.T. 336; 24 T.L.R. 518; 52 Sol. Jo. 442, C.A.; 26 Digest (Repl.) 238, *1823*.

(7) *Moel Tryvan Ship Co.* v. *Krüger & Co.*, [1907] 1 K.B. 809; 76 L.J.K.B. 550; 96 L.T. 429; 23 T.L.R. 271; 10 Asp.M.L.C. 416; affirmed, [1907] A.C. 272; 76 L.J.K.B. 985; 97 L.T. 143; 23 T.L.R. 677; 51 Sol. Jo. 623; 10 Asp.M.L.C. 465; 13 Com. Cas. 1, H.L.; 26 Digest (Repl.) 232, *1792*.

(8) *Robinson* v. *Reynolds* (1841), 2 Q.B. 196; 1 Gal. & Dav. 526; 114 E.R. 76, Ex. Ch.; 6 Digest 162, *1040*.

(9) *Springs* v. *Hanover National Bank* (1913), 209 N.Y. 224.

(10) *Hannay* v. *Guaranty Trust Co. of New York* (1911), 187 Fed. 686; on appeal (1913), 210 Fed. 810.

(11) *Craig* v. *Sibbett* (1851), 15 Pa. 238.

(12) *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. Div. 848; 54 L.J.Ch. 1024; 52 L.T. 878; 34 W.R. 2; 5 Asp.M.L.C. 433, C.A.; 5 Digest (Repl.) 761, *6532*.

(13) *Amsinck* v. *Rogers* (1907), 189 N.Y. 252.

(14) *Guaranty Trust Co. of New York* v. *Grotrian* (1902), 114 Fed. Rep. 433.

(15) *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 20 Mans. 54, H.L.; 39 Digest 420, *526*.

(16) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.

(17) *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex.D. 164; 47 L.J.Q.B. 418; 38 L.T. 597; 3 Asp.M.L.C. 591, C.A.; 39 Digest 520, *1357*.

(18) *Sanders* v. *Maclean* (1883), 11 Q.B.D. 327; 52 L.J.Q.B. 481; 49 L.T. 462; 31 W.R. 698; 5 Asp.M.L.C. 160, C.A.; 39 Digest 423, *557.*

(19) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266.*

(20) *Crosse* v. *Gardner* (1688), Carth. 90; Comb. 142; Holt, K.B. 5; 3 Mod. Rep. 261; 1 Show. 68; 90 E.R. 656; 39 Digest 419, *515.*

(21) *Medina* v. *Stoughton* (1700), 1 Salk. 210; Holt, K.B. 208; 1 Ld. Raym. 593; 91 E.R. 188; 39 Digest 419, *516.*

(22) *Pasley* v. *Freeman* (1789), 3 Term. Rep. 51; 100 E.R. 450; 39 Digest 419, *517.*

(23) *Shepherd* v. *Harrison* (1871), L.R. 5 H.L. 116; 40 L.J.Q.B. 148; 24 L.T. 857; 20 W.R. 1; 1 Asp.M.L.C. 66, H.L.; 39 Digest 520, *1355.*

(24) *Woods* v. *Thiedemann* (1862), 1 H. & C. 478; 10 W.R. 846; 158 E.R. 973; 26 Digest (Repl.) 238, *1891.*

Also referred to:

National Bank v. *Merchants' Bank* (1875), 91 U.S. 92.
Lowery v. *Steward* (1862), 25 N.Y. 239.
Brill v. *Tuttle* (1880), 81 N.Y. 454.
Hibbs v. *Brown* (1907), 190 N.Y. 167.
Munger v. *Shannon* (1874), 61 N.Y. 251.
Lanfear v. *Blossman* (1846), 1 La. An. 148.
La Fayette v. *Merchants' Bank* (1905), 73 Ark. 561.
Waddell v. *Hanover National Bank* (1905), 48 N.Y. Miscel. Rep. 578.
Whitney v. *Eliot National Bank* (1884), 137 Mass. 351.
Martin v. *Brown, Shipley & Co.* (1883), 75 Ala. 442.
Bank of Guntersville v. *Jones Cotton Co.* (1908), 156 Ala. 525.
Cosmos Cotton Co. v. *First National Bank of Birmingham* (1911), 171 Ala. 392.
Schmittler v. *Simon* (1886), 101 N.Y. 554.
Hoffman & Co. v. *Bank of Milwaukee* (1870), 12 Wall. 181.
Goetz v. *Bank of Kansas City* (1887), 119 U.S. 551.
First National Bank of Detroit v. *Burkham* (1875), 32 Mich. 328.
Thiedemann v. *Goldschmidt* (1859), 1 De G.F. & J. 4; 1 L.T. 50; 8 W.R. 14; 45 E.R. 260, L.C. & L.JJ.; 6 Digest 209, *1291.*
Dynamit Act. v. *Rio Tinto Co.*, [1918] A.C. 292; 87 L.J.K.B. 549; 118 L.T. 191, H.L.; 11 Digest (Repl.) 444, *851.*

Appeal by plaintiffs from an order of BAILHACHE, J., made in an action in the Commercial List tried by him with a City of London special jury.

The facts appear in the headnote.

Gore-Brown, K.C., Hogg, K.C., Macnaghten, and *Cassie Holden* for the appellants.

Langdon, K.C., Greer, K.C., Herbert Jacobs, and *A. R. Kennedy* for the respondents.

Cur. adv. vult.

May 6, 1918. The following judgments were read.

PICKFORD, L.J.—The appeal in this case arises out of some extensive cotton frauds committed by a firm of Knight, Yancey & Co., of Decatur, Alabama. The particular transaction in question is a pretended sale of 100 bales of cotton by Knight, Yancey & Co. to the defendants in this action. The 100 bales were a part of a quantity of 1,000 bales sold c.i.f. Liverpool to be paid for by the sellers' draft upon the Bank of Liverpool. The plaintiffs became holders of the draft to which was attached a bill of lading for the 100 bales, and presented it to the Bank of Liverpool for acceptance. The bank accepted the draft, retaining the bill of lading, and paid the money on the due date to the London City and Midland Bank, who had become holders of the document after acceptance. The bill of lading had been forged by Knight, Yancey & Co., and no cotton had been shipped by them as described in it or corresponding to the description of cotton in the bill of

lading. The defendants repaid to the Bank of Liverpool—who had accepted the draft by agreement with them—the amount paid by them, and then sued the plaintiffs to recover the amount on grounds afterwards to be mentioned. A

The facts are stated in detail by BAILHACHE, J., with such care and accuracy that I think it would be useless to repeat them, and I adopt his statement ([1918] 1 K.B. at pp. 44–50) as part of this judgment. It is, however, necessary to mention that we were told by the plaintiffs' counsel that the statement that it was conceded that if the acceptance were conditional—i.e., not a negotiable instrument – the defendants were entitled to have their money back was a misapprehension on the part of the learned judge, and that it was not intended to make any such concession. They contended before us that, even assuming the document to be conditional and not negotiable, the defendants were not entitled to recover the amount on the following grounds. The money was not paid by the defendants, but by the Bank of Liverpool, and it was not paid to the plaintiffs, but to the London City and Midland Bank, who received it, not as the plaintiffs' agents, but by reason of a purchase of the bill after acceptance. If the document were not negotiable then, the plaintiffs contended, the bank were not liable upon it, and could avail themselves of any defence which would be good against Knight, Yancey & Co. Before payment by the bank it had come to their knowledge and that of the defendants that the bill of lading was probably forged, and the defendants had instructed the bank not to pay the money. The bank, however, declined to dishonour their own acceptance, and paid the money. It was contended that in these circumstances the defendants were not bound to indemnify the bank, and that their doing so was a voluntary payment and no action would lie against the plaintiffs to recover the amount from them. It was also contended that, whether the bank were liable to pay the London City and Midland Bank or not, and whether the defendants were liable to indemnify the bank or not, the defendants had no right to be reimbursed by the plaintiffs because the money was not paid to them or at their request, and there was no contract existing between the plaintiffs and the defendants which gave any rights to such reimbursement. These contentions are not mentioned by BAILHACHE, J., and were probably not raised before him. As I have mentioned, he considered that the liability of the plaintiffs in these events was conceded, but, after inquiries from the counsel for both parties, I think there was nothing in the conduct of the case below to preclude the plaintiffs from raising these contentions before us. B C D E F

I shall now deal with the points raised before BAILHACHE, J., and reserve these contentions till later. The first question is whether the defendants can recover this money assuming the case to be governed by English law. I agree with BAILHACHE, J., that the document was by English law a bill of exchange and negotiable, and that neither the draft nor the acceptance was conditional according to our law. Assuming this, the defendants contend that they are entitled to succeed on one or all of the following grounds: (a) that the plaintiffs warranted the genuineness of the bill of lading; (b) that they represented that it was genuine; (c) that they undertook to indemnify the defendants if it were not genuine; (d) failure of consideration, which entitled the defendants to recover the money as money had and received by the plaintiffs to the use of the defendants or paid by the defendants to the use of the plaintiffs at their request; (e) a mistake of fact by both parties which induced the bank as the defendants' agents to accept the bill. BAILHACHE, J., held that both on principle and authority all these grounds of claim failed, and I agree with him. G H I

So far as warranty, representation, and undertaking to indemnify are concerned, the case is governed by *Leather* v. *Simpson* (1), a decision of MALINS, V.-C., in 1871, and *Baxter* v. *Chapman* (2), a decision of BACON, V.-C., in 1873. These cases are decisions of a court of first instance, and are open to review in this court, but they have remained unquestioned now for over forty years, have been quoted in text-books as authorities, and have, no doubt, been guides in the conduct of many important mercantile transactions. I should, therefore, be much disinclined

to interfere with them even if I disagreed with their conclusions, but on examining them I am of opinion that the decisions are quite right, though, perhaps, some of the reasoning in the former may be open to criticism. Knight, Yancey & Co. had sold the cotton to the defendants on the terms that payment was to be made by sixty days' draft on the Bank of Liverpool. In order to carry out that transaction and to put themselves in funds, they sold the draft to the plaintiffs and handed over with it the bill of lading. There was probably also some document as to insurance and an invoice, but this is immaterial. The object of handing over the bill of lading or attaching it to the draft was to enable the plaintiffs to hand it to the bank on acceptance and also to give the plaintiffs a security in case of a refusal to accept. The plaintiffs, however, to use the words of BAILHACHE, J., bought the exchange, not the cotton, and they acquired no property in the bill of lading or the goods represented by it except so far as was necessary to secure them during the period between the purchase of the draft and its acceptance. On acceptance their interest in the bill of lading ceased to exist, and the special property which they had in it was not transferred to the bank, but extinguished. The property in the cotton and the right to the bill of lading then passed to the bank or the defendants, not by reason of any contract between the plaintiffs and the bank or the defendants, but by reason of the original contract of sale between Knight, Yancey & Co. and the defendants, the bank's principals. I doubt if the presentation of the draft for acceptance was a request by the plaintiffs to the bank at all; it may well be only an inquiry as to whether they were going to perform the contract of their principals with Knight, Yancey & Co. by accepting the draft.

The position of the holder of a bill of exchange who presents it for payment is, I think, well expressed in a lecture by DEAN AMES, of Harvard, in the HARVARD LAW REVIEW, vol. 4, pp. 297, 302, republished in AMES' LECTURES ON LEGAL HISTORY, p. 270, where he says:

> "The attitude of the holder of a bill who presents it for payment is altogether different from that of a vendor. The holder is not a bargainor. By presentment for payment he does not assert, expressly or by implication, that the bill is his or that it is genuine. He, in effect, says: 'Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money or protest it for non-payment.' CHAMBRE, J.'s statement (in *Smith* v. *Mercer* (3), 6 Taunt. at p. 84), that the holder warrants the genuineness of the bill by presenting it, was expressly repudiated by LITTLEDALE and BAYLEY, JJ., in *East India Co.* v. *Tritton* (4) (3 B. & C. at pp. 289, 291)."

He is no doubt in that passage speaking of the question whether there is a representation as to the genuineness of the bill of exchange, but I think the statement as to the position of the holder in such a case applies equally to the question whether there is a representation as to the bill of lading. But if it were a request, it was only a request to them to perform that contract, and such a request did not impose any liability upon the plaintiffs. It was not in any way such a request as those in *Sheffield Corpn.* v. *Barclay* (5) and *Bank of England* v. *Cutler* (6): see *Moel Tryvan Ship Co.* v. *Krüger & Co.* (7) ([1907] 1 K.B. at p. 825). I can see nothing in these circumstances to afford evidence of warranty or representation or undertaking to indemnify, and it is admitted that there was no express agreement by the plaintiffs on any of the points, and that it must arise, if at all, by a necessary implication from the circumstances. I think that the cases which negatived such an implication were rightly decided, and that the defendants' case on those heads fails. If it were a question of fact, the point of warranty is found against the defendants by the verdict of the jury.

The head of failure of consideration raises very much the same point. There was no intention that any consideration should in the circumstances pass from the plaintiffs to the defendants, and I think this part of the case is concluded by the decision of *Robinson* v. *Reynolds* (8). This is the decision of a Court of

Appeal and binding on us; but, apart from this, I entirely agree with the decision. I think that the same authority practically disposes of the contention of mistake of fact in the contract of acceptance. Both parties, no doubt, thought that the bill of lading was genuine, and both were innocent in the transaction, and it was for the defendants as the bank's principals to satisfy themselves as to the genuineness of the bill of lading, and not for the plaintiffs, as is shown by the correspondence between them before acceptance. There was, in my opinion, no such mistake in fact as to entitle the defendants to throw the loss occasioned by the fraud of their vendors upon the plaintiff.

There remains, however, the question of how far the case is affected by American law. If the document be an unconditional order and acceptance, and so a negotiable instrument, it is not contended that American law applies to the case, and, indeed, such a contention would be useless, since American law in that case is the same as our own: see *Springs* v. *Hanover National Bank* (9) and the cases there cited. But it is contended by the defendants that the meaning of the draft must be ascertained according to American law because it was issued in America, and that when its meaning has been so ascertained it is shown to be only a conditional order, and, therefore, not a negotiable instrument. To support this contention they refer to the Bills of Exchange Act, 1882, s. 72, which is in these terms:

> "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows—(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or endorsement, or acceptance supra protest, is determined by the law of the place where such contract was made. Provided that—(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue: (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom. (2) Subject to the provisions of this Act, the interpretation of the drawing, endorsement, acceptance, or acceptance surpra protest of a bill, is determined by the law of the place where such contract is made."

To deal with the effect of this section it is necessary to refer to s. 2 and s. 3 (1) and (2) of the same Act. Section 2 defines "acceptance," "bearer," "bill," "delivery," "holder," "endorsement." Section 3 (1) provides:

> "A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer."

By sub-s. (2):

> "An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange."

This draft was issued either in Alabama or New York. I think it is immaterial in which State, for all the evidence is to the effect that the law is the same in both, and that is not affected by the fact, if it exist, that there are conflicting decisions in the two States.

The argument for the defendants proceeds upon the ground that one requisite of form is that there shall be an unconditional order, that this depends upon the meaning of the words used as governed by the law of the place of issue, and that

in America the meaning of the words is such as to make the order conditional. The plaintiffs contend that on the true construction of s. 72 (1) and (2) the meaning of the draft is to be ascertained according to English law, and that American law does not apply. The construction of this section is difficult: see DICEY ON CONFLICT OF LAWS (2nd Edn.) pp. 588, 593, referring to STORY ON BILLS OF EXCHANGE, ss. 153, 154, and CHALMERS ON BILLS OF EXCHANGE (6th Edn.) p. 244; (7th Edn.) p. 266. But I will assume without deciding that the question whether the draft is conditional is to be answered according to American law. In view of the conclusion at which I have arrived in the case the question whether the draft and acceptance were conditional or unconditional is immaterial, but considerable argument was addressed to us on the point, and, therefore, I think it well to express my opinion upon it.

In considering the matter it is, I think, necessary to keep quite distinct two questions: (i) Was the drawee entitled as a condition of his acceptance to possession of the bills of lading with or without a warranty as to their genuineness? (ii) Was the draft which he accepted an order dependent for its fulfilment upon a condition? I do not think these two questions have been kept sufficiently distinct by some of the witnesses, or in some of the arguments and cases. It is quite probable that by virtue of the contract between the drawer and drawee (who were vendor and purchaser) it was a condition of acceptance that the bills of lading should be handed over, and yet that the order to pay contained in the draft and accepted by the drawee should be unconditional. This point has to be determined according to the conditional or unconditional nature of the draft alone. Some difficulty is occasioned in the consideration of this question by the uncertainty in which the matter is left as to the nature of the condition which is said to be contained in the draft. The only condition mentioned in the Bills of Exchange Act, 1882, or the Negotiable Instruments Law of Alabama or New York is a condition that the amount ordered to be paid should be paid out of a particular fund. The provisions are as follows. The New York Negotiable Instruments Law, s. 210, defines a bill of exchange as

> "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer."

With regard to condition it provides (s. 22) when a promise is unconditional:

> "An unqualified order or promise to pay is unconditional within the meaning of this chapter though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional."

The law of Alabama defines an unconditional promise to pay in this way:

> "An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional."

So with a slight variation in language the law of the two States is the same and is the same as the English law.

This definition of a conditional order is, of course, not exhaustive, and there may be other conditions. This, however, is the one which is referred to in nearly all the American cases to which we were referred, and is mentioned by BAILHACHE, J., as if it were the one he was considering. The passage is as follows ([1918] 1 K.B. at p. 54):

"The defendants say that the draft sold to the plaintiffs and accepted by the defendants is not regarded in America as a negotiable instrument, but as a conditional order or assignment of a fund." A

In his final conclusion (ibid. at p. 62) he does not state the nature of the condition. Some of the witnesses called for the defendants were by no means certain of the condition which they said existed. NOYES, J., (*Hannay* v. *Guaranty Trust Co. of New York* (10)), who decided that the draft was conditional, does not define the condition further than by saying that the draft was drawn against the cotton. This is an expression which I think, with respect, is somewhat lacking in precision. It may mean that the draft is only to be paid out of the proceeds of the cotton; it may mean that there is an undertaking that the bill of lading is genuine; and it is often used to mean no more than that the draft is drawn to carry out a cotton transaction, and is not a finance or accommodation draft. I think an examination of the evidence in this case shows that the last was the meaning which the witnesses attached to these words. The expression is often used with this meaning by commercial men and also by judges: see *Craig* v. *Sibbett* (11); *Brown, Shipley & Co.* v. *Kough* (12) (29 Ch.D. at p. 855); *Amsinck* v. *Rogers* (13), and other cases. I think that NOYES, J., was using it in the first sense, but it does not appear clearly in his judgment. I fail to see how this first meaning can attach to a draft drawn as this was by a vendor on a purchaser to pay for cotton sold by the former to the latter, and for this purpose I do not think it makes any difference whether the draft is payable at sight or after a specified number of days. If the goods sold are not delivered, but the money is paid at once, the matter is clearer, but if they are sold on credit for the number of days mentioned in the draft, it only establishes that the buyer hoped, and perhaps expected, to receive the goods and realise them, and so put himself in funds to pay the draft. It cannot mean that the draft is only to be paid out of the proceeds, for, if so, the vendor, and not the purchaser, is exposed to the risks of the market. If there were a heavy fall in the market, he would on this construction be paid, not the contract price of the cotton, but the amount realised after the fall in the market. This is altogether inconsistent with the transaction. The same considerations apply to a draft drawn for advances against cotton. Probably from these considerations the learned counsel for the defendants did not contend that the condition in this case was that the draft should be paid out of the proceeds of the cotton, but stated it as being a condition that the drawee should receive a genuine bill of lading and insurance certificate for cotton corresponding to the marks and description of the cotton mentioned in the draft. B C D E F G

For the points I am now considering it is essential to remember that the question is whether the condition alleged is to be found in the words of the draft. It matters not whether in construing the draft regard is given to surrounding circumstances or not; the question is whether in the draft itself there is this condition. According to the contention of the defendants' counsel, the condition is to be found in the words "charge same to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton," and the mention of the sale date and quality of the cotton in the margin. This, they say, should be read as meaning, not "pay to the order of ourselves out of the proceeds of the cotton mentioned," this meaning they expressly disclaimed, but "pay to the order of ourselves provided that the bill of lading of the cotton mentioned herein is genuine and represents actual cotton." This must be found in the terms of the draft itself, which, it may be noticed, does not mention the bill of lading at all. This makes the examination of the American law in this case rather difficult, for on examination I think it will be found that the witnesses directed their evidence to the question of the condition first mentioned, i.e., Was the order to pay out of a particular fund or out of the drawee's assets with a right of recoupment, rather than to the condition for which the defendants now contend? It also appears, in my opinion, that, with the exception of the very special accep- H I

tance in *Guaranty Trust Co. of New York* v. *Grotrian* (14), the decision in every American case cited to us dealt with the first mentioned condition. American law is a question of fact, and evidence was called on both sides of gentlemen of position and authority as American lawyers. After a careful consideration of their evidence I have no hesitation in preferring the evidence of the witnesses called for the plaintiffs to that of the witnesses called for the defendants. I think it is clearer, more logical, and more satisfactory in the treatment of the cases cited.

If, therefore, the decision turned upon the evidence of these witnesses alone, I should have no difficulty in deciding that by American law this draft was unconditional and a negotiable instrument. But there is an additional circumstance of weight which it is necessary to consider. In the litigation between the parties in America, which has been mentioned, NOYES, J., sitting as a judge of the Circuit Court of the United States for the Southern District of New York (*Hannay* v. *Guaranty Trust Co. of New York* (10)), decided on demurrer that this draft was conditional, as I have already stated, but without making clear what condition existed, and it is said that this decision has been approved by the New York Court of Appeals in the case already mentioned of *Springs* v. *Hanover National Bank* (9), and in the decision in this case—*Guaranty Trust Co. of New York* v. *Hannay* (10)—of the United States Circuit Court of Appeals, granting a new trial. The witnesses for the plaintiffs have given evidence that this decision of NOYES, J., is incorrect in American law and inconsistent with other authorities. The defendants' witnesses have given evidence to the contrary, and both have cited authorities in support of their respective contentions. It seems to me that we must consider whether, in our opinion, this decision was correct, and must consider it as a question of fact upon the evidence. If this were not so, evidence as to foreign law would be useless wherever there was a decision of any foreign judge on the point, and our courts could only follow that decision as a binding authority. This is not the position of our courts in such a matter. It may be that we have, strictly speaking, the same power to consider a decision of the ultimate Court of Appeal, but I cannot imagine that an English court would hold a decision of the final Court of Appeal in the State of New York erroneous according to the law of that State. We must, however, give our opinion on the decision of NOYES, J. [HIS LORDSHIP discussed the American authorities and said that the present case fell within those where the orders were considered under American law to be unconditional.]

But I must deal also with the plaintiffs' contention that, assuming this draft to be conditional, the defendants have proved no right to recover from the plaintiffs the amount they paid to the bank. Assuming the draft to be conditional, two positions are possible: (i) The document, whether before or after acceptance, was never a bill of exchange or negotiable, and the bank, therefore, could have defended an action by the London City and Midland Bank on the ground that would have been available against Knight, Yancey & Co. (ii) Although conditional by American law, it must, by virtue of the proviso contained in s. 72 (1) (b) of the Bills of Exchange Act, 1882, be taken as unconditional and negotiable as between the acceptor and any subsequent holder in England. In the former of these two positions there is considerable force in the plaintiffs' contention which I have already mentioned—i.e., that as the bank chose to pay without any liability and after being directed by the defendants not to do so they were not entitled to indemnity from the defendants, and the defendants cannot make any claim to be reimbursed their payment to the bank because it was voluntary. But, in my opinion, either in the case of the bank's non-liability or liability the defendants have no claim against the plaintiffs. The money was not paid to the plaintiffs, and, therefore, in order to recover the defendants must, as it seems to me, base their claim on a warranty that the bill of lading was genuine, an agreement to indemnify the bank if it were not, or a request by the plaintiffs upon which the defendants paid the London City and Midland Bank. There is an express warranty, representation, agreement to indemnify, or request to pay, and if any one of these

things is to be established it must arise by necessary implication from the circumstances of the transaction between the plaintiffs and the bank which took place in England. Whether there be such an implication is a matter to be decided according to the law of England, and in the earlier part of the judgment I have expressed my opinion that no such implication arises from the circumstances of the case. In any event, therefore, I think that the defendants cannot recover and that the appeal should be allowed, the declarations asked for by the plaintiffs made, and the judgment given for them on the counter-claim. The plaintiffs must have the costs here and below.

WARRINGTON, L.J.—After many days' discussion the result, in my opinion, is that the real question is a short one—namely, whether the plaintiffs, on presenting to the Liverpool bank for acceptance on behalf of the defendants a draft drawn upon them by Knight, Yancey & Co. accompanied by what purported to be a bill of lading of certain cotton, warranted the genuineness of the bill of lading, and are, therefore, liable in damages for breach of such warranty, the bill of lading having turned out to be forged, and the amount of the draft having been paid to the holders in due course. The answer to this question does not, in my opinion, depend upon the negotiability or otherwise of the draft, and is to be decided in accordance with English law. In this view the discussion as to the American law is largely, if not wholly, irrelevant, but as BAILHACHE, J., has decided against the plaintiffs on the footing that the negotiability or otherwise of the draft is the determining factor, that this depends on American law, and that under that law it was not negotiable, and in deference to the elaborate argument addressed to us on the point, I propose to deal with it hereafter.

[HIS LORDSHIP stated the facts and continued:] I propose now to deal with what I have stated above to be the real question—namely, whether in the circumstances there must be implied a warranty by the plaintiffs that the so-called bill of lading was a genuine document. There is clearly no express warranty, nor is there any express representation, that the bill of lading was genuine, which if acted on might result in a warranty to the same effect. The defendants are driven to insist on an implied warranty. Whether there was or was not such a warranty depends on the intention with which certain acts were done: *Heilbut, Symons & Co.* v. *Buckleton* (15). Moreover,

> "in business transactions, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties, who are business men"

per BOWEN, L.J., in *The Moorcock* (16) (14 P.D. at p. 68). There appears to be some difference of opinion between the noble and learned Lords who sat to consider *Heilbut's Case* (15) whether the question of intention is for the jury: compare the speeches of LORD HALDANE and LORD ATKINSON. In the present case, if it be a question for the jury, they have negatived the alleged warranty, but without insisting on this as conclusive, and treating the question as one for the court, or at all events as one which ought to be withdrawn from the jury on the ground that there is no evidence of warranty, I am clearly of opinion that the alleged warranty ought not to be implied.

I will first consider the case on the assumption that the draft was a bill of exchange in the proper sense—i.e., a negotiable instrument. The plaintiffs receive from the drawer the bill of exchange with the bill of lading attached. They are the endorsees of the bill, and have become so for value and in due course. They then present the bill to the drawee for acceptance. The consideration for the acceptance moves from the drawer to the acceptor, not from the endorsee, even in a case in which the endorsee requests the drawee to accept: *Robinson* v. *Reynolds* (8). That is to say, the drawee accepts the bill, not in performance of any new engagement made between him and the endorsee, but by virtue of the arrangements he has with the drawer. But in truth the plaintiffs did not request the bank to accept; they only desired to know whether the bank would acknow-

ledge their liability to do so, and perform it or not, with an intimation that in the latter case a well-known step would be taken. It is quite clear that in such a case there is no warranty of the genuineness of the signature of the drawer: *East India Co.* v. *Tritton* (4) (3 B. & C. at p. 289); the principle of which, though dealing directly with the signature of the endorser, applies also, with at least equal force, to that of the drawer. I can see no ground on which any such warranty should be implied as to the bill of lading. It is contended that by surrendering the bill of lading on acceptance the plaintiffs purported to transfer the property represented by it to the acceptors, and that it must be taken that they warranted the existence of such property and that the bill of lading represented it. The answer is that the endorsee of a bill of exchange with the bill of lading attached obtains a special property only in the goods defeasible on acceptance, and that on that event the property in the goods passes, not by virtue of the surrender to the acceptor of the bill of lading, but by virtue of the contract between the drawer as vendor of the goods and the acceptor as the purchaser thereof: *Mirabita* v. *Imperial Ottoman Bank* (17). The bill of lading is surrendered, not by virtue of any contractual obligation between the endorsee and the drawee, but by virtue of the obligation he assumes towards the drawer. Under such circumstances I can see no room for any implication of warranty as to the genuineness of the bill of lading.

I have so far considered the question as if there were no direct authority on the point. But this is by no means the case. The precise question was decided by MALINS, V.-C., in *Leather* v. *Simpson* (1). This case has been known to the legal profession since 1871, it has been treated in text-books as expressing the law, it has never been questioned, and in America, at all events, there are many cases reported in which it has been followed. I do not say this intending to throw any doubt on the correctness of the decision, with which, as will have been seen, I entirely agree, but only as indicating that, even if I did not, I should hesitate now to overrule it. In my opinion, therefore, if the draft be a bill of exchange, there is no such warranty as alleged. But supposing it be not—that is to say, suppose it is a conditional order to pay and, therefore, not negotiable—and suppose the condition be that the bill of lading is genuine and that the goods have been shipped, with all respect to the learned judge and others who seem to have assumed that this would bring about a different result, I really fail to see how it would affect the question. The consequences of non-negotiability would be that the holder would be in the position of an ordinary assignee holding subject to any equities between the parties to the original contract, and if the drawer could not require payment unless he gave the acceptor the goods, the holder could not do so either, but this is not a circumstance leading to the inference of an implied warranty that the drawer has performed or will perform his obligation. If anything, there is less ground for implying the warranty in the case now under consideration than in the case of a negotiable instrument, inasmuch as the acceptor is in a stronger position as regards the holder than if the draft were negotiable, for he is not bound to pay even a bona fide holder if the drawer's contract with himself is broken. The result is that the plaintiffs are not, in my opinion, under any liability to the defendants, and are entitled to the direction they ask, and to have the counterclaim dismissed.

The application of the American law, as found by BAILHACHE, J., affects only the question whether the draft was negotiable or not, which is, in my view, immaterial, but as the learned judge has decided against the plaintiffs on this point I think it right to say a few words about it. [HIS LORDSHIP considered the American authorities.] On the whole, then, I should find, if it were necessary to decide the point, that on the question whether the instrument is a bill of exchange or not the American law is the same as the English, and that it is a bill of exchange, notwithstanding the judgment of NOYES, J. The conclusion of the whole matter is that, in my opinion, the plaintiffs here are under no liability to the defendants, the appeal ought to be allowed, and a judgment entered for a

declaration as asked by the plaintiffs and dismissing the defendants' counterclaim. I would like to add that I have not dealt with the suggested right of the defendants to recover on the ground of failure of consideration or mistake of fact for the reason that they were not really argued on the defendants' behalf before us. It must not, however, be supposed that I think there is anything in them.

SCRUTTON, L.J.—In this case Messrs. Hannay, purchasers of certain cotton, are claiming to recover from the Guaranty Trust Co. certain sums representing the price of the cotton, because the Guaranty Trust has presented for acceptance to Messrs. Hannay's bank a bill of exchange for the price of the cotton, accompanied by bills of lading, which, though the Guaranty Trust did not know it, had been forged by the vendors of the cotton.

The enormous volume of sales of produce by a vendor in one country to a purchaser in another has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be carried out with the greatest monetary convenience to both parties. The vendor, to help the finance of his business, desires to get his purchase price as soon as possible after he has dispatched the goods to his purchaser: with this object he draws a bill of exchange for the price, attaches to the draft the documents of carriage and insurance of the goods sold and sometimes an invoice for the price, and discounts the bill—that is, sells the bill with documents attached to an exchange house. The vendor thus gets his money before the purchaser would, in ordinary course, pay; the exchange house duly presents the bill for acceptance, and has, until the bill is accepted, the security of a pledge of the documents attached and the goods they represent. The buyer, on the other hand, may not desire to pay the price till he has re-sold the goods. If the draft is drawn on him, the vendor or exchange house may not wish to part with the documents of title till the acceptance given by the purchaser is met at maturity. But if the purchaser can arrange that a bank of high standing shall accept the draft, the exchange house may be willing to part with the documents on receiving the acceptance of the bank. The exchange house will then have the promise of the bank to pay, which, if in the form of a bill of exchange, is negotiable, and can be discounted at once. The bank will have the documents of title as security for its liability on the acceptance, and the purchaser can make arrangements to re-sell and deliver the goods. Before acceptance the documents of title are the security, and an unaccepted bill without documents attached is not readily negotiable. After acceptance the credit of the bank is the security, and an accepted bill with documents attached is unusual and not readily negotiable. It further appears from the evidence as to commercial usage on which the above statements are based that it is commercially convenient to have on the face of the bill an indication of the transaction in respect of which it is drawn. It is convenient for the exchange house to know that the documents of title relate to the transaction in respect of which the bill is drawn. It is convenient for the accepting bank and purchaser to be able to identify the bill as relating to a particular transaction, and to check the documents of title as relating to that transaction; and when the documents of title are detached from the bill, bills which on their face purport to be founded on commercial transactions, and to be "produce" or "commodity" bills, are more readily negotiable and realisable than bills which on their face show nothing, and may be "kites" or accommodation bills. It is very common, therefore, to find on the face of the bill a statement: "Pay —— and charge same to the account of" certain specified commodities. A witness from the exchange house found that in 23,000 bills in a period of five years 93 per cent. bore on their face these or similar words referring to the commercial transaction giving rise to the bill. As BOWEN, L.J., said in *Sanders* v. *Maclean* (18) (11 Q.B. at p. 343):

> "the practice of merchants . . . is not based on the supposition of possible frauds,"

and the great business of financing produce sales generally goes through safely

because most transactions are honest. But fraud occasionally happens and gives rise to a dispute like the present. The vendors originally forged bills of lading, and afterwards shipped goods to correspond, so that the goods arrived before the bill of exchange became due. They thus anticipated the time when they could honestly obtain the price, but in fact delivered the goods. But a crisis came when they forged the bills of lading, but did not ship the goods and became insolvent. The question would then arise who was to bear the loss, the exchange house who had presented for acceptance a bill of exchange with forged documents attached, or the accepting bank who had incurred a liability on their acceptance, or the purchaser, the bank's principal, if he had to indemnify them on that liability.

A confusing number of questions were argued and authorities cited in the case before us, and it is, therefore, vital clearly to define what is the cause of action alleged and the question we have to decide. (i) This is not an action on the bill of exchange, or document to which the bank has put its signature, by a bona fide holder for value. In such an action the question might directly arise: Is the document sued on a negotiable instrument on which such a holder can recover in spite of the fraud of the drawer inducing the acceptance, or is it a conditional promise, or equitable assignment, the assignee of which may be affected by the debtor's rights against previous parties though the assignee was ignorant of them? For in this case the Bank of Liverpool, the accepting bank, paid the City and Midland Bank, bona fide endorsees for value from the Guaranty Trust Co., after notice of probable forgeries and without raising any defence, and neither the Bank of Liverpool nor Hannays have claimed to recover the money so paid from the City and Midland Bank. (ii) Nor is it an action by purchaser against vendor on the contract of sale of the cotton asking for damages for failure to deliver goods or the return of the price on a total failure of consideration. Knight, Yancey & Co., the vendors, are insolvent, and it is not suggested that the Guaranty Trust are any parties to the contract of sale of the cotton, so that they could be sued for damages for delivery of inferior quality, for short delivery, or for non-delivery. (iii) Nor is it an action by the Bank of Liverpool as agent asking for indemnity from the purchaser, the principal, or by the principal against the bank for negligence in accepting without getting genuine documents. The purchaser, Hannays, inspected the documents and then instructed the bank to accept. On suspicion of the forgery the principal instructed the bank not to pay; the bank disobeyed the instructions, and the principal then indemnified them for a payment made against express instructions. (iv) It is not an action to recover money paid under a mistake of fact against any person to whom Hannays or the bank paid money. (v) It is not an action of deceit for any fraudulent representation made by the Guaranty Trust, for it is admitted they were innocent of any deceit, and were not reckless in putting forward the documentary bill.

The nature of the action is this. A principal has instructed his agent to undertake personal liability to a third party. The agent has paid an assignee of the third party on the ground of that liability, though his principal has told him, and still contends, he is not liable and has instructed him not to pay, and the principal has indemnified the agent against such payment. The principal then sues, not the agent, nor the person whom the agent has paid, but the original third party, alleging some promise or representation to the principal on which the principal can sue. Some things seem clear at any rate. Up to the time that the Bank of Liverpool accepted the bills with documents attached there was no contractual relation between the Guaranty Trust, on the one hand, and the bank, or Hannays, on the other. Indeed, the Guaranty Trust knew nothing of Hannays in the matter. When the Bank of Liverpool accepted a bill, if it was a negotiable instrument, of which the Guaranty Trust were endorsees, the two parties were as regards each other remote and not immediate parties, and failure of consideration to the bank for the bill did not give them any claim to recover money from their prior endorsees: see *Robinson* v. *Reynolds* (8), a judgment of the Exchequer Chamber, and binding on this court. If the Guaranty Trust are liable to Hannays, it must

be because by what happened they made some promise that the bills of lading were genuine documents, or, to use a phrase which in view of the many meanings of "warranty" I would rather avoid, warranted them genuine. To call their legal position a representation involves the same question, for an innocent representation gives no cause of action for its breach unless it is a term of a contract, and if it is said that the untruth of the representation entitles Hannays to rescind the contract, made relying on that representation, the question is still: What contract had Hannays with the Guaranty Trust, and did it include a promise that the bills of lading were genuine? The actual transaction was this: The Guaranty Trust Company wrote from New York to the Bank of Liverpool at Liverpool: "We beg to enclose for favour of your procuring acceptance and transmitting for our account to our London office, the bills noted at foot." This included the bill in question, which does not refer on the face of it to any documents of title, but had, in fact, such documents attached. The Bank of Liverpool asked Hannays to come and inspect the documents and instruct them whether the bill was in order for acceptance. Hannays did so, and requested the Bank of Liverpool to accept "on surrender of documents purporting to be as specified below. . . . Bill of lading representing R.S.M.I. 100 . . ." Thereupon the bank accepted the bill, detached the documents and kept them, and sent the accepted bill to the London office of the Guaranty Trust. The Guaranty Trust had no communication with Hannays, and knew nothing about them; they asked for and got the personal liability of the Bank of Liverpool; and the Bank of Liverpool only described the document to Hannays as "purporting to be bill of lading." It is clear that there was no express contract by the Guaranty Trust as to genuineness of documents; if there was such a promise, it is to be implied from the above facts. It seems further to be clear that if that implication is a question of law, it is a question of English law, as all the material facts from which the implication can be made took place in England. There is only one matter in which American law might be material. If the bill drawn in America were by American law not a bill of exchange, as only a conditional promise to pay (a matter I deal with later), it might be necessary to consider whether it was therefore a conditional promise to pay in England, and whether the substitution of a conditional promise to pay, which is not negotiable, for a negotiable bill of exchange, made any difference to the implication, if any.

But was there such an implication? Terms are to be implied in contracts, not because they are reasonable, but because they are necessarily involved in the contractual relation, so that the parties must have intended them, and have only failed to express them because they are too obvious to need expression: *The Moorcock* (16); *Hamlyn & Co.* v. *Wood* (19). Whether there was an implied contract or not was left to the jury.

> "It was rightly held by HOLT, C.J. [in *Crosse* v. *Gardner* (20) and *Medina* v. *Stoughton* (21)], that an affirmation at the time of sale is a warranty provided it appear on evidence to have been so intended"

per BULLER, J., in *Pasley* v. *Freeman* (22) (3 Term. Rep. at p. 57), approved by the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton* (15). I am inclined to think, though I do not find it necessary to decide it, that unless there are undisputed facts which can only admit of one implication, the question of implied contract in such a case should be left to the jury. If so, a City of London special jury have found there was no such implied contract, and there was certainly evidence on which they could so find. But if, there being no dispute as to the facts, the implication is for the court, I am clearly of opinion, as was BAILHACHE, J., that there was no such promise or representation. The Guaranty Trust were not parties to the contract of sale, or bound to the purchasers to carry it out; they were not persons having peculiar knowledge of the vendor, or of his performance of the contract of sale. The purchasers themselves inspected the bills of lading before authorising the bank to accept. The Guaranty Trust did not transfer any property of theirs to the Bank of Liverpool on acceptance. It is true

that legal results followed from the bank accepting the bill put forward by the Guaranty Trust, but they were results following from change of property, and not from the creation of contracts. The Guaranty Trust could not take the acceptance and keep the documents; the bank could not keep the documents and decline to accept the bill. But this was because, on the vendors receiving an acceptance for the price of the goods, the property in the goods would pass under the contract of sale; and it did not pass until he received the acceptance or payment; the right to the documents followed the title to the goods: see *Shepherd* v. *Harrison* (23); *Mirabita* v. *Imperial Ottoman Bank* (17). It is agreed that the exchange house by presenting the bill of exchange for acceptance does not warrant the genuineness of the drawer's signature; that is the concern of the acceptor to verify. It is curious, if not warranting this, it yet warrants the genuineness of the documents attached to the bill, about which it can know much less than it may know about the bill itself. The position of the exchange house seems to be: "Here is a bill which I am told to ask you to accept under some contract to which I am not a party; will you accept it? If you do, I am told by the vendor to hand you documents under his contract, which at present I hold as security for my loan to him; if you do not, I can deal with my security and you cannot get the documents from the vendor." This is the view taken in *Woods* v. *Thiedemann* (24), where POLLOCK, C.B., says (1 H. & C. at p. 490):

> "The words 'bill of lading' mean such a document as the vendor might send or which was in the course of coming, professing to represent a cargo of wheat";

and by BRAMWELL, B. (ibid. at p. 495). It is also the view taken by MALINS, V.-C., in *Leather* v. *Simpson* (1). In that case the discounting bank sent forward a bill for acceptance, drawn in the form "pay . . . and place to account 251 bales cotton per William Cummings," with a memorandum that the bank "holds bill of lading . . . for 251 bales of cotton, per William Cummings"; and it was held that when the bill of lading turned out to be a forgery the acceptor could not recover from the bank the money they had paid them on the acceptance. While the reasoning of some parts of the judgment is not very precise, the case has stood unchallenged in result for over forty years, and I am not disposed to disturb it, especially as I think the result is correct. The decision in *Baxter* v. *Chapman* (2), a case arising out of the same frauds, is to the same effect.

If this is so, does it make any difference whether the document presented for so-called acceptance is a valid bill of exchange, or only a conditional promise to pay which may be an equitable assignment of funds? I think it makes no difference to the original presenter of the bill for acceptance except this, that if there is a condition in the document you have the less ground for implying a condition on the same subject-matter. It may make a difference to his assignee. It is suggested, as I understand, that the fact that the bill is drawn "charge to account of specified cotton," or is "drawn against cotton," makes it a promise to pay conditional on cotton having been shipped, and on genuine documents of title for that cotton being handed over; or, in the words of Hannays' counsel, "on condition that drawee had delivered to him a genuine bill of lading for the goods"; and, though it is admitted that the words of the document say nothing about bills of lading, it is said such a condition must be implied, or is involved in the "draft against cotton," and that the words of the draft having been drawn in the United States, the courts of the United States have put such a meaning on this form of bill that the English courts must take that meaning to be the meaning here. It is quite accurate, in my opinion, to say that as between drawer and drawee, being parties to a contract of sale, the consideration for the acceptance of a bill for the price may be the handing over of genuine documents of title for the goods sold, and even, as said by FRY, L.J., in *Brown, Shipley & Co.* v. *Kough* (12) (29 Ch.D. at p. 874), that this is a condition on the acceptance of the bill, but it does not follow that because the drawee is not bound to accept unless a condition is

fulfilled, that, when he has accepted his transferable or negotiable promise to pay is not unconditional. It turns on the terms of his promise to pay. By the English Bills of Exchange Act an unqualified order to pay, coupled with either an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount or a statement of the transactions which gives rise to the bill is unconditional. These words seem expressly to cover the case where a produce bill is shown to be such by an identification on its face of the transaction giving rise to it, and I did not understand it to be argued that by English law a bill in this form was other than an unconditional promise to pay. But it was said that by the law of the United States it was, and the judgment of BAILHACHE, J., finds that by that law a bill in this form is a conditional promise to pay. [HIS LORDSHIP considered the American authorities.] No American case was cited to us where such a condition as contended for in this case, as to genuineness of documents, had been established.

I have come, therefore, to the conclusion that both by English and American law this draft was an unconditional order to pay. If so, the learned judge below, as I read his judgment, would have arrived at a different result, in accordance with his own views of the law, which I think I am really giving effect to in reversing his judgment. This renders it unnecessary for me to express a final opinion on a point on which I feel great difficulty, the true meaning of s. 72 (1) and (2) of the English Bills of Exchange Act, especially as to the exact extent of application of sub.-s. (1) (b). It would be curious if an American bill, differing from the English form, were valid by English law for enforcing payment, and invalid in a suit to recover payment which had been made under it. And I have great doubts as to the meaning of "interpretation" in sub-s. (2), especially in view of the explanations of SIR M. D. CHALMERS (BILLS OF EXCHANGE (7th Edn.) p. 266), and the comments thereon of MR. DICEY (CONFLICT OF LAWS (2nd Edn.), p. 593). But as, in my view, the English and American laws are the same, the question need not be decided here. On the commercial position, it seems to me to be a question of the haggling of the market whether English buyers and banks can secure a term in the contract of purchase that acceptances with documents attached, when presented by persons other than the vendor, shall be guaranteed as genuine by those presenting them, or whether they will continue to rely on the fact that commercial transactions are generally honest. In this case, in my opinion, the appeal should be allowed, the effect of which is that the English purchasers cannot recover from the American discount house the money they have paid in reliance on documents which turn out, without the knowledge of the discount house, to be forged by the vendor. The appeal succeeds with costs here and below.

Appeal allowed.

Solicitors: *Crosley & Burn*; *Pritchard, Englefield & Co.*, for *Simpson, North, Harley & Co.*, Liverpool.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BOURNE AND ANOTHER v. KEANE AND ANOTHER

[House of Lords (Lord Birkenhead, L.C., Lord Buckmaster, Lord Atkinson, Lord Parmoor and Lord Wrenbury), March 21, 24, 25, 27, June 3, 1919]

[Reported [1919] A.C. 815; 89 L.J.Ch. 17; 121 L.T. 426; 35 T.L.R. 560; 63 Sol. Jo. 606]

Will—Masses for the dead—Bequest of personalty—Validity—Chantries Act, 1547 (1 *Edw.* 6, *c.* 14)—*Acts of Uniformity*, 1548, 1551, 1559—*Roman Catholic Relief Act*, 1829 (10 *Geo.* 4, *c.* 7)—*Roman Catholic Charities Act*, 1832 (2 *& 3 Will.* 4, *c.* 115).

At common law Masses for the dead were not unlawful; on the contrary, dispositions of property to be devoted to procuring Masses to be said or sung were recognised by common law and by statute. The Chantries Act, 1547, did not make Masses or testamentary gifts for the celebration of Masses for the soul illegal, but as a result of the Acts of Uniformity, 1548, 1551, and 1559, Masses became illegal. After the passing of the Roman Catholic Relief Act, 1791, and the Roman Catholic Charities Act, 1832, however, all statutory prohibitions were removed which could in any way operate to render void a bequest for Masses for the souls of the dead, and such a gift ceased to be impressed with the stamp of superstitious use.

So **held** by Lord Birkenhead, L.C., Lord Buckmaster, Lord Atkinson and Lord Parmoor, Lord Wrenbury dissenting.

West v. *Shuttleworth* (1) (1835), 2 My & K. 684, and cases following it overruled.

Statute—Preamble—No enacting effect—Use in construction of ambiguous language in enacting sections—Contemporanea expositio—General application of rule—Exceptions from rule—Decisions based on erroneous assumption of previous law—Persons mistakenly precluded from doing lawful acts.

The preamble of a statute is an important part of the statute and may be of great service in determining the nature of doubtful or ambiguous language in the enacting sections, but it is not of itself an enacting part of the statute and cannot have that effect. The terms of a preamble cannot be used to extend the provisions of a statute beyond the limitations clearly expressed in the enacting sections, and thus introduce an intention which the legislature has not expressed.

The rule that a long course of judicial interpretation of a statute, resulting in a construction which for a long period has been established and acted on, and has stood unchallenged and widely acted on, will not be set aside by the courts is of general application, and is not confined to cases in which questions of title are raised. But where the first decision on the subject and the line of cases which followed it was based on an erroneous assumption of the previous law and resulted in persons mistakenly holding themselves precluded from doing lawful acts—e.g., the making, after the passing of the Roman Catholic Relief Acts, of bequests by Roman Catholics for the saying of Masses for the souls of the dead, the court will overrule those cases.

Notes. Considered: *Re Barclay, Gardner* v. *Barclay, Steuart* v. *Barclay*, [1929] 2 Ch. 173; *Re Caus, Lindeboom* v. *Camille*, [1933] All E.R.Rep. 818. Applied: *Perrin* v. *Morgan*, [1943] 1 All E.R. 187. Followed: *Re Warden and Hotchkiss, Ltd.*, [1945] 1 All E.R. 507. Applied: *Gilmour* v. *Coats*, [1949] 1 All E.R. 848. Considered: *Brownsea Haven Properties, Ltd.* v. *Pool Corpn.*, [1958] 1 All E.R. 205; *Triefus & Co.* v. *Post Office*, [1957] 2 All E.R. 387. Referred to: *Blackwell* v. *Blackwell*, [1929] All E.R.Rep. 71; *Re Pratt's Settlement Trusts, McCullum* v. *Phipps-Hornby*, [1943] 2 All E.R. 458; *Chichester Diocesan Fund and Board of Finance (Inc.)* v. *Simpson*, [1944] 2 All E.R. 60; *National Anti-Vivisection Society* v. *I.R.Comrs.*, [1947] 2 All E.R. 217.

As to superstitious uses and purposes contrary to public policy, see 4 HALSBURY'S LAWS (3rd Edn.) 238–241; as to the preamble of a statute and the contemporanea expositio rule, see 31 HALSBURY'S LAWS (2nd Edn.) 461, 494. For cases see 8 DIGEST (Repl.) 336, 359, and 42 DIGEST 605, 667. For Acts of Uniformity, see 7 HALSBURY'S STATUTES (2nd Edn.) 568, 577; for Roman Catholic Relief Act, 1829, see ibid., p. 1281; and for Roman Catholic Charities Act, 1832, see ibid., vol. 2, p. 836.

Cases referred to:

(1) *West* v. *Shuttleworth* (1835), 2 My. & K. 684; 4 L.J.Ch. 115; 39 E.R. 1106; 8 Digest (Repl.) 336, *182*.

(2) *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 33 T.L.R. 376; 61 Sol. Jo. 478, H.L.; 8 Digest (Repl.) 359, *378*.

(3) *A.-G.* v. *Delaney* (1875), I.R. 10 C.L. 104.

(4) *Adams and Lambert's Case* (1598), 4 Co. Rep. 96a; 76 E.R. 1079; 4 Co. Rep 104b; 76 E.R. 1091; sub nom. *Adams* v. *Lambert*, Moore, K.B. 648.

(5) *Cary* v. *Abbot* (1802), 7 Ves. 490; 32 E.R. 198; 8 Digest (Repl.) 338, *203*.

(6) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 6 State Tr.N.S. 79; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034, H.L.; 42 Digest 650, *569*.

(7) *Stowel* v. *Lord Zouch* (1569), 1 Plowd. 353; 75 E.R. 536; 42 Digest 635, *378*.

(8) *Croft* v. *Evetts* (1606), Moore, K.B. 784; 72 E.R. 198; 8 Digest (Repl.) 338, *202*.

(9) *Lady Egerton's Case* (1606), Duke, 133; 8 Digest (Repl.) 338, *201*.

(10) *A.-G.* v. *Baxter* (1684), 1 Vern. 248; reversed sub nom. *A.-G.* v. *Hughes* (1689), 2 Vern. 105; 23 E.R. 677; 8 Digest (Repl.) 335, *166*.

(11) *Moggridge* v. *Thackwell* (1803), 7 Ves. 36; 32 E.R. 15, L.C.; 8 Digest (Repl.) 450, *1462*.

(12) *De Costa* v. *De Pas* (1754), Amb. 228; 27 E.R. 150; Dick 258; 3 Hare 194, n.; sub nom. *Da Costa* v. *De Paz*, 2 Swan. 487, n., L.C.; 8 Digest (Repl.) 461, *1615*.

(13) *A.-G.* v. *Guise* (1692), 2 Vern. 266; 23 E.R. 772; 8 Digest (Repl.) 461, *1613*.

(14) *Glasgow College* v. *A.-G.* (1848), 1 H.L.Cas. 800; 9 E.R. 978, H.L.; 8 Digest (Repl.) 457, *1568*.

(15) *Greenshield's Case* (1710), 19 Lords' Journels, 240.

(16) *Gates* v. *Jones* (1690), cited in 7 Ves. 496; 2 Vern. 266; 23 E.R. 773; sub nom. *Jones' Case* (1690), [1893] 2 Ch. 49, n., H.L.; 8 Digest (Repl.) 336, *169*.

(17) *R.* v. *Lady Portington* (1692), 1 Salk. 162; 91 E.R. 151; 3 Salk. 334; 12 Mod. Rep. 31; 8 Digest (Repl.) 503, *2239*.

(18) *De Garcin* v. *Lawson* (1798), 4 Ves. 433, n.; 31 E.R. 222, L.C.; 8 Digest (Repl.) 337, *195*.

(19) *Smart* v. *Prujean* (1801), 6 Ves. 560; 31 E.R. 1195, L.C.; 8 Digest (Repl.) 338, *196*.

(20) *Doe d. Wellard* v. *Hawthorn* (1818), 2 B. & Ald. 96; 106 E.R. 302; 8 Digest (Repl.) 339, *208*.

(21) *De Themmines* v. *De Bonneval* (1828), 5 Russ. 288; 7 L.J.O.S.Ch. 35; 38 E.R. 1035; 8 Digest (Repl.) 359, *376*.

(22) *Bradshaw* v. *Tasker* (1834), 2 My. & K. 221; 3 L.J.Ch. 183; 39 E.R. 928, L.C.; 8 Digest (Repl.) 338, *204*.

(23) *A.-G.* v. *Pearson* (1817), 3 Mer. 353; 36 E.R. 135, L.C.; 8 Digest (Repl.) 425, *1146*.

(24) *A.-G.* v. *Fishmongers' Co., Kneseworth's Will* (1839), 2 Beav. 151; affirmed (1841), 5 My. & Cr. 11; 5 Jur. 285; 41 E.R. 276, L.C.; 8 Digest (Repl.) 337, *192*.

(25) *A.-G.* v. *Todd* (1837), 1 Keen, 803; 6 L.J.Ch. 205; 48 E.R. 516; 8 Digest (Repl.) 336, *170*.

(26) *Heath* v. *Chapman* (1854), 2 Drew. 417; 2 Eq. Rep. 1264; 23 L.J.Ch. 947; 24 L.T.O.S. 31; 18 J.P. 693; 2 W.R. 649; 61 E.R. 781; 8 Digest (Repl.) 336, *184.*

(27) *Re Blundell's Trusts* (1861), 30 Beav. 360; 31 L.J.Ch. 52; 5 L.T. 337; 25 J.P. 820; 8 Jur.N.S. 5; 10 W.R. 34; 54 E.R. 928; 8 Digest (Repl.) 337, *186.*

(28) *Re Michel's Trust* (1860), 28 Beav. 39; 29 L.J.Ch. 547; 2 L.T. 46; 24 J.P. 581; 6 Jur.N.S. 573; 8 W.R. 299; 54 E.R. 280; 8 Digest (Repl.) 339, *214.*

(29) *Re Fleetwood, Sidgreaves* v. *Brewer* (1880), 15 Ch.D. 594; 49 L.J.Ch. 514; 29 W.R. 45; 8 Digest (Repl.) 337, *187.*

(30) *Re Elliott, Elliott* v. *Johnson* (1891), 39 W.R. 297; 8 Digest (Repl.) 337, *188.*

(31) *Sion College* v. *London Corpn.*, [1901] 1 K.B. 617; 70 L.J.K.B. 369; 84 L.T. 133; 65 J.P. 324; 49 W.R. 361; 17 T.L.R. 223, C.A.; 38 Digest (Repl.) 556, *459.*

(32) *Associated Newspapers, Ltd.* v. *London Corpn.*, [1916] 2 A.C. 429; 85 L.J.K.B. 1786; 115 L.T. 419; 80 J.P. 393; 32 T.L.R. 700; 60 Sol. Jo. 694; 14 L.G.R. 1027; 1 B.R.A. 500, H.L.; 38 Digest (Repl.) 557, *460.*

(33) *Re Wright, Ex parte Willey* (1883), 23 Ch.D. 118; 52 L.J.Ch. 546; 48 L.T. 380; 31 W.R. 553, C.A.; 30 Digest (Repl.) 231, *783.*

(34) *Hebbert* v. *Purchas* (1871), L.R. 3 P.C. 605; 7 Moo.P.C.C.N.S. 468; 41 L.J.P.C. 33; 35 J.P. 452; 19 W.R. 898; 17 E.R. 177; 42 Digest 773, *3008.*

(35) *A.-G.* v. *Bristol Corpn.* (1820), 2 Jac. & W. 294; 37 E.R. 640, L.C.; 8 Digest (Repl.) 402, *937.*

(36) *Morgan* v. *Crawshay* (1871), L.R. 5 H.L. 304; 40 L.J.M.C. 202; 20 W.R. 554, H.L.; 42 Digest 684, *985.*

(37) *Tancred, Arrol & Co.* v. *Steel Co. of Scotland, Ltd.* (1890), 15 App. Cas. 125; 62 L.T. 738; 30 Digest (Repl.) 219, *617.*

(38) *West Ham Union* v. *Edmonton Union*, [1908] A.C. 1; 77 L.J.K.B. 85; 98 L.T. 1; 72 J.P. 9; 24 T.L.R. 108; 6 L.G.R. 39, H.L.; 30 Digest (Repl.) 216, *583.*

(39) *O'Hanlon* v. *Logue*, [1906] 1 I.R. 247; 8 Digest (Repl.) 337, **87.*

(40) *Phillpotts* v. *Boyd* (1875), L.R. 6 P.C. 435; 44 L.J.Eccl. 44; 32 L.T. 73; 39 J.P. 244; 23 W.R. 491, P.C.; 19 Digest 237, *185.*

(41) *Harrison* v. *Evans* (1767), 3 Bro. Parl. Cas. 465; 1 E.R. 1437; sub nom. *Evans* v. *Lord Chamberlain*, 2 Burn's Ecc. Law, 9th ed. 207, H.L.; 19 Digest 529, *3904.*

(42) *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381, P.C.; 8 Digest (Repl.) 354, *337.*

(43) *R.* v. *Sedgley* (*Inhabitants*) (1831), 2 B. & Ad. 65; 9 L.J.O.S.M.C. 61; 109 E.R. 1068; 34 Digest 603, *5.*

(44) *Nicol* v. *Paul* (1867), L.R. 1 Sc. & Div. 127; 19 Digest 478, *g.*

(45) *I.R.Comrs.* v. *Harrison* (1874), L.R. 7 H.L. 1; 43 L.J.Ex. 138; 30 L.T. 274; 22 W.R. 559, H.L.; 30 Digest (Repl.) 221, *637.*

(46) *L.C.C.* v. *Erith Parish* (*Churchwardens, etc.*) *and Dartford Union Assessment Committee, West Ham Parish* (*Churchwardens, etc.*) v. *L.C.C., St. George's Union Assessment Committee* v. *L.C.C.*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22; sub nom. *L.C.C.* v. *Erith Overseers, L.C.C.* v. *West Ham Union, L.C.C.* v. *Woolwich Union, L.C.C.* v. *St. George's Union*, Ryde, Rat. App. (1891–93) 382, H.L.; 38 Digest (Repl.) 481, *47.*

(47) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 338, *198.*

(48) *Re Smith, Johnson* v. *Bright-Smith*, [1914] 1 Ch. 937; 83 L.J.Ch. 687; 110 L.T. 898; 30 T.L.R. 411; 58 Sol. Jo. 494; 8 Digest (Repl.) 338, *200.*

(49) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1.*

(50) *Charitable Donations and Bequests Comrs.* v. *Walsh* (1823), 7 I.Eq.R. 34, n.; 8 Digest (Repl.) 337, **74.*
(51) *Read* v. *Hodgens* (1844), 7 I.Eq.R. 17; 8 Digest (Repl.) 337, **75.*
(52) *A.-G.* v. *Hall*, [1897] 2 I.R. 426; 8 Digest (Repl.) 337, **86.*
(53) *Elmsley* v. *Madden* (1867), 18 Gr. 386; 8 Digest (Repl.) 357, **170.*
(54) *Carrigan* v. *Redwood* (1910), 30 N.Z.L.R. 244; 8 Digest (Repl.) 337, **80.*
(55) *Nelan* v. *Downes* (1917), 23 C.L.R. 546; 8 Digest (Repl.) 337, **70.*
(56) *Holland* v. *Alcock* (1888), 108 N.Y.Rep. 312.
(57) *Re Schouler* (1888), 134 Mass. 426.
(58) *Pits* v. *James* (1616), Hob. 121; 80 E.R. 271; sub nom. *Pitts* v. *James*, 1 Roll. Rep. 418; 8 Digest (Repl.) 336, *180.*
(59) *Brooks* v. *Woolfrey* (1838), 1 Curt. 880; 163 E.R. 304; 7 Digest 533, *138.*
(60) *Kent County Council* v. *Lord Gerard*, [1897] A.C. 633; 66 L.J.Q.B. 677; 77 L.T. 109; 61 J.P. 804; 46 W.R. 111; 13 T.L.R. 536, H.L.; 26 Digest (Repl.) 444, *1411.*
(61) *Dean of St. Paul's Case* (1580), 3 Dyer, 368a; cited in 4 Co. Rep. 109a.
(62) *Simon Peter's Case* (1678), Duke, B. 126; 8 Digest (Repl.) 336, *181.*
(63) *Clyde Navigation Trustees* v. *Laird* (1838), 8 App. Cas. 658, H.L.; 42 Digest 685, *986.*
(64) *A.-G.* v. *Fishmongers Co., Preston's Will* (1841), 5 My. & Cr. 16; 5 Jur. 693; 41 E.R. 278, L.C.; 8 Digest (Repl.) 448, *1428.*

Also referred to in argument:

Bradshaw v. *Jackman* (1887), 21 L.R.Ir. 12; 8 Digest (Repl.) 429, **430.*
Re Wilkinson's Trusts (1887), 19 L.R.Ir. 531; 8 Digest (Repl.) 429, **429.*
Walsh v. *Gladstone* (1843), 1 Ph. 290; 8 Jur. 25; 41 E.R. 642; 8 Digest (Repl.) 455, *1533.*

Appeal from an order of the Court of Appeal (reported [1918] 2 Ch. 350), sub nom. *Re Egan*, *Keane* v. *Hoare*) upon a summons taken out by the executors of a will.

The testator Edward Egan, who died on Dec. 27, 1916, by his will, dated Nov. 29, 1916, bequeathed to the cathedral (which was held to mean Westminster Cathedral) for Masses £200, £100 each to Dominican Fathers and Franciscan Fathers in Ireland for Masses, and to the Jesuit Fathers, Farm Street, £200 and his residuary estate for Masses. EVE, J., held on the authority of *West* v. *Shuttleworth* (1) and cases following it, that the gifts were invalid under the Chantries Act, 1547 (1 Edw. 6, c. 14), and his judgment was affirmed by the Court of Appeal (SWINFEN EADY, M.R., WARRINGTON and DUKE, L.JJ.). Cardinal Bourne, claiming the bequest left to "the cathedral," and the Rev. Terence Donnelly, claiming the bequest to the Jesuit Fathers, appealed. The respondents, James Keane and Thomas Cowperthwaite, the two executors of the will, having no beneficial interest, lodged no case, and the sole respondent to the appeal in this House therefore was Catherine Broderick, who appeared on behalf of the next-of-kin and submitted the decision of the courts below should be affirmed.

Frank Russell, K.C., C. J. Mathew, K.C., and *F. McMullan* for the appellants.
John Muldoon, K.C., and *J. A. R. Cairns* for the respondent executors.
Their Lordships took time for consideration.

June 3, 1919. The following opinions were read.

LORD BIRKENHEAD, L.C.—This is a difficult and an extremely important case. Your Lordships cannot, in my view, escape the duty, anxious as it undoubtedly is, of overruling decisions which have been treated as binding for generations. The question is whether, by the law of England to-day, bequests of personalty to be applied to Masses for the dead can be supported. I have reached the conclusion, and I am bound to state it, that they can. Unwilling as I am to question old decisions, I shall be able, if my view prevails, to reflect that your Lordships will not within a short period of time have pronounced to be valid

legacies given for the purpose of denying "some of the fundamental doctrines of the Christian religion"; LORD PARKER OF WADDINGTON in *Bowman* v. *Secular Society, Ltd.* (2), [1917] A.C. at p. 445; and have held to be invalid a bequest made for the purpose of celebrating the central sacrament in a creed which commands the assent of many millions of our Christian fellow countrymen. In the second place, and in the event supposed, your Lordships will have the satisfaction of deciding that the law of England corresponds upon this important point with the law of Ireland, of our great Dominions, and of the United States of America. A decision based, as I believe this to be based, upon a sound view of the law may reasonably appeal to these two powerful considerations of policy as against the admitted impolicy of disturbing old conclusions. The judge of first instance and the Court of Appeal took the view that so far as they were concerned the matter was covered by authority which could only be reviewed and reversed by your Lordships' House.

The facts upon which your Lordships have to pronounce are shortly as follows. On Nov. 29, 1916, Edward Egan, of 15 Alderney Street, Pimlico, London, made a will on a printed form which contained (inter alia) the following bequests:

> "To the Cathedral, for Masses, £200; to the Jesuit Fathers, Farm Street, £200 for Masses; to the Dominican Fathers, Black Abbey, Kilkenny, £100 for Masses; to the Franciscan Fathers, Walking Street, Kilkenny, £100 for Masses. What money remains after all expenses I wish to be given to the Jesuit Fathers, Farm Street, for Masses."

He died on Dec. 29, 1916, and his executors proved the will on Jan. 23, 1917. The only evidence as to the legatees is contained in James Keane's affidavit. Paragraph 13 is mainly concerned with the identification of the expression "the cathedral," but no question now arises upon that. Paragraph 14 says:

> "The Dominican Fathers are a religious body or association comprising in Ireland several hundred members. The community of them at Black Abbey comprises twelve members or thereabouts, of whom the Rev. James Alphonsus O'Reilly is prior. The Jesuit Fathers are a religious body or association comprising several hundred members in Great Britain and Ireland. The community of them at Farm Street comprises some thirty members of whom . . . the Rev. Terence Donelly is the superior."

For some reason the similar gift to the Franciscan Fathers was not questioned, and no evidence as to their identity was adduced. It is not stated, but I assume, that the Dominican, Jesuit, and Franciscan Fathers are communities of Roman Catholic priests, with or without laymen, professing the Roman Catholic doctrines.

It is not necessary to consider in minute detail the sacrament commonly called the Mass. Evidence, both informing and complete, as to its exact nature was given in the Irish case *A.-G.* v. *Delaney* (3), and there was produced to the House in the course of this debate the Ordinary of the Holy Mass, consisting of a print of the service with an English translation. At the date of the death of Henry VIII there was no one uniform rite followed by all persons in communion with Rome, and ceremonies of ritual were followed which varied in the different parishes, dioceses, and countries of Christendom. They all had the common characteristic that in one form or another there was a ritual oblation, and the sacrament of the Mass was, and is, a sacrifice propitiatory of the whole Church, both living and dead. The celebration of Mass, according to Roman Catholic doctrine, is by no means a benefit entirely confined to the soul or souls of the persons for whom it is directly designed; it benefits (such is the conception) the whole of the living community as well as the dead. The common law recognised the validity of gifts to establish Masses. It would, indeed, have been strange if it has discouraged gifts in reinforcement of a religion recommended by its own doctrines. Two common law forms of tenure were recognised under which the duty of the landholder was to say Masses. Co. Litt., s. 135, states that tenants in frankalmoign

"are bound of right before God to make orisons, prayers, Masses, and other divine services, for the souls of their grantor of feoffor, and for the souls of their heires [quære ancestors] which are dead, and for the prosperity and good life and good health of their heires which are alive. . . ."

COKE'S comment is that notwithstanding the change in the liturgy,

"the tenure in frankalmoign remaineth, and such prayers and divine service shall be said and celebrated as now is authorised: yea, though the tenure be in particular, as LITTLETON hereafter saith—namely, to sing a Masse, etc., or to sing a placebo et dirige, yet if the tenant saith the praiers now authorised it sufficeth."

And so, too, s. 137:

"But if an abbot or prior holds of his lord by a certaine Divine service, in certaine to be done, as to sing a Masse everie Friday in the week, for the soules, ut supra, or every yeare at such a day to singe a placebo et dirige, &c., or to finde a chaplain to sing a Mass, &c., or to distribute in almes to an hundred poor men an hundred pence at such a day, in this case if such Divine service be not done, the lord may distreyne, &c. . . . And such tenure shall not be said to be tenure in frankalmoign, but is called tenure by Divine service."

Your Lordships may also consider s. 169:

"Also by such custom a man may devise by his testament that his executors may alien and sell the tenements that he hath in fee simple for a certain sum to distribute for his soule."

The editor's note is to the effect that the distribution here meant was probably a grant of money to the church to endow Masses for the testator's soul, a disposition very common in the time of LITTLETON and not inconsistent with any law. He then proceeds to discuss 23 Hen. 8, c. 10 [a Statute of Mortmain repealed by Mortmain and Charitable Uses Act, 1888 (2 HALSBURY'S STATUTES (2nd Edn.) 910)], and conjectures that, apart from this statute, such gifts would now be void under the Statutes of Mortmain, or if not within such Acts would be deemed superstitious by the courts of equity. Section 383 deals with a case, Lib. Ass. 38 Edw. 3, which turned on the conduct of an executor who had failed to sell land in order to distribute money for the testator's soul. It is curious that neither COKE nor HARGRAVE and BUTLER deemed it necessary to discuss 1 Edw. 6, c. 14 [Chantries Act, 1547] in this connection, and also that COKE did not treat such tenures as extinct but merely changed in the nature of the services. If he had held the view attributed to him upon the strength of his report of *Adams and Lambert's Case* (4) it would naturally have occurred to him (or so it would seem) to mention it in this connection.

Although the statute law contained many provisions restricting the right to give property for ecclesiastical purposes, and also defining or restricting the powers and privileges of the Pope and the clergy, Christianity was certainly the established religion, and the validity of gifts for Masses is abundantly proved by the terms of statutes, e.g., 31 Edw. 3, st. 1, c. 11 [Administration on Intestacy, repealed by Administration of Estates Act, 1925, and Supreme Court of Judicature Act, 1925], which provides that if a man dies intestate the ordinary shall appoint administrators who can sue for debts to the deceased "for to administer and dispend for the soul of the dead," and also by the institutions of the common law. No fundamental changes in doctrinal matters were made during the reign of Henry VIII. His disputes with the Pope were mainly on questions of jurisdiction, and, whatever powers may have been claimed by him or vested in him by statute, it is certain that the Mass during the last year of his reign was in all essentials the same as that now observed by Roman Catholics. He himself in his will directed Masses to be said for his soul: FROUDE, HISTORY OF ENGLAND, iv., p. 527. There is no sufficient ground for impeaching the authenticity of his will; reference may be

made to the note at p. 350 of the fourth volume of Lingard's History of England; to the corresponding treatment of the subject in Froude (vii, p. 482); and to the observations upon the same point in the Political History of England, in the volume 1547–1603, p. 5. It is noteworthy that one of the first steps taken in the reign of Queen Mary to restore Roman Catholicism was the passing of the Act 1 Mar. Sess. 2, c. 2, which placed the Mass in the position which it filled during the last year of the reign of Henry VIII.

When Edward VI came to the throne, the Mass was still a recognised religious institution in England. On Sept. 22, 1547, special injunctions to the dean and chapter of Canterbury were issued containing directions as to the singing of Masses: Gasquet and Bishop: Edward VI and the Book of Common Prayer, p. 56. On Nov. 4, 1547, the first Parliament of Edward VI opened, in accordance with ancient practice, by the celebration of the Mass of the Holy Ghost: Gasquet and Bishop, p. 64. The first Act passed in that session was an Act against persons who speak irreverently "against the Sacrament of the body and blood of Christ, commonly called the Sacrament of the Altar" (ibid., pp. 69, 71, 77) which really combined two measures, one Bill being directed against the prevalent and increasing practice of reviling the Mass in an indecent manner, and the other requiring communion to be administered in both kinds. No Act had been passed which altered in any fundamental particular the law on the subject of Masses at the date when the Chantries Act (1 Edw. 6, c. 14) obtained the Royal sanction. The subsequent history of the Mass abundantly proves this. On Mar. 8, 1584, appeared the order of the communion which provided:

> "The time for the communion shall be immediately after the priest himself has received the sacrament without the varying of any other rite or ceremony in the Mass (until other order shall be provided), but as heretofore usually the priest hath done with the Sacrament of the Body."

This order relates to the rite of communion to be administered during the celebration of Mass, and in no way can it be said to condemn or supersede the Mass. Indeed, inasmuch as before then communion could take place at any celebration, public or private, the requirements of notice, and of communication only at a public service, tended to diminish the opportunity of communicating afforded to the laity (ibid., p. 91). The Latin Mass, according to the various rites then in use in England, still remained intact (ibid., p. 90). The contemporary evidence in support of this proposition is quite clear. Lord Protector Somerset wrote to Bishop Gardener on June 28, 1548, a letter (ibid., p. 129) which contains the sentence:

> "The questions and controversies concerning the Sacrament of the Altar and the Mass rest at present in consultation."

Again a letter to the Vice-Chancellor of Cambridge University dated Sept. 4, 1548, he refers to the form of Mass in use in the Royal Chapel (ibid., p. 147).

The Order of the Communion was a mere temporary measure, and steps were taken almost immediately to provide new services. The First Prayer Book of Edward VI was drawn up in 1548 and was the subject of debates in both Houses of Parliament. Sweeping changes were made in the form of the Mass. The fourth rubric made the wearing of the chasuble (which was the sacrificial vesture) optional, and the entire portion of the Mass which constitutes the act of formal oblation, together with the prayers which accompany it, were omitted (ibid., pp. 189, 194, 196). It may be argued that this omission marks the point where the Mass ceased to exist and the service became Holy Communion, but it is most highly disputable whether its authors so intended it. The name "Mass" was retained both in the title and also where it is mentioned in the preamble to the Act of Uniformity, 1549 (2 & 3 Edw. 6, c. 1), and the general acquiescence of the clergy and laity also point to the conclusion that the new rite was a form of Mass. The book of Common Prayer came into force on Whitsunday, June 9, 1549, and, as this was by the Act of Uniformity the only form allowed by law, it follows that

if, contrary to the view which I respectfully urge upon your Lordships, this service was not a form of Mass, then the celebration of Mass was thenceforth forbidden. There were many who refused to obey the new Book, and accordingly further provision to compel its adoption was made by the Act 3 & 4 Edw. 6, c. 10 [repealed], which recites the establishment of this Book and refers to the "old accustomed superstitious service" and requires (inter alia) all obnoxious images and books to be destroyed. This first Prayer Book was a compromise which pleased neither party, and which was obnoxious to the Protestants for many reasons, but principally because it used words in the Communion Service which were generally understood to denote the sacrifice of the Mass. The title reads: "The Supper of the Lord and the Holy Communion commonly called the Mass." What became in the Second Prayer Book the Prayer for the Church Militant here on Earth, is in the earlier volume a prayer for the Church, including both living and dead, and it contains the words:

> "We commend to thy mercy, O Lord, all other Thy servants which are departed hence from us with the sign of faith and now do rest in the sleep of peace: grant unto them, we beseech Thee, Thy mercy and everlasting peace."

This passage is almost the same as that in the Ordinary of the Mass, but is entirely omitted in the Second Prayer Book, which was published in 1552 under sanction of the statute 5 & 6 Edw. 6, c. 1. There can be no doubt that this service was a Communion Service pure and simple and that the Mass had disappeared for the time being from the Book of Common Prayer.

On the death of Edward VI this country became reconciled to Rome, but on the accession of Queen Elizabeth the statutes of Mary were repealed, thus restoring the Acts of Henry VIII and Edward VI (1 Eliz., c. 1). By the Act of Uniformity, 1559 (1 Eliz., c. 2), the Second Book of Common Prayer of Edward VI as altered was again made obligatory and s. 4 of the Act prohibited the use of any other form in any place. The effect was to render celebration of Mass illegal, and there are many instances of people being arrested for attending Mass (e.g., see STRYPE, ANNALS, vol. 1, p. 365) and the services at the Ambassadors' Chapels were even interfered with in order to prevent the attendance there of English subjects. It was not, however, until 23 Eliz., c. 1, that the saying or singing of Masses was expressly declared to be a criminal offence. From 1559, or at latest 1581, the Mass was an illegal service, and it remained so until 31 Geo. 3, c. 32 [Roman Catholic Relief Act, 1790], but, as was pointed out by GRANT, M.R., in *Cary* v. *Abbot* (5) (7 Ves. at p. 494) that Act contained a proviso that all dispositions of property before considered unlawful should continue to be so, and it was not until the Catholic Relief Act, 1829, and the various Roman Catholic Charities Acts, the first of which was passed in 1832, that Roman Catholics obtained anything like the freedom of worship which had been conceded to Protestant Dissenters.

It has been necessary to discuss the history of the Mass in England in order to consider the true interpretation of the Chantries Act, 1547, but, before that Act is dealt with, it is also necessary (if only to avoid misunderstanding) to refer to the statute 23 Hen. 8, c. 10, which is entitled "An Act for feoffments and assurances of lands and tenements made to the use of any parish church, chapel, or such like." This Act recites the practice of feoffments and other assurances of land to the use of "parish churches, chapels, churchwardens' guilds, fraternities, commonalties, companies, or brotherhoods" whereby "there groweth and issueth to the King our Sovereign Lord, and to other Lords and subjects of the realm, the same like losses and inconveniences, and is as much prejudicial to them, as doth, and is, in case where lands be aliened into mortmain." The Act provides that all such uses, intents, or purposes declared or ordained after Mar. 1 in the same regnal year should be void, but also contains a proviso that any such uses for terms not exceeding twenty years shall be valid. The Act is general in its terms, and its object, on the face of it, is to extend the law of mortmain because of the economic evils

which resulted from the obnoxious uses. Even if it be true that, in spite of the express words of the Act, its real object was spoliatory, there is nothing in it which can be relied upon in impeachment of the validity of gifts for Masses for the souls of the dead. The Act was repealed by the Mortmain and Charitable Uses Act, 1888.

We are therefore left with the Chantries Act, 1547, as the only Act upon which the respondents can rely in the attempt to establish the illegality of gifts for Masses for the dead. It is necessary to consider its terms in detail. The title is "An Act whereby certain Chauntries Colleges Free Chapels and the possessions of the same be given to the King's Majesty," and there is a lengthy preamble which sets out in detail the evils which it is intended to remedy. The words are:

> "Considering that a great part of superstition and errors in Christian religion hath been brought into the minds and estimations of men by reason of the ignorance of their very true and perfect salvation through the death of Jesus Christ, and by devising and phantasying vain opinions of purgatory and Masses satisfactory, to be done for them which be departed; the which doctrine and vain opinion by nothing more is maintained and upholden than by the abuse of trentals, chantries, and other provisions made for continuance of the said blindness and ignorance. . . ."

In the enacting sections the Act vests in the King, first, by s. 2, all manner of colleges, free chapels, and chantries in existence within five years before the first day of that Parliament except those in the actual possession of Henry VIII or Edward VI and those excepted from the Act of Henry VIII dissolving chantries and not altered by the commissioners in the manner prescribed, and all manors, lands, rents, tithes, pensions, portions, or other hereditaments belonging to them, and by any assurance, conveyance, will, devise, or otherwise had, made, suffered, acknowledged or declared, given, assigned, limited, or appointed to the finding of any priest to have continuance for ever or wherewith or whereby any priest was sustained or found within that period of five years, and also any annual rents, profits, and emoluments within the same period employed, paid, or bestowed towards or for the maintenance, support, or finding of any stipendiary priests intended by any act or writing to have continuance for ever. The same is enacted by s. 3 as to lands, hereditaments, &c., given to the finding of a priest or priests, for terms of years subject to the rights of reversioners at the expiration of such terms. The Act proceeds, by s. 4, to forfeit to the King all lands, rents, or other hereditaments at any time theretofore given, &c., to be employed wholly for the finding or maintenance of any obit or anniversary or any other like thing, intent, or purpose for ever, or for the finding or maintenance of any light or lamp in any church or chapel to have continuance for ever; and generally the Act vests in the King all property held for such purposes or belonging to the foundations thereby vested in him. Except in s. 17, which deals with personalty belonging to such foundations, the Act only deals with realty, chattels real, or money arising out of, or charged upon, realty. It only applies to existing colleges, free chapels, and chantries in existence within the five years mentioned, and with one exception does not purport to deal with the future, and indeed it by s. 37 clearly recognises the existence of obits not annihilated by the Act. There is not a word in the enacting part which prohibits such gifts in the future, and it seems certain that the Act was not so construed at the period when it came into operation.

Bishop Gardiner, preaching before Edward VI and his Council on June 29, 1548, said (Gasquet and Bishop, p. 83n):

> "And if ye ask concerning the Masses that were wont to be said in monasteries that, if the Masses had been good, the monasteries had not been put down, to that, I say that when the number of the monasteries went away there was no prejudice to the Mass, no more think I now that the Chantries be gone. Though the Chantries be transposed to another use, yet the Mass is not condemned."

Had the Act been believed to invalidate gifts for Masses it is hardly conceivable that it should have escaped the repealing energy of Queen Mary, during whose reign many Roman Catholic foundations were restored or established. On the accession of Queen Elizabeth all such were vested in the Crown by the Act 1 Eliz., c. 24 [partly repealed by Roman Catholic Relief Act, 1926], which also provided that all lands, sums of money, &c., given since the death of King Edward VI for a priest to say Masses or for obits or lights should be vested in the Crown. This Act did not, however, prohibit such gifts in the future.

An argument founded upon the Chantries Act, 1547, must, therefore, be based either on the preamble or on some peculiar construction of the words of the Act rather than the plain natural meaning. The preamble is an important part of a statute, and plays a definite part in the construction of the enacting part; but it is not itself the enacting part, and cannot have that effect. As was said by TINDAL, C.J., in his opinion in the *Sussex Peerage Case* (6) (11 Cl. & Fin. at p. 143):

> "The only rule for the construction of Acts of Parliament is that they shall be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature it has always been held a safe mean of collecting the intention, to call in aid the ground of making the statute, and to have recourse to the preamble which, according to DYER, C.J. (*Stowel* v. *Lord Zouch* (7), 1 Plowd. at p. 369), is 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'"

Applying that principle to the present Act, it is clear that the existence of chantries was abhorrent to the framers of the measure, and that they intended to destroy them. They might have chosen many ways of effecting their purpose, but the method which they did adopt makes it clear that, in their view, the evil could be corrected by confiscating the peccant foundations and their property. There is no trace of an intention to prohibit such gifts in the future; and the preamble cannot be construed so as to enact what Parliament did not in fact enact, whether the omission was deliberate or by inadvertence. Nor can any forced or strained construction be put upon the Act itself. If the cases are carefully considered they do not lead to the conclusion that the Act, either by express words or by necessary implication, prohibited such gifts in the future. Many cases were decided on the Act, but the one upon which reliance is chiefly placed is *Adams and Lambert's Case* (4).

This was an action of ejectment, and raised the question of the effect of the Act upon a devise of one John Barton the elder, dated June 5, 1431, of certain tenements in the town of Buckingham, to relatives of his on condition of finding a priest to say Masses for the souls of himself and others. The report is not a report in the modern sense, but rather a dissertation upon the construction of the statute. LORD ELLESMERE said of it that

> "he [COKE] hath darkened the case by many intricate differences whereof the court that argued the same did never dream."

The point in dispute was whether the whole lands or only so much of the issues thereof as were devoted to the purpose mentioned were given to the King, and the instructiveness of the case rests upon the discussion of the circumstances which affect the application of the Act. All the various devices and uses which COKE discusses are dealt with in the present tense, so that it is quite easy to imagine that he is laying down principles and distinctions as to such gifts which might then or thereafter be made; but it is clear, from the dates of the gifts in the cases he cites and comments upon, that they are all prior in date to the Act, and the present tense is not intended to mean that any gifts not then made are governed either by the Act, or by the reason of the Act, or by some principle of

law which is not expressed but must lie implicit in the terms of the Act. This explanation also applies to his general statements upon the intent of the Act, as, e.g., the statement on fo. 109b, that the intent of the Act was to prohibit all

> "superstitious uses, which were public in churches for the general prejudice which might accrue by them; for malum quo communius eo pejus, and not to prohibit private prayers in their chambers, or other private places, which could not tend to so dangerous an example,"

and on fo. 111b,

> "the intention of the Act (as hath been said, and so it ought to be expounded) was to take away all such superstition."

It appears from the report of the same case in MOORE, K.B. 648 that there was no question raised in the case as to any uses which were or might be created after the Act. This case, therefore, is one of several decided during the reign of Elizabeth on the construction of the statute, and its application to chantries existing during the period mentioned by the statute is plainly not an authority for the proposition that the Act or any principle deducible from the Act has a prospective operation.

The real author of this construction of the statute appears to have been DUKE, who in his work on CHARITABLE USES (1st Edn., 1676) p. 106; (Bridgman's edition, p. 350), c. 7, s. 1, says:

> "If any manors, lands, tenements, rents, annuities, pensions, profits, hereditaments, goods, chattels, money or stocks of money have been or shall be given . . . to have continuance for ever, or for a time only, towards or for the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit or of any light or lamp in any church or chapel of any like interest, these, and such like gifts and dispositions as these, are not to be accounted charitable uses intended by the purview of this statute, but superstitious uses intended by the statute of 1 Edw. 6, c. 14. What is disposed and settled in any such course is forfeit and given to the King.
>
> "And therefore, if at any time heretofore any such thing hath been given or hereafter shall be given by any man, by his last will at his death, or by act executed in his lifetime, to any person sole or corporate in fee simple, fee tail for life or years, to the intent or upon condition to find a chaplain, and have the service of a priest or other man to say Mass, or to have a priest or other man to pray for the soul of any dead man in such a church or other place, or to have or maintain perpetual obits, lamps, or torches, &c., to be used at certain times to help to save the souls of men out of the supposed purgatory, these, and such like uses as these, are not nor shall they be said to be charitable uses within the intendment of the statutes, made and provided for the preservation and execution of such uses, for these are looked upon and accounted in law for superstitious uses. And therefore all these and such like uses as these are void. And the lands so given to such superstitious use are by other statutes given and forfeited to the King, and he shall have them. And yet so that if there be any charitable use intermixed with the superstitious use, and they may be distinguished, there the King shall have only so much as is given to the superstitious use, and not that which is given to the charitable use also. And for this see *Adams and Lambert's Case* (4), 4 Co. Rep. 104b; 15 Ric. 2, c. 5; 37 Hen. 8, c. 4; 1 Edw. 6, c. 14; 1 Cro. 180; Bridgman Rep. 105; 2 Cro. 51, 52, where to our present purpose these things are agreed upon, 1 Edw. 6, c. 14."

SIR FRANCIS MOORE, in his EXPOSITIONS ON THE ACT 43 ELIZ. (printed as an appendix to DUKE, 1676 edition), at pp. 131–2 states that such gifts are not within that Act and were deliberately omitted lest such gifts should, on change of times, find their way into the King's Treasury:

"For religion being variable according to the pleasure of succeeding princes, that which at one time is held for orthodox may at another be accounted superstitious and then such lands are confiscate as appears by the Statute of Chanteryes, 1 Edw. 6, c. 14."

It seems, therefore, that Parliament, in order to prevent the risk that the pious intentions of donors might be defeated by possible confiscation, determined with grave irony that if the donors expressed such intention confiscation should become inevitable.

I think that the plain truth of the matter is that when the Reformation became an accomplished fact the general notion was that only one form of religion could be safely allowed, and, therefore, there was an instinctive feeling that such gifts should not be permitted. Lawyers, accordingly, sought for a juridical basis, and DUKE's statement is one of the attempts to find a solution. The absence of a statute expressly in point or of any satisfactory ancient precedent led to uncertainty, and to a desire to support the doctrine on some undoubted authority, appealed to because, though it was not precisely in point, it had some show of relevance. Quite apart from this attempt to justify the principle that such a rule was the law, the courts early in the reign of James I placed the law as to superstitious uses on a sound juridical footing and the attempt above referred to appears to have remained without any substantial effect until the decision in *West* v. *Shuttleworth* (1) in 1835.

No survey of this important subject would be complete which failed to examine, however shortly, the authorities upon these and cognate subjects which were delivered between the legislation of Queen Elizabeth and the decision in *West* v. *Shuttleworth* (1). BOYLE ON CHARITIES, p. 242, thus defines a superstitious use:

"A superstitious use may be defined generally to be one which has for its object the propagation or the rites of a religion not tolerated by the law."

This is not exhaustive but will serve as a working definition. The Chantries Act, 1547, had terminated all chantries at the date of its passing. Those which had been restored or newly established during the reign of Queen Mary were confiscated by 1 Eliz., c. 24, practically at the same moment as the reversal of the Marian religious legislation. During the reign of Queen Elizabeth statutes had been passed making it clear that the celebration of Mass was illegal, but no statutes had been passed making it clear that dispositions such as those under discussion were void. Apparently 43 Eliz., c. 4, had been drawn so as to avoid any legislative pronouncement. In these circumstances two cases fell to be decided in 1606. The first was *Croft* v. *Evetts* (8). The date of the assurance is not given, but the settlor is described as a popish recusant, which indicates that the assurance was made after the penal laws of Queen Elizabeth. The facts were, shortly, that one William Evetts before his death, in order to disinherit the plaintiff (his heir-at-law) conveyed certain lands to divers popish recusants upon trust after his own and his wife's death to apply the revenues

"upon poor scholars in Oxford and Cambridge or elsewhere such as study and profess or intend to profess and study Divinity and to enter into holy orders according to the true intent and meaning of the said William Evetts."

On the case coming for hearing before LORD ELLESMERE, L.C., he directed it to be re-argued before himself, the Master of the Rolls, and the two Chief Justices. The King's Counsel were also present, and, after full argument, it was decided that conveyances made on such trusts were pernicious and dangerous to the State, and that if the profits of the lands could be so applied they would be bestowed upon traitors, Jesuits, seminary priests, and others being enemies to the State, and that the precedent would be too pernicious and dangerous an example to be tolerated, and, as such trusts were void and repugnant to law, and there was no intention that the feoffees should take anything to their own use, the lands were declared to belong to the plaintiff after the death of the settlor's widow and the feoffees were ordered to convey the lands accordingly. The other case was *Lady*

Egerton's Case (9). A fine had been levied by a recusant to another in Queen Elizabeth's time in trust that the profits might be employed upon a hospital of religious persons which should be renewed "when the times should serve"; and in the meantime the profits were "to be employed to the relief of poor people by the discretion of the conusee and his heirs to the intent of the conusor." The court decreed the land to the heir-at-law on the ground that it was apparent that the donor was a recusant, and that the employment of the money must be according to his intent, which could be no other than the relief of poor recusants, and that such a disposition, not being agreeable to the law, the use could not be charitable within the meaning of statute 43 Eliz.

The principle of these cases is that no disposition of property for purposes which are contrary to the law can effect the intended purposes, even if the statutes merely prohibit the purpose and do not in terms prohibit the settlement of property for such purpose. I have on the whole formed the opinion that it is upon this principle that the subsequent cases are to be supported. No justification for refusing to uphold the settlements of Dissenters, Jews, and others who do not believe in the doctrines of the Mass, can be founded upon a statute which was only aimed at certain practices and ceremonies of the Roman Catholic Church. When it is borne in mind that the Church of England was the only lawful form of religion until the Toleration Act, the all-embracing scope of this principle can readily be understood. It explains indeed the series of cases following. The decision in *A.-G.* v. *Baxter* (10) (1684) turned upon the validity of a devise in favour of sixty poor ejected ministers to be named by Baxter. The Attorney-General argued that it was void because it tended to encourage and perpetuate schism, and the Lord Chancellor held the bequest void. It appears from the note 2 Vern. at p. 105, where the case is mentioned as *A.-G.* v. *Hughes* (10), that in 1689 the Lords Commissioners reversed this decision. Lord Eldon, in delivering judgment in *Moggridge* v. *Thackwell* (11), said, on the authority of Lord Hardwicke's notes in *De Costa* v. *De Pas* (12), that the reversal was on the ground that the bequest was a mere legacy. *A.-G.* v. *Guise* (13) is an extreme example of the principle. Objection was taken to a charity to educate and ordain Scots to go to Scotland in order to propagate the Church of England there. The ground was that, inasmuch as by statute Presbyterianism was the established religion in Scotland, the trust had thereby become illegal. Lord Somers upheld the objection and made a decree for a scheme (which is printed 2 Coll. at p. 670). This case came on before more than one Lord Chancellor—e.g., Lord Hardwicke in 1744 (9 Mod. Rep. 407), Lord Henley in 1759 (2 Coll. at p. 672)—and was cited in a case which also arose on the scheme—*Glasgow College* v. *A.-G.* (14) (1 H.L.Cas. at p. 820). Episcopacy had been almost forbidden in Scotland: see *Greenshield's Case* (15), which led to the Act 10 Anne, c. 7, being passed to enable Episcopalians in Scotland to worship in their own proper fashion. *Jones' Case* (16) was decided on an information alleging that a lease and release of lands covered an intention to pass the estate for the benefit of Roman Catholic priests in England. This was filed in the reign of James II and alleged that the purpose was unlawful and superstitious. The lands were adjudged to the King in Trinity Term 1688. The Lords dismissed the appeal which claimed that the lands, being given to a superstitious use, should go to the next of relation, or, in the alternative, that a charity should be appointed consonant with the Protestant religion.

Lady Portington's Case (17) was decided on an absolute devise, but the jury on an inquisitio post mortem found for the King on the ground that the devise was in fact for superstitious uses. The case was, it would appear, decided in the Exchequer (1 Salk. 162) and in the King's Bench (3 Salk. 334). The Exchequer held that the lands went to the King, and the King's Bench that they did not. The report in 1 Salk. 162 assigns as the ground of the decision that

> "the King as the head of the commonwealth is obliged by the common law . . . to see that nothing be done to . . . the propagation of a false religion."

The report at 3 Salk. 334 sets out several propositions, which appear to be a kind of headnote. The first of them is as follows: A

> "1. All superstitious uses are void, and given to the King by the statute of Edward VI, which extends only to such uses as were made before that time, so that all superstitious uses since that statute was made, though they are void, yet they are not forfeited to the King." B

It is, however, clear from the terms of the report and the authority cited in the judgment of HOLT, C.J.—namely, *Croft* v. *Evetts* (8)—that the decision was based, not on the statute, but on the common law principle; and, indeed, if anything, it suggests the view that the Act of Edward VI has no application at all to such cases.

De Costa v. *De Pas* (12) was a bequest to a trustee to invest and apply the income in maintaining an assembly for daily reading the Jewish law, and for advancing and propagating the Jewish religion. The report in AMBLER, 228, was said by LORD ELDON in *Moggridge* v. *Thackwell* (11) (7 Ves. at p. 81) not to be very accurate, and he cited LORD HARDWICKE'S notes. The report in SWANSTON, 487, n., is taken from COX'S notes in Lincoln's Inn Library. LORD HARDWICKE was of opinion that the cases had gone further than the statute of Edward VI, and it would indeed be very difficult to attack this bequest on the words of that Act. If the principle of *Croft* v. *Evetts* (8) is applied, then the case becomes clear and intelligible. *De Garcin* v. *Lawson* (18) arose upon a codicil giving legacies to several Roman Catholic establishments both in England and abroad. The legacies were considered void—those to foreign establishments as being contrary to the policy of this country, the others because they were given either to individuals in characters with respect to which they could not claim, or to an illegal establishment. The argument against the Crown was that, as the Chantries Act gave to the Crown only such superstitious uses as were then subsisting, subsequent superstitious uses were merely void. The case did not proceed to judgment as it was very doubtful whether there would prove to be sufficient funds to pay these legacies. *Smart* v. *Prujean* (19) concerned a devise by a Roman Catholic priest on trusts which were held not to have been sufficiently incorporated in the will, and, therefore, to have failed. LORD ELDON (6 Ves. at p. 567) expressed the view that, if a legacy were given for such purpose as the superior of a convent or her successor should judge most expedient, the fact that it was given in that character was sufficient to show that the gift was for a superstitious use. C D E F

In *Cary* v. *Abbot* (5) a bequest for the education and maintenance of poor children in the Roman Catholic faith was considered. SIR WILLIAM GRANT, M.R. (7 Ves. at p. 494), pointed out that, although the Roman Catholic religion had received a considerable degree of toleration from the statute 31 Geo. 3, c. 32 [Roman Catholic Relief Act, 1790], yet that Act contained a provision that all dispositions before considered unlawful should continue to be so. He continued: G

> "There is no statute making superstitious uses void generally. The statute of Edward VI relates only to superstitious uses of a particular description then existing. The statute of Hen. 8 (23 Hen. 8, c. 10) relates only to assurance of land to churches and chapels which if for a longer term than twenty years it declares absolutely void. The statute 1 Geo. 1, c. 55, was only temporary." H

Doe d. Wellard v. *Hawthorn* (20) was an action construing the lease of a dissenting meeting house. It was held that the lease was void either as a superstitious use within 23 Hen. 8, c. 10, or as a charitable use within 9 Geo. 2, c. 36. Both of these Acts are now repealed. In *De Themmines* v. *De Bonneval* (21) it was decided that a trust to apply the dividends of certain securities to the printing and publishing a book which inculcated the absolute and inalienable supremacy of the Pope in ecclesiastical matters was void, as being contrary to the policy of the law and in the nature of a superstitious use. SIR JOHN LEACH, M.R., distinguished this trust from the case of a treatise inculcating the general doctrines of the I

Roman Catholic Church. It was (in his view) against the policy of the country to encourage any work which asserted the absolute supremacy of the Pope in ecclesiastical matters over the sovereignty of the State.

Such was the case law at the date of the passing of the Roman Catholic Relief Act, 1829. It is convenient now to refer to two statutes: 1 Geo. 1, c. 50 [repealed by Roman Catholic Relief Act, 1926] and 31 Geo. 3, c. 32 [Roman Catholic Relief Act, 1790]. The former Act was intended to raise money at the expense of Roman Catholics, and it approached this object among other roads by appointing commissioners to find out what lands, &c., were then held for superstitious uses and to confiscate them to the King for the public use. This Act did not profess to have any operation beyond the existence of the commission and has long since undergone exhaustion. The Act of 1790 permitted religious worship according to the tenets of the Roman Catholic Church, but it was very closely guarded by exceptions and precautions. Section 17 provided that no change was authorised in the holding of land, &c., so that neither Act can be relied upon as altering the law in any relevant particular. The Catholic Relief Act, 1829, is a much wider measure and subject to certain exceptions allows full freedom of worship to Roman Catholics. The provision of the Act of 1790 as to the disposition of property was not repeated. It was now impossible to apply the doctrine of *Croft* v. *Evetts* (8) to the full extent, and, as Roman Catholicism had become a religion recognised by the law, the courts were thereafter constrained to consider later cases from a new angle. *Bradshaw* v. *Tasker* (22) is really a case before the Act. The testator, who died in 1823, had made bequests for Roman Catholic schools. Lord Brougham held that the case did not come within s. 3 of the Roman Catholic Charities Act, 1832, that this Act was retrospective, and, therefore, that the bequests were valid. It follows that he was of opinion that, apart from the 1832 Act, the bequests were invalid.

The Roman Catholic Charities Act, 1832, is entitled "An Act for the better securing of the charitable donations and bequests" of Roman Catholics. After reciting the Toleration Act and other Acts for the relief of Dissenters and the expediency of removing doubts respecting the right of Roman Catholics to acquire and hold property necessary for religious worship, it provides that Roman Catholics shall be on the same footing as Protestant Dissenters in respect to their schools and places for religious worship, education and charitable purposes, and not further or otherwise, but by s. 4 the sections (28–36) of the Act of 1829 against Roman Catholic religious orders were maintained, and by s. 5 the then existing Mortmain Acts were affirmed. The position, therefore, was that the Roman Catholic religion was recognised as one which could be practised without any penal consequences or breach of the law.

The first case after the last-named Act in which the doctrines with which your Lordships are concerned was *West* v. *Shuttleworth* (1), decided by Sir Charles Pepys, afterwards Lord Cottenham, L.C. This decision (not the old cases) is the real foundation for the proposition that bequests of the kind now under consideration are invalid. The question was as to the validity of the provisions of the will of a testatrix who had given bequests to priests for prayers and Masses and directed the residuary estate to be applied in providing funds for the ministers of certain named Roman Catholic chapels for prayers for the soul of the testatrix and her dead husband and, so far as not required for such purposes, in promoting the knowledge of the Roman Catholic religion among the poor and ignorant of certain named districts. The Master of the Rolls held that the bequests to the priests and ministers of chapels were void, but that the ultimate residuary gift was valid. The desire of the testatrix to benefit her soul was indeed defeated; but her desire to have others taught that such a desire was in accordance with true religion was, not without paradox, upheld. The case was fully argued, but the arguments afforded little foothold to those who contend that gifts to superstitious uses, not within the statute of Edward VI, were void as being contrary to the policy of the law. The argument for the validity of the bequests was put

upon the ground that, admitting such gifts to have been invalid, they had ceased to be so by reason of the Catholic Relief Act, 1829, as explained by the Act of 1832. The rule (so it was contended) was then to be taken as laid down in the well-known judgment of LORD ELDON in *A.-G.* v. *Pearson* (23). The earliest case cited in argument was *De Costa* v. *De Pas* (12), and the counsel do not appear to have cited, or examined, any of the earlier authorities in order to unfold the dubious genesis of the rule. SIR C. PEPYS, in his judgment on the superstitious uses (2 My. & K. at pp. 697 and 698), assumes that the rule is one which is binding, unless altered by the statute of 1832, and, taking the view that a bequest to a priest or the minister of a chapel, although for religious purposes, was not a gift to "schools, places for religious worship, education and charitable purposes," naturally came to the conclusion that the gifts were invalid. It is not clear upon what authority he made the statement that the statute of Edward VI "has been considered as establishing the illegality of certain gifts"; but the reference to DUKE ON CHARITABLE USES suggests that he had consulted DUKE'S treatise, and there found an explanation of certain cases, which did not fall within the terms of the statute, and for which he could not find any satisfactory reason. This case is really the earliest authority. LORD COTTENHAM, in 1841, had occasion to deal with a will which came into force before 1 Edw. 6. He held that the gift would have been void under the authority of *Adams and Lambert's Case* (4), and the cases cited in COKE'S REPORTS, but for letters patent and a statute which cured the defect (*A.-G.* v. *Fishmongers' Co., Kneseworth's Will* (24)).

Attorney-General v. *Todd* (25) was concerned with the estate of a testatrix, who in 1680 devised her lands subject to a rentcharge, and by a memorandum directed the devisee and the holder of the rentcharge to carry out certain trust (inter alia) for a Roman Catholic priest. LANGDALE, M.R., held that as litigation was pending at the date of the passing of the 1832 Act, that statute, by s. 3, did not apply, and held the trust invalid without giving reasons. *Heath* v. *Chapman* (26) was a decision of KINDERSLEY, V.-C. He was sitting as a judge of first instance, and as the question was as to the validity of certain trusts created inter vivos for the purpose (inter alia) of paying annuities to certain named Roman Catholic churches in England and abroad for Masses and requiems for the souls of certain named persons, and the poor dead, he was bound by *West* v. *Shuttleworth* (1). He examined, however, the reasons for the rule, and said (2 Drew. at p. 423):

> "It is quite clear that at all events before the [Roman Catholic Charities Act, 1832] it was commonly assumed to be the law . . . that a gift to a priest for Masses for the repose of the testator's soul, or a gift to a priest to say Masses generally, was superstitious and void. The way in which this came to be the law is this: at the time of the passing of the statute of Edward VI such gifts were void. That statute declared as to certain uses; not that they are void—it assumes that—but that the property given to such uses is to belong to the Crown; and the courts of law have subsequently put this interpretation on that statute—not that it actually declares such trusts to be void, but that it stamps on all such trusts, whether created before or subsequently to the statute, the character of illegality, on the ground of being superstitious; it gives to the Crown certain property devoted to such uses, but it stamps all such uses as superstitious and void. That has been the view of the courts of law; and LORD COTTENHAM when Master of the Rolls, in referring to the cases collected in DUKE, refers to the cases where that is stated."

The Vice-Chancellor does not appear to have realised that *Adams and Lambert's Case* (4) was a decision on the statute itself, and, apart from his erroneous assumption that at the date of the passing of the Chantries Act Masses were illegal, he seems to have assumed further that the cases could only have been decided on the strained interpretation of the Act which he stated in the terms cited above. This reasoning cannot be supported. The Vice-Chancellor then discussed the Act of 1832 and its effect upon such trusts, and came to the conclusion that though the

statute was intended to place Roman Catholics on the same footing as Dissenters as to their places of worship, that does not apply to the purposes to which such places are devoted. He said:

> "No doubt if property is given for the use of a place of worship that is good; but the statute leaves quite untouched the case where property is given for superstitious uses."

He ended by stating his entire concurrence with the reasoning of LORD COTTENHAM in *West* v. *Shuttleworth* (1). It is not doing KINDERSLEY, V.-C., an injustice to say that his decision adds nothing to the earlier case which he followed.

In 1860 a new Act [the Roman Catholic Charities Act, 1860] was passed to amend the Act of 1832 providing that where property was held as a trust for the purposes of the Roman Catholic religion, part of which were valid and part invalid, as being for superstitious uses, then so much as was held applicable to the void uses should be applied under a scheme to be settled by the judge for purposes of the Roman Catholic religion. At one period of the debate the suggestion was thrown out that the "superstitious trusts" referred to in the Act of 1860 must mean trusts of the kind which were condemned by the decision in *West* v. *Shuttleworth* (1), and the contention was, therefore, indicated that Parliament had stamped upon such trusts the character attributed to them in that much discussed case. I am not able to accept this view. When the Act says, "trusts or provisions deemed to be superstitious," I am of opinion that it meant a trust or provision rightly and lawfully so deemed. Holding the view which I have formed upon the merits of the decision in *West* v. *Shuttleworth* (1), I necessarily conclude that these trusts were not superstitious, and I, therefore, leave the words of the Act to operate in other ways. Alternatives were suggested to us during the argument, and I think an ingenious person could multiply instances in which even today dispositions connected with relics, the veneration of saints, or the sustenance of miracle producers, might be held to be invalid. But I do not find it necessary to attempt a conclusion upon any of these matters because in my view Parliament simply intended ex cautela to give to Roman Catholics this advantage, that if any trusts hereafter purporting to benefit Roman Catholics should be held superstitious the property so disposed should be applied cy-près.

The Act of 1860 was not referred to in *Re Blundell's Trusts* (27), which arose in the following way. ROMILLY, M.R., had decided a point arising on trusts for Jewish purposes (*Re Michel's Trust* (28)), and in the course of his judgment had expressed obiter the view that since the recent legislation as to Roman Catholics the old cases upon superstitious uses were no longer law, but when the point arose in *Re Blundell's Trusts* (27) he considered the authorities, and found that he was bound by *West* v. *Shuttleworth* (1) and accordingly followed it. This course was adopted in the subsequent cases of *Re Fleetwood*, *Sidgreaves* v. *Brewer* (29) (15 Ch.D. at p. 609), and *Re Elliott*, *Elliott* v. *Johnson* (30), and the late LORD PARKER OF WADDINGTON in his judgment in *Bowman* v. *Secular Society, Ltd.* (2) ([1917] A.C. at p. 437) quite recently uttered a dictum to the effect that it was unlawful to procure Masses to be said for the testator's soul.

This series of authorities has led me, after the most anxious consideration, to several conclusions: (i) That at common law Masses for the dead were not illegal, but on the contrary that dispositions of property to be devoted to procuring Masses to be said or sung were recognised both by common law and by statute. (ii) That at the date of the passing of [the Chantries Act, 1547], no Act or provision having the force of an Act had made Masses illegal. (iii) That the Act of 1547 did not itself make Masses illegal, or provide that property might not thereafter be given for the purpose of procuring Masses to be said or sung. It merely confiscated property then held for such and similar purposes, and subsequent legislation was passed to confiscate property afterwards settled to such uses. This is certainly true of 1 Eliz. c. 24 [Religious Houses: repealed by Roman Catholic Relief Act, 1926] and may be true of 1 Geo. 1, c. 50 [Crown Lands: Forfeited Estates: also

repealed by Act of 1926]. (iv) That, as a result of the Acts of Uniformity, 1548 and 1559, Masses became illegal. The saying or singing of Masses was a penal offence from 1581 to 1791, and no court could enforce uses or trusts intended to be devoted to such uses. (v) That neither contemporaneous exposition of the [Chantries Act, 1547], nor any doctrine closely related to it in point of date, placed upon it the construction adopted in *West* v. *Shuttleworth* (1). The principle of that decision is certainly affirmed in DUKE ON CHARITABLE USES and in ROPER ON LEGACIES, but the authorities cited on its behalf not only do not support it but in some cases contradict it. (vi) That the substratum of the decisions which held such uses and trusts invalid perished as a consequence of the passing of the Catholic Relief Act, 1829, and, therefore, your Lordships may give free play to the principle cessante ratione legis cessat lex ipsa. (vii) That the current of decisions which held such uses and trusts are ipso facto superstitious and void begins with *West* v. *Shuttleworth* (1), and is due to a misunderstanding of the old cases.

If there were, in fact, an unbroken line of authorities dating back 300 years, then it would have been a matter for grave discussion whether this House, in accordance with well-recognised principles, would consent to break that chain. The authorities, however, are only uniform in result. Some depend upon statutes, some on the principle that no religion other than that by law established can be recognised and protected by the court, while others depend upon a misunderstanding of the ancient decisions. *West* v. *Shuttleworth* (1) is not such a decision. The nearest analogy is that of *Sion College* v. *London Corpn.* (31), which was reversed in *Associated Newspapers, Ltd.* v. *London Corpn.* (32), because it was considered that the old decisions upon which the Court of Appeal relied in the *Sion College Case* (31) had not the effect attributed to them in the Court of Appeal. I have carefully and respectfully considered the authorities collected by my noble friend LORD WRENBURY in his judgment. The principle upon which he founds his conclusion is perhaps stated in its widest terms by JESSEL, M.R., in *Re Wright, Ex parte Willey* (33), where he says (23 Ch.D. at p. 127):

> "The judge . . . must not allow any number of dicta, or even decisions which are not binding on him, to affect his judgment except in one peculiar case. . . . Where a series of decisions of inferior courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs."

In *Hebbert* v. *Purchas* (34) LORD HATHERLEY, L.C., in delivering the judgment of the Board on another question raised as to the Reformation settlement, said (L.R. 3 P.C. at p. 650):

> "Through the researches . . . a clear and abundant expositio contemporanea has been supplied, and which compensates for the scantiness of some other materials for a judgment. It is quite clear that neither contrary practice nor disuse can repeal the positive enactment of a statute, but contemporaneous and continuous usage is of the greatest efficacy in law, for determining the true construction of obscurely framed documents. In the case of *A.-G.* v. *Bristol Corpn.* (35) LORD ELDON observes (2 Jac. & W. at p. 321):
>
> > 'Length of time (though it must be admitted that the charity is not barred by it) is a very material consideration, where the question is, what is the effect and true construction of the instrument? Is it according to the practice and enjoyment which has obtained for more than two centuries or has that practice and enjoyment been a breach of trust?'
>
> We may ask in like manner what is the true construction of the Act of 1662 and of the Rubric which it sanctioned? Is it according to the practice of two

centuries, or was the practice a continual breach of the law, commanded and enforced by the bishops, including the very bishops who aided in framing the Act?"

In *Morgan* v. *Crawshay* (36) Lord Westbury stated the rule in these terms (L.R. 5 H.L. at p. 320):

"If we find a uniform interpretation of a statute upon a question materially affecting property and perpetually recurring, and which has been adhered to without interruption, it would be impossible for us to introduce the precedent of disregarding that interpretation. Disagreeing with it would thereby be shaking rights and titles which have been founded through so many years upon the conviction that that interpretation is the legal and proper one, and is one which will not be departed from."

Lord Herschell's judgment in *Tancred, Arrol & Co.* v. *Steel Co. of Scotland, Ltd.* (37) applied the rule to the law of contract. He said (15 App. Cas. at p. 141):

"I think that that doctrine having been laid down so long ago, whether it rests upon any sound basis or not, it would be most improper to depart from it now, because one would be really altering the contract between the parties; for we have a right to suppose that they have entered into it upon the basis of that which for nearly a century has been understood to be the law."

In *West Ham Union* v. *Edmonton Union* (38), a case relating to the settlement of paupers, Lord Loreburn, L.C., said ([1908] A.C. at pp. 4, 5):

"I ought to say that, in my opinion, the cases which governed the decisions in the courts below do lead to the conclusion which they reached. . . . Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them."

In my view, it is undoubtedly true that ancient decisions are not to be lightly disturbed when men have accepted them and regulated their dispositions in reliance upon them, and this doctrine is especially deserving of respect in cases when title has passed from man to man in reliance upon a sustained trend of judicial opinion. But this is not the present case. If my view is well founded, citizens of this country have for generations mistakenly held themselves precluded from making these dispositions. I cannot conceive that it is my function as a judge of the Supreme Appellate Court of this country to perpetuate error in a matter of this kind. The proposition crudely stated really amounts to this, that because members of the Roman Catholic faith have wrongly supposed for a long period of time that a certain disposition of their property was unlawful, and have abstained from making it, we, who are empowered and bound to declare the law, refuse to other members of that Church the reassurance and the relief to which our view of the law entitles them. I cannot and will not be a party to such a proposal. The conclusion, therefore, so far as I am concerned, is that a gift for Masses for the souls of the dead ceased to be impressed with the stamp of superstitious use when Roman Catholicism was again permitted to be openly professed in this country, and that thenceforth it could not be deemed illegal. This is not to say that there are now no superstitious uses, or that no gift for any religious purpose, whether Roman Catholic or other, can be invalid. Such cases may arise and will call for decision when they do arise.

A third point remains, and this may be briefly dealt with. The respondent contends that all the gifts, except that to the Westminster Cathedral, were bad, as being to orders bound by monastic vows: Catholic Relief Act, 1829, s. 28; Roman Catholic Charities Act, 1832, s. 4; and Roman Catholic Charities Act,

1860, s. 7. I do not think it is necessary to examine this contention or the cases which were cited to us for two reasons: (i) The respondent does not raise the point in his Case, though he certainly would have done so had he placed substantial reliance upon it; (ii) he has not placed before us, as was his duty, any evidence sufficient to establish the facts which are necessary in order to found his contentions of law. In my opinion, the cumulative effect of the various Emancipation Acts is to remove from the doctrines of the Roman Catholic faith every stigma of illegality. Gifts inter vivos or by will may now be made to build a Roman Catholic church or to erect an altar. I am content that my decision should not involve your Lordships in the absurdity that a Roman Catholic citizen of this country may legally endow an altar for the Roman Catholic community, but may not provide funds for the administration of that Sacrament which is fundamental in the belief of Roman Catholics, and without which the Church and the altar would alike be useless. I am of opinion that this appeal must be allowed with costs, and I move your Lordships accordingly.

LORD BUCKMASTER (read by LORD PARMOOR).—Edward Egan was an Irishman domiciled in England, who lived and died in the consolations of the Roman Catholic faith. He made his will on Nov. 29, 1916, and thereby, among other bequests, gave £200 to "the cathedral" for Masses, and £200 and the residue of his estate to the Jesuit Fathers, Farm Street, for Masses. He also made certain bequests to the Dominican and the Franciscan Fathers. He died on Dec. 27, 1916, and the question raised on this appeal is as to the validity of the gifts to the cathedral and the Jesuit Fathers. They have been declared invalid by EVE, J., and by the Court of Appeal, but in neither case did the judgments depend upon any investigation of the law. Both courts accepted and followed the authority of certain decisions dependent upon *West* v. *Shuttleworth* (1), to which I will make more reference hereafter. The bequests are open to challenge on the ground: (i) that they are for a superstitious and unlawful purpose; and (ii) so far as the gift to the Jesuit Fathers is concerned, that they are made to a monastic body. It is on the first of these grounds that the gifts have been held to fail.

It is important at the outset to disentangle the consideration of this question from that connected with the cases where money has been left for purposes which the law would declare to be illegal, but associated with what the law would regard as a charitable intent. If a general charitable purpose be expressed, and a particular method of carrying it out directed which the law would not recognise, the failure of the particular method in which that charitable intention is to be effected does not destroy the charity, and the law substitutes by the doctrine of cy-près another method of devoting the property to charitable uses. The unlawful purpose is in such cases regarded as a means of disappointing the principal intention of the will, notwithstanding that in the result property has frequently been devoted to something which was the exact opposite of what the testator desired. It is unnecessary to multiply references to authorities upon this point; they are to be found referred to in *Moggridge* v. *Thackwell* (11), and the distinction mentioned is well illustrated in *Cary* v. *Abbot* (5) (7 Ves. at p. 494). In that case a gift had been made for the purpose of educating poor children in the Roman Catholic faith, and the next-of-kin sought to have the gift declared illegal and void, but the Attorney-General claimed that, a general charitable intent being disclosed, the residue ought to be applied to such purposes as the Crown should please to direct. The Master of the Rolls said (ibid. at p. 495):

> "to entitle the heir or next-of-kin it is requisite not only that the devise is to a superstitious use, but to such as is made void by statute. There is no statute making superstitious uses void generally. The statute of Edward VI relates only to superstitious uses of a particular description then existing."

Holding that the use was clearly charitable, though vitiated by the provisions that the poor children were to be educated in the Roman Catholic religion, he directed that the property should go to such use as the King should direct. In the present

case no general charitable intention is disclosed; the gift is either void or it passes to the persons and for the purposes defined. There is, therefore, no doctrine of equity affecting this gift; if void, it must be so by common law or statute. Now the principles of the common law do not change, though their application is capable of indefinite variation with the changing habits and customs of mankind. If void by the common law, therefore, it must always have been so. It cannot, however, be successfully contended that a gift to provide Masses for the souls of the dead was at all times contrary to the common law. Until legislative interference with worship according to the rites and ceremonies of the Roman Catholic Church, Masses for the souls of the dead were a recognised method of intercession for the souls of the departed, and there still remain scattered over the country chantries and chapels which were built and endowed for this very purpose. The common law of Ireland does not differ from the common law of England, and PALLAS, C.B., in a judgment in *O'Hanlon* v. *Logue* (39) showed with great distinctness that in Ireland such a gift is good.

I do not think that the common law upon this point needs any further investigation. It, therefore, becomes necessary to examine what statute law affects the question, and in this respect only one statute is relied upon, the Chantries Act, 1547. It is one of those statutes that cumber the statute-book long after their purpose has been fulfilled, and the reason why it remains unrepealed is, probably because it is completely obsolete. It was prefaced by a preamble which runs in these words:

> "Considering that a great part of superstition and errors in Christian religion hath been brought into the minds and estimations of men by reason of the ignorance of their very true and perfect salvation through the death of Jesus Christ, and by devising in phantasying vain opinions of purgatory and Masses satisfactory to be done for them which be departed; to which doctrine and vain opinion by nothing more is maintained and upholden than by the abuse of trentals, chantries, and other provisions made for the continuance of the said blindness and ignorance."

It then proceeded to enact that chantries and lands for the maintenance of any anniversary or obit or other like thing, intent, or purpose or of any light or lamp in any church or chapel which had been kept or maintained within five years then next preceding should be forfeited to the Crown. It also provided by s. 38 that it should not be lawful to any person by reason of any remainder, use or condition, to claim any lands for the non-doing or non-finding of any obit, anniversary, light or lamp, from thenceforth to be founded or done. The only part of the statute dealing with personal property is s. 7, which avoids certain gifts made within the said period of five years. These are the material parts of the statute, and from them it is perfectly plain, first, that there was no general declaration avoiding the gifts then existing or thereafter to be made in support of Masses for departed souls, but that in the case and only in the case of then existing trusts of lands and certain limited cases money given for such purposes operative within five years before the passing of the Act, the King should be at liberty to enter and enjoy the same, and that for the future, if any lands were given for similar purposes, the persons in remainder should not be entitled to enter if the conditions were not performed. This last provision is of consequence, for if the statute had intended that all gifts for such uses were to be declared superstitious and bad, it would not have been possible to make express provisions merely preventing re-entry by the remainder men in cases where such gifts were subsequently established.

Shortly after the passage of this Act the Act of Uniformity, 1548 (2 & 3 Edw. 6, c. 1) established the Book of Common Prayer and imposed penalties upon any people who should use any other rite, ceremony, form or manner of Masses openly or privily and, as has been pointed out, the Book of Common Prayer so established contained as part of the Communion Service a solemn and appealing supplication for the souls of the dead. The form of Common Prayer was altered in 1552, and

these services were omitted. In 1581, by 23 Eliz., c. 1, s. 4 (repealed, 7 & 8 Vict., c. 102 (1844)), penalties of fine and imprisonment were imposed both upon any person who celebrated and any who attended the service of the Mass.

The next step in the history is *Adams and Lambert's Case* (4). It was a decision upon the statute of 1547. The only point that then arose for determination was as to whether certain estates for life and entail were within the statute, and it was decided that they were; so far, therefore, as the decision is concerned, it does not affect the question. It is, however, true that in the long and tangled report of this authority there are to be found scattered statements of far wider significance. Example at p. 113b of 4 Co. Rep., where it is said that the equity of the said Act "intended to extirpate all praying for souls"; but whether this was part of the judgment or part of the comments upon it is not plain. In any case I find it difficult to understand what is meant by the equity of any Act, or, whatever is the meaning of the phrase, how the equity is to be ascertained apart from plain language and reasonable inference. The purpose of the Act was limited, and there is no means by which it can be extended. In this connection a statement made in *Phillpotts* v. *Boyd* (40) (L.R. 6 P.C. at p. 462) as to the effect of 3 & 4 Edw. 6, c. 10, intituled "An Act for the abolishing and putting away of divers books and images" is peculiarly appropriate. This statute provided that any person who then had or thereafter should have in his custody images taken out of any church or chapel, or yet standing in any church or chapel, should destroy them; but it was held that this did not render images on a reredos illegal, and Lord Hatherley says (ibid. at p. 462) that

> "the efficacy of the Act of Edward was spent upon the definite purpose to which it was directed, and that the legislature did not thereby make or intend to make provision in respect of the subsequent use or abuse of any other images."

Following in point of date are cases such as *Cary* v. *Abbot* (5), where the illegality of gifts in support of Roman Catholic teaching is discussed and applied. But the illegality is nowhere stated to be due to the statute of Edward VI and is more probably referable to the statute of 23 Eliz. In the reported cases these gifts are associated with charitable purposes and they were not declared void. But had a gift been made in the terms of the present will, it would, owing to this illegality, have been bad.

This is indeed stated in exact language by Lord Mansfield in his speech in *Harrison* v. *Evans* (41) in 1767. The question that there arose for decision was remote from that in the present case. A Protestant Nonconformist was chosen sheriff of London, and he refused to serve upon the ground that he was disqualified since he had not, in accordance with the provisions of the Corporation Act, qualified himself by taking the sacrament according to the usage of the Church of England within a year before his election. He refused to serve and proceedings were taken against him to recover fines in accordance with the bye-laws of the city. It was held that the proceedings would not lie. Lord Mansfield's speech is certainly worthy of a more important place in the law reports than that hitherto assigned. So far as I can ascertain it is only fully reported in Furneaux, Letters to Blackstone and Cobbett's Parliamentary History (vol. 16). In the former it is to be found in the second edition published in 1771, at p. 249, and in the latter in columns 313–327. Its importance lies in its strong declaration of the liberty accorded to every man for freedom of religious opinion in this country except so far as such right has from time to time been limited and invaded by Acts of Parliament. The Toleration Act (1 Will. & Mar., c. 18) had been passed, and, in dealing with its effect upon dissenters, Lord Mansfield said:

> "Dissenters, within the description of the Toleration Act, are restored to a legal consideration and capacity; and one hundred consequences will from thence follow which are not mentioned in the Act. For instance, previous to the Toleration Act it was unlawful to devise any legacy for the support of a

dissenting congregation, or for the benefit of dissenting Ministers; for the law knew no such assemblies and no such persons; and such a devise was absolutely void, being left to what the law called superstitious purposes. But will it be said in any court in England that such a devise is not a good and valid one now? And yet there is nothing said of this in the Toleration Act."

The question asked by LORD MANSFIELD, to which he thought there was only one possible reply, is the question your Lordships are called upon to answer in the present case. The statement has no special application to nonconformity, it applies with equal force to a gift for Roman Catholics when once the disabilities imposed upon them have been removed as by the Toleration Act they were removed from Dissenters.

Now Roman Catholics were not within the privilege of the Toleration Act, but by the Roman Catholic Relief Act, 1791, the effect of the statute of Elizabeth was modified. By the Roman Catholic Relief Act, 1829, civil disabilities were removed and by the Roman Catholic Charities Act, 1832, after reciting the Toleration Act, it was provided that Roman Catholics in respect to schools, places for religious worship, education and charitable purposes and property held therewith and the persons employed in and about the same should in respect thereof be subject to the same laws as the Protestant Dissenters, and by 7 & 8 Vict., c. 102, the penal statute of Elizabeth was repealed and there remained no illegality in the Roman Catholic faith.

The next and by far the most important authority in this case is *West* v. *Shuttleworth* (1), decided in 1835. The gift under consideration provided that whatever was left to priest or chapels "I desire the benefit of their prayers and Masses," and the gift was held to be void by LORD COTTENHAM, who was then SIR C. PEPYS, M.R. He was under no misapprehension as to the Chantries Act, 1547, but he said that by the preamble it was generally regarded that all such uses were superstitious and were consequently void, and in support of this he quoted the authority of DUKE'S CHARITABLE USES, and uses words which suggest reference to *Adams and Lambert's Case* (4). It is difficult to understand how these authorities supported the conclusion. The cases quoted in DUKE'S CHARITABLE USES are all of them cases relating to the special application of the section in the Chantries Act which forfeited then existing gifts in favour of the Crown. They are of no assistance for the purpose of showing that it was intended by the statute to declare all such uses superstitious and void, nor, as already shown, does *Adams and Lambert's Case* (4) carry the matter any further. In *A.-G.* v. *Fishmongers' Co.* (24) LORD COTTENHAM again took the same view of the Chantries Act, but added nothing to the reasons already given. In *Heath* v. *Chapman* (26) the question came before KINDERSLEY, V.C. He acted on the assumption that before the Roman Catholic Charities Act, 1832, it was clearly admitted to be the law that a gift of money for the welfare of a testator's soul was superstitious and void, and he says that this was due, not to the law effected by the Chantries Act, but because the law assumed that the gifts are void, and it stamps such trusts with illegality, and he holds that the statute of William IV did not alter the law in this respect. I find it difficult to understand why, if the Chantries Act assumed all the gifts to be void, there should have been a limited provision covering these made within a limited time and forfeiting those only in favour of the Crown. And if it be true that the law subsequently assumed the gifts to be bad, it is explained upon the ground already referred to—that the worship had become illegal by statute. The learned Vice-Chancellor had not before him the statement I have quoted from LORD MANSFIELD, which would, I think, have provided an answer to his conclusions as to the limited operation of the statute of William IV. In *Re Michel's Trust* (28), a case which related to the Jewish religion, LORD ROMILLY expressed his doubts as to the validity of *West* v. *Shuttleworth* (1) and *Heath* v. *Chapman* (26) in these words (28 Beav. at p. 42):

"So far as relates to their places for religious worships, and the property held therewith, Roman Catholics and Jews are now placed in the same

position as Protestant Dissenters: and, if it be part of the forms of their religion that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it would be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question, which practically have authorised them."

But he refrained from expressing any definite opinion as the case did not arise. In *Re Blundell's Trusts* (27) the same learned judge reiterates his opinions.

"I think the decided cases too strong, and that the House of Lords alone can alter the settled law. It is clear that I must act on *West* v. *Shuttleworth* (1), which I cannot overrule."

But in *Re Flectwood, Sidgreaves* v. *Brewer* (29), as late as 1880, HALL, V.-C., following *West* v. *Shuttleworth* (1), expressed his judgment in these words: "As regards the intended gift of £10 for Masses, it seems to be void on the authority of *West* v. *Shuttleworth* (1)" and other cases to which he referred, language of strange and uncertain import if the learned judge was administering a well-recognised and well-established principle of law. Finally, in *Yeap Cheah Neo* v. *Ong Cheng Neo* (42) and in *Bowman* v. *Secular Society, Ltd.* (2), *West* v. *Shuttleworth* (1) is referred to by way of illustration, without any expression of doubt as to the soundness of the decision, which indeed was in neither of the cases brought up for consideration.

There remains only the consideration of the effect of the Roman Catholic Charities Act, 1860. This statute clearly proceeds upon the hypothesis that there are purposes connected with the Roman Catholic faith which may be regarded as superstitious, and, at the same time, it may well be that the decision in *West* v. *Shuttleworth* (1) was regarded as an illustration of such uses. It was intended as an enabling statute; its purpose was to prevent the destruction of an entire gift if, associated with gifts that were charitable, were others that would be held to be void. This statute was passed twenty-five years after the decision in question; but it appears to me that its interpretation would be the same had it been passed immediately after the decision. In such a case it would be impossible to rely on the antiquity of the authority for its support; and, to my mind, it would have been equally impossible to prevent your Lordships' House from declaring it unsound, had the matter then arisen for decision. The fact that the statute was passed twenty-five years afterwards cannot, it seems to me, affect its construction, and it would indeed have been an unfortunate result if, after other objections to this gift were shown to be unsound, an Act of Parliament passed with an obviously remedial purpose were found to have effected the exact opposite of its real intent.

I am clearly of opinion that *West* v. *Shuttleworth* (1) was wrongly decided. A preamble to a statute may be of great service in determining the nature of doubtful and ambiguous language in its clauses, but it is impossible to legislate by a preamble, and the facts to which I have referred are, to my mind, clear for the purpose of showing that the statute did not, and did not intend to, have any such wide and general application. It remains only to be considered whether in these circumstances your Lordships ought to act on the view that *West* v. *Shuttleworth* (1) was erroneous. I see no reason why, if that opinion be clearly and positively held, hesitation should be felt in giving it effect. There could have been no principles known to LORD COTTENHAM that are not equally open to your Lordships. Had his decision depended upon the doubtful words of an ambiguous statute more difficulty might have arisen, but indeed it does not. Until that decision, and apart from certain dicta in *Adams and Lambert's Case* (4), there is nothing in the whole course of authority to which the error can be traced, nor can it be said that to alter this decision now would affect the title of existing estates. Obedience to the authority would have led to no other result than that such gifts would have been excluded from testators' wills, and that in consequence valid dispositions

may have been made in favour of beneficiaries which would not have been effected had the law performed other dispositions. In other words, it is the Roman Catholic religion which may have suffered by the effect of the authority, and I see no reason why what I regard as a mis-statement of the law should be perpetuated in violence to the convictions of those who accept its teachings.

In this respect I have the great misfortune to differ from one of your Lordships who has come to the contrary conclusion, and I have anxiously examined the authorities on which he relied—authorities some of which are binding upon this House—for the purpose of seeing that my opinion does not overstep the limits which those authorities have laid down. They are numerous; but the ones that I have selected enunciate the doctrine in sufficiently clear and unmistakable terms. In *R.* v. *Sedgley* (*Inhabitants*) (43) LORD TENTERDEN said, with regard to a construction of a doubtful rating statute (2 B. & Ad. at p. 73):

> "The rule of construction has been established and acted upon for a long time and ought to be adhered to unless we could say positively that it was wrong and productive of inconvenience."

In *Nicol* v. *Paul* (44), in considering certain old decrees of valuation, LORD WESTBURY said (p. 131):

> "The suit, and the determination of it, are matters of very great concern generally to the heritors in Scotland. No doubt the payments made by them and the value of their estates have for a long period of years been calculated upon the belief that these decrees of valuation would not be lightly disturbed. And I think it very desirable that the principle should be established that a very liberal interpretation should be given to the language of these decrees, so as to support long usage, and the conclusions that fairly may be derived from the acquiescence of persons who had an interest in disturbing them if not well founded."

In *Morgan* v. *Crawshay* (36) a question arose as to whether iron mines were rateable for poor relief under the statute of 43 Eliz., c. 2. This statute in terms made coal mines rateable, and there had been decisions for upwards of 200 years that other mines were not. These decisions were followed, and LORD WESTBURY, who, it appeared, was not satisfied with their correctness, said (L.R. 5 H.L. at p. 319):

> "We must bow to the uniform interpretation which has been put upon the statute of Elizabeth and must not attempt to disturb the exposition which it has received."

LORD CAIRNS, in *I.R.Comrs.* v. *Harrison* (45), says with regard to disturbing established decisions on fiscal statutes (L.R. 7 H.L. at p. 8):

> "I think that a course of proceeding of that kind is one which your Lordships never have adopted. It appears to me that it would be a most dangerous course for this House to adopt; and if it could be more dangerous in one case than in another, it would be so in a case in which your Lordships are dealing with one of the fiscal Acts of the country, as to which the object must be, above that of all other Acts, to maintain them and to expound them in a manner which will be consistent, and which will enable the subjects of this country to know what exactly is the amount of charge and burden which they are to sustain. I think that with regard to statutes of that kind, above all others, it is desirable, not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty."

SIR GEORGE JESSEL in the Court of Appeal in *Ex parte Willey* (33), in construing a Bankruptcy Act, said (23 Ch.D. at pp. 127, 128):

> "Where a series of decisions of inferior courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily

dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs."

LORD HERSCHELL in his speech in *L.C.C.* v. *Erith Parish* (*Churchwardens, etc.*) (46), after stating ([1893] A.C. at p. 598) that he could not regard as satisfactory the grounds upon which the Court of Queen's Bench had rested the non-rateability of certain sewers, "and that the law on the subject could not be said to be upon a sound and consistent basis," went on to say (ibid. at p. 599):

"I entirely concur with the learned judge in deeming it inexpedient to interfere in such a matter as this with a long course of practice supported by decisions which are not of very recent date. Therefore even if it be not possible to rest upon grounds altogether satisfactory the exemption of these sewers, yet the case being, as I have said, a very particular one, I could not advise your Lordships to depart from a practice which has prevailed for a very long period, and which has been sanctioned by judicial authority."

In *Tancred, Arrol & Co.* v. *Steel Co. of Scotland, Ltd.* (37) a question arose as to the effect of an arbitration clause agreeing to refer disputes to an unnamed arbitrator designated only by his filling a particular office. By the law of Scotland such agreements are inoperative, and LORD HERSCHELL, in support of the view that such an agreement did not oust the jurisdiction of the courts, said (15 App. Cas. at p. 141):

"I think that doctrine having been laid down so long ago, whether it rests upon any sound basis or not, it would be most improper to depart from it now because one would really be altering the contract between the parties or we have a right to suppose that they have entered into it upon the basis of that which for nearly a century has been understood to be the case."

In *Associated Newspapers, Ltd.* v. *London Corpn.* (32), which raised a question as to liability to rates, the same sentence was again enunciated.

From these authorities, I collect the following principles as applicable to such a question. (i) The construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless your Lordships would say positively that it was wrong, and produced true inconvenience; (ii) that decisions upon which title to property depends, or which by establishing principles of construction or otherwise form the basis of contracts, ought to receive the same protection; (iii) decisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected, ought in the same way to continue. I cannot find, however, that they compel acceptance as accurate of a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of a mistake. For over eighty years Roman Catholics have been unlawfully restricted in the disposal of their property; that seems to me no reason why the restrictions should continue to be imposed.

The final question is whether the gift to the Jesuit Fathers of Farm Street is bad on the ground that it is given to a monastic body. If it became necessary to consider what the constitution of this body was I should require further evidence than that furnished by the affidavit in this matter, but in truth I regard this as unnecessary. The Jesuit Fathers at Farm Street are not a corporation, and the gift to them cannot be regarded as a gift to a corporate body. It is, in fact, a gift to a group of men, members of a particular community resident at a named place, but the gift is to them individually: see *Cocks* v. *Manners* (47); *Re Smith, Johnson* v. *Bright-Smith* (48). If there were imposed upon them by the terms of the will the obligation of holding the gift so made for the purpose of a monastic order the

gift would be bad, but no such trust exists. The trust that is imposed upon them is a trust for a purpose which I regard as lawful, which is certainly not the peculiar and exclusive duty of any monastic order, but a trust which they can perform, not as members of any body, but by virtue of their ecclesiastical office in the Roman Catholic community. It is in that capacity and for that purpose that the gift was made. All the objections to this gift, therefore, fail, and in my opinion this appeal should be allowed.

LORD ATKINSON.—I concur. The testator, a Roman Catholic, upon whose will the only question ripe for decision in this case arises, bequeathed to certain persons or bodies therein named certain sums of money admittedly for the purpose of having Masses celebrated for the repose of his, the testator's, soul. He was not entitled to any real estate. EVE, J., felt himself bound by the authorities to hold that these bequests were void, and the Court of Appeal upheld his decision on the ground that the law on the subject was too well settled to be shaken or disturbed by that court, having regard to the course of the decisions since the passing of the Chantries Act, 1547, six of which decisions they named. None of these cases nor any others raising the same point was decided in your Lordships' House. The question of the validity of bequests such as these now comes, therefore, for the first time before this House for decision. We are consequently unfettered by any authority which the House is bound to accept and act upon.

The parties on both sides admitted that the Sacrament of the Mass was the most sacred, solemn, and vital of their religious ceremonies, that attendance at its celebration is compulsory, that in it a prayer is offered up to the Deity to accept the Immaculate Host which the officiating priest offers up, not only for himself and all present, but also for all faithful Christians living or dead, that it may be profitable, not only for his own, but for their salvation unto eternal life, and another prayer that those who have gone before those present with the sign of Faith may sleep in the sleep of peace. The parties upon both sides have accepted as accurate the description given in the supplemental statement made by the defendant in *A.-G.* v. *Delany* (3) as to the precise nature of the Mass and of gifts made for Masses for the repose of the donor's soul.

The Chantries Act, 1547, upon which the authorities referred to by the Court of Appeal appear to be based, is entitled:

> "An Act whereby Chantries, Colleges, Free Chapels and the Possessions of the same may be given to the King."

This, and this only, was apparently the aim of the statute. Its provision cannot be too closely examined in detail. It begins with a very pronounced, and what one would, I think, in the present day, at least, consider a very bigoted preamble, in which are set forth certain evils it was desirable to correct and remedy. The true function of a preamble to an Act of Parliament is possibly better described by TINDAL, C.J., in the *Sussex Peerage Case* (6), cited with approval by LORD HALSBURY in *Income Tax Special Purposes Comrs.* v. *Pemsel* (49) ([1891] A.C. at p. 544) than elsewhere. His statement of such law has been already quoted. Judging from the report of *Adams and Lambert's Case* (4) (4 Co. Rep. 104b) the first of the six cases mentioned by the Court of Appeal, and the authority upon which the other cases mentioned purport to be based, the preamble to this statute of 1547 seems to have served a much more ambitious purpose. It was treated, it appears to me, as if it extended beyond the evils named and the remedies prescribed in clear and precise language in the enacting portions of the statute, and dealt, with legislative authority and force, with other matters, making them unlawful on the ground that they, though untouched by the sections of the Act, conduced to the evils against which the statute was directed. The more important portion of this preamble has been already quoted. I only quote in addition the concluding portion of it:

> "And further considering and understanding that the alteration, change, and amendment of the same and converting to good and godly uses, as in erecting

of Grammar Schools to the Education of Youth in Virtue and Godliness, the further augmenting of the universities and better provision for the poor and needy cannot in this present Parliament be provided and conveniently done, nor cannot nor ought to any other manner person be committed than to the King's Highness, whose Majesty, with and by the advice of his Highness' most prudent council, can and will most wisely and beneficially, both for the honour of God and the weal of His Majesty's realm, order, alter, convert, and dispose of the same."

This might possibly be a not unsuitable preamble for a statute which, looking both to the past and to the future, made disbelief in the efficacy of the Atonement, or belief in the doctrine of Purgatory, or the efficacy of Masses to secure for departed souls release from Purgatory, or the celebration of or attendance at the saying of Masses illegal or possibly criminal acts, but the Act of 1547 does none of these things. In one section, and one section alone, does it deal with the future. Every other section deals with the past. It did not make belief in any doctrine or the performance of any religious ceremony an offence. It did not, it appears to me, make any gift for the celebration of Masses or any ceremony for the repose of the souls of deceased persons illegal or void. It recognised them as valid, but enabled the King in the specific instances mentioned, but none others, to capture the subject-matter of each gift and employ it for purposes other than and different from those for which it was originally given. And as to the future, it, by s. 38, enabled those to whom these gifts were made to omit with impunity to fulfil the duties for the discharge of which they were given.

Following the preamble, the provisions of the statute 27 Hen. 8, c. 28, dealing with the dissolution of chantries are recited, and then, developing the policy of that measure, it is enacted that all manner of colleges, free chapels, and chantries having been in esse within five years before the opening of the then present Parliament other than those in the actual possession of Henry VIII and those excepted by the aforesaid Act of his reign, or altered by the commissioners in manner prescribed, and all the manors, lands, and tenements, tithes, rents, pensions, portions, or other hereditaments belonging to them or any of them.

"And also all manors, lands, tenements, rents and other hereditaments and things above mentioned by any assurance, conveyance, will, devise or otherwise had made, suffered, acknowledged or declared, given, assigned, limited or appointed to the finding of any priest to have continuance for ever, or wherewith or whereby any priest was sustained, maintained or found within the five years next before the first day of the present Parliament, (which were not in the actual and real possession of the said late King that now is) which were not in the actual possession of the late or present King; and also any annual rents, profits, and emoluments, at any time within five years next before the beginning of the present Parliament, employed, paid or bestowed, towards or for the maintenance, supportation or finding of any stipendiary priest intended by any Act or writing to have continuance for ever, shall by the present Parliament, immediately after the Feast of Easter, next coming, be adjudged and deemed and also be, in the very actual and real possession and seisin of the King our Sovereign Lord, and his heirs and successors for ever, without office or inquisition thereof to be had or found, and in as large and ample manner and form as the priests, wardens, masters, ministers, governors, rulers, or other incumbents, of them, or any of them, within five years next before the beginning of this present Parliament, had, occupied, or enjoyed . . . the same."

It will be observed that the provision of this period of five years limits every branch of this enactment. The third section of the statute deals with terms of years, created at any time before the passing of the Act for the finding or maintenance of a priest or priests, but in pursuance of the policy of the Act required that the term should be enjoyed by the aforesaid priest or priests within the

aforesaid period of five years. The following section secures to those entitled to the reversion a right of re-entry at the expiration of the term. The fifth and sixth sections deal with anniversaries, obits, lights and lamps, in churches and chapels, and provide that there shall be forfeited to the King any lands, rents or other hereditaments at any time theretofore given or appointed, &c., to be employed wholly for the finding or maintenance of any anniversary or obit *or other like thing, intent, or purpose* for ever, or for the finding or maintenance of any light or lamp in any church or chapel to have continuance for ever. The sixth section deals with the cases where only portions of the lands or rents are given for the above-mentioned purposes. But here again comes, as I construe the section, the provision that the finding, keeping and maintenance mentioned must have taken place or be enjoyed within the aforesaid period of five years. There is not in the foregoing sections, nor in any part of the statute any suggestion or trace of a provision that where only part of the lands or the rents thereof are given for any of the purposes mentioned, the grant of the remainder of the lands or rents to some legitimate purpose, such as a charity, is vitiated or contaminated by its connection with the first grant. An obit, we were informed by counsel for the appellants, was a requiem service which may or may not include the solemnisation of the Mass. The italics are mine; I use them to draw attention to words which in some of the cases have been constructed as not confined, as, in my opinion, they should be, to things of similar intent and purpose to anniversaries and obits, and subject to the like conditions, but extending much beyond these. Section 7 deals with sums of money, profits, emoluments, or commodities theretofore given within the said five years by the corporations or guilds named, for purposes similar to those described in two next preceding sections. Section 38, the only section dealing with the future, provides that it shall not be lawful for any person or body politic or corporate by reason of any remainder, use, or condition to enter into, claim, or challenge any lands, tenements, or hereditaments for the non-doing, non-naming, or non-finding of any such priest or priests as aforesaid, or an obit, anniversary, light, or lamp henceforth to be provided or done anything contained therein to the contrary notwithstanding. This section, so far as the remaindermen and reversioners are concerned, secures to the grantees the continued enjoyment of property given to them for certain purposes though they may never so use it. Probably it may have been designed to discourage such gift, but on the face of it, and of the fact that the period of five years made applicable to all gifts made in the past, I am, with the most infinite respect for the distinguished judges with whose decision I shall presently deal, utterly unable to discover on what just, legitimate, or rational principle of construction they have found in this statute a provision, expressly or impliedly, invalidating, or making void, a gift made hundreds of years after the statute was passed providing for the celebration of Masses for the repose of the soul of the donor.

In the first place it can be clearly shown that this preamble is not declaratory of, or based upon the then existing common law of England. First, from the very nature of the duties which those holding lands by the tenure of frankalmoign were bound to perform. In Coke on Littleton, s. 135, it is stated that these duties were

> "of right before God to make orisons, prayers, and Masses and other Divine services for the soul of their grantor or feofor and for the soules of their heires which were dead, and for the prosperity, good life, and good health of their heires which were alive. And, therefore, they shall do no fealty to their lord because this Divine service is better for them before God than any doing of fealty, and also because this word Frankalmoigne excludes the Lord to have any earthly or temporal service, but to have onely Divine and spirituall service to be done to him, etc."

If this Divine service be not performed, complaint is to be made to the ordinary or visitor. Littleton proceeds in the next section 137b, (Co. Litt. 96b), to distinguish

this tenure from the tenure by Divine service—i.e., where "the Masses are to be sung or said at stated periods." According to BRACTON, the common law regarded these gifts as in a primary sense made to God and the Church, and in a secondary sense made to the canons or monks or other persons, and for this reason he says the gifts were held and considered to be pious: see HISTORY OF ENGLISH LAW, POLLOCK AND MAITLAND (1st Edn.), vol. 1, p. 222; (2nd Edn.) p. 243. In *O'Hanlon* v. *Logue* (39), PALLES, C.B., in the course of an elaborate judgment on these points, says:

> "All this shows the true reasons why the common law held these gifts pious. It was because they were gifts to God. Even had the common law acknowledged more religions than one, it would have held pious any gift making provision for the worship of God, irrespective of the particular acknowledged religion according to which the worship was to be offered, provided only the religion was recognised as lawful."

There is a second fact which leads to the same conclusion. Henry VIII died in January, 1547, the year in which this statute of Edward VI was passed. It is, as I understand, an undoubted historical fact that Henry VIII got the title of Fidei Defensor from the Pope for his writings against Luther, and that he never had any quarrel with the Pope on points of doctrine. By his will dated in December, 1544, of which there is no valid ground for doubting the authenticity, he directed that an honourable tomb for his body should be made in the choir of the College of Windsor, and that there should be provided and set up a convenient altar honourably prepared and apparelled with all manner of things for daily Masses there to be said perpetually while the world should endure. And that his executors should with all convenient speed cause his body to be removed to the College at Windsor and the service of Placebo Dirige with a sermon and Mass on the morrow be done and solemnly kept. He further directed his executors to give in as short a space as possible after his death 1,000 marks to the most needy people (other than regular beggars) to pray heartily unto God for the remission of his sins and the health of his soul. It is impossible, I think, to believe that the King would have made a will to this effect, if either the saying of Masses for the repose of the soul of the dead, or the praying for the soul of the dead was at common law illegal as a superstitious use or practice.

There is a third and most significant fact, namely, that the authorities cited in argument conclusively establish that in those countries upon which England has conferred the boon of her common law, but to which the Chantries Act, 1547, does not extend, gifts for Masses for the repose of the soul of the donor or any other person are held not to be gifts for superstitious use or void at law. Those authorities are in the case of Ireland: *Comrs. of Charitable Donations and Bequests* v. *Walsh* (50) (decided by LORD MANNERS, L.C., in 1823); *Read* v. *Hodgens* (51) (decided by BLACKBURN, M.R., in 1844), and several other cases, the two most recent of which are *A.-G.* v. *Hall* (52) (1897) and *O'Hanlon* v. *Logue* (39) (1906); in the case of Canada, *Elmsley* v. *Madden* (53); in the case of New Zealand, *Carrigan* v. *Redwood* (54); in the case of Australia, *Nelan* v. *Downes* (55); and in the case of the United States of America, *Holland* v. *Alcock* (56) and *Re Schouler* (57), while 31 Edw. 3, c. 11, expressly directed any administrator to expend money for the soul of the deceased.

Adams and Lambert's Case (4) is reported in 4 Co. Rep. 104b, at extraordinary length. Even in the ENGLISH REPORTS it covers sixteen closely printed pages. It is not easy to distinguish the observations of the judges who decided the case from the opinions and reflections of the reporter; and any person who reads the report will be inclined to concur with LORD ELLESMERE who said the one who does so will

> "run into a wood or thicket out of which he shall not easily wind himself; he [i.e., the reporter] hath so darkened the case by many intricate differences whereof the court that argued the same did never dream."

The action was one of ejectment. The jury found a special verdict that John Barton, who was seized in fee of the lands sought to be recovered, had devised the same to his younger brothers for life with remainder to his sister in tail on condition that they should appoint a priest and have celebrated for ever obits. No devise was made of the remainder in fee. The point of controversy raised in the case was that the letter of the statute of 1547 applied only to costs for the finding of a priest to have continuance for ever or for a term of years, and, therefore, that the cases of devises of estates for life or in tail for their purposes were casus omissi from the statute. The report states it was decided that estates for life and in tail were included in equity within the statute. The report then goes on in a passage which appears to be a suggestion of the reporter rather than a statement of the court, to give the reason for the decision in these words (4 Co. Rep. at p. 106b):

> "for the intent and meaning of the Act was, as appears by the preamble, to extirpate out of men's minds these superstitious errors and to take them utterly away, in what manner or for what time they were given, and not to take them away only which were appointed to have continuance for ever, and leave those to have essence which were determinable or limited for a time."

Then follows a statement which is entirely erroneous, indeed, little more than a traversty of enacting portions of the statute:

> "and forasmuch as the statute by express words abrogates and takes away all such uses as were to have continuance for ever by equity and good construction, it extends to every less time whatsoever. . . . It was said that the statute says by any manner of assurance, &c., for ever and by common possibility an estate tail may continue for ever. Also in the case at Bar the intention of the devisor was (as appears by his will) that the priest should be found for ever, for he appoints also to his right heirs to find him, and if such a construction should not be made, the mischief intended to be remedied by the Act would remain against the intent and meaning of the Act."

In the clauses touching obits the words are: "To have continuance for ever." If in this case the devise plainly satisfied all the requirements of the statute save that the estate given was for life with remainder in tail and not in fee, the observations quoted seem far-fetched enough; but the puzzle is to see how, even by treating the preamble as a positive enacting clause, it could be held that all gifts for Masses for the repose of the soul of the donor made in the future should be treated as void. Your Lordships have not been referred to any authority to show that such an effect as this can be given to the preamble of a statute. I myself can find none. I do not think the preamble to this statute can be regarded as an enacting provision, and, in my opinion, any decision solely or mainly based upon the assumption that it can must be erroneous.

In Bacon's Abridgement (7th Edn.), vol. 2, p. 37, Title: Charitable Uses and Mortmain (D), a superstitious use is defined to be

> "where lands and goods or chattels are given for the maintenance of a priest or chaplain to pray for the soul of any dead man, which the King as head of the Church and State and entrusted by the common law to see that nothing is done in maintenance or propagation of a false religion is entitled."

It would, in my view, be as rational to hold that the Roman Catholic religion was, on the morrow of the death of Henry VIII looked upon by the State as a "false religion" as it would be to hold that it was similarly regarded when the statute 27 Hen. 8, c. 28, was passed in the year 1535, or the statute 37 Hen. 8, c. 4 [Dissolution of Colleges], was passed in the year 1554. The young Sovereign has left in the legislation of the very next year of his reign, statutory evidence of the light in which he regarded that religion. The 2 & 3 Edw. 6, c. 1 [the Act of Uniformity, 1548], is entitled "An Act for the Uniformity of Service and Administration of the Sacraments throughout the Realm." It commences with a preamble

reciting that there has been for a long time in the realm divers forms of Common Prayer, commonly called the Service of the Church, as well concerning the matins or morning prayer and the evening song, as also concerning the Holy Communion, commonly called the Mass. The drawing up of the Book of Common Prayer and the administration of the sacraments and other rites and ceremonies of the church after the use of the Church of England is then recited, and it is enacted that this book shall be used for matins, evensong, celebration of the Lord's Supper, commonly called the Mass, and the administration of each of the Sacraments. In the Communion Service so prescribed we find this prayer addressed to the Deity:

> "And here we give unto Thee most high praise and heartie thanks for the wonderful grace and virtue declared in all Thy saints from the beginning of the world chiefly in the glorious and most blessed Virgin Mary Mother of the Son Jesus Christ. . . . We commend unto Thy mercy, Oh Lord, all other Thy servants which are departed hence from us with the sign of the faith, and now do rest in the Sleep of Peace. Grant unto them, we beseech Thee of Thy mercy, an everlasting peace, and that at the day of general resurrection we and they which be of the mistical Body of Thy Son may together be set on His right."

This prayer closely resembles one of the prayers offered up by Roman Catholics in the sacrifice of the Mass to-day. Three years after this date [i.e., in 1551] the King, by the Act of Uniformity of that year, s. 5, reciting that he had caused the Book of Common Prayer to be explained and amended, and had directed it, so explained and perfected, to be used. The above-mentioned prayer is not to be found in this second Prayer Book.

Thirty years later, owing probably to the political events which had occurred in the interval, the condition of things was completely changed. In the year 1581, 23 Eliz., c. 1, was passed. By its fourth section, the saying or singing of, or being present at the celebration of the Mass was made a serious criminal offence, absolutely punishable on conviction, in the former class of cases, with a fine of 200 marks and imprisonment for one year and for such further time as the fine should remain unpaid, and in the latter class of cases punishable by a fine of 100 marks and imprisonment for one year. While this statute continued in operation, as it did for 210 years, a gift to have Masses said for the soul of anyone was a gift to have a crime committed, and, therefore, illegal and void, and such Roman Catholic ceremonials as involved the saying of the Mass was also necessarily illegal.

Adams and Lambert's Case (4) was decided in the year 1602, twenty-one years after this statute of Elizabeth was passed. From the mode in which the case is reported in 4 Coke it is not, I think, extravagant to conjecture that the reporter was not entirely insensible to the spirit which finds expression in this statute. At length after 210 years of waiting, some relief came to people of the Roman Catholic persuasion. In the year 1791 the Roman Catholic Relief Act (31 Geo. 3, c. 32) was passed. By s. 4 of that statute Roman Catholics, on taking the oath of allegiance prescribed, were permitted to conduct and be present at all their religious services. They were entitled to believe in the existence of purgatory as they had always done, and were so entitled to have the ordinary Masses said for the repose of the souls of the dead. But by the seventh section of this statute it was provided that nothing contained in the statute should make lawful the founding or endowing of any religious order or society of persons bound by monastic or religious vows, or the founding or endowing or establishing of any school or academy or college of persons professing the Roman Catholic religion without the realm or the dominions thereto belonging, and further that all uses, trusts and dispositions, whether of real or personal property which immediately before June 24, 1791, were deemed to be superstitious, should continue to be so deemed and taken to be anything in the Act to the contrary notwithstanding. In this state of the law *Cary* v. *Abbot* (5) was, in 1802, decided. There a Roman Catholic

testator bequeathed the residue of his property to trustees for the purpose of educating and bringing up poor children in the Roman Catholic faith, &c. The Bill in the case was filed by the next-of-kin of the deceased claiming to have the bequest declared void, not to have it forfeited to the King which was the result at which the Chantries Act, 1547, aimed. SIR WILLIAM GRANT, M.R., in delivering judgment, said (7 Ves. at p. 495):

> "But in this case I, founding myself upon the expression of LORD HARDWICK in *De Costa* v. *De Pas* (12), say this is so wholly void as not to be applicable to any other purpose. According to that statement, to entitle the heir or next-of-kin, it is requisite not only that the devise is to be to a superstitious use, but to such as is made void by statute. The statute of Edward VI only relates to superstitious uses of a particular kind then existing."

He then refers to statutes of Henry VIII and George I which he shows do not apply, and winds up by saying (ibid. at p. 497):

> "Here the use is clearly charitable in its nature: viz. for poor orphan children. What vitiates it is that they are to be educated in the Roman Catholic religion. I must declare the gift of the residue void, but that it must go to such uses as the King shall direct."

It would appear to me that the Master of the Rolls must have misunderstood what LORD HARDWICK laid down in *De Costa* v. *De Pas* (12): see that noble Lord's correction of the report of the case in *Moggridge* v. *Thackwell* (11). The important point, however, is that the Master of the Rolls clearly recognises that the statute of 1547 does not either by its preamble or enacting part apply to all gifts to superstitious use, but only to those with which it specifically deals. The Master of the Rolls does not explain upon what ground he holds a gift to educate orphan children in a religion which, if they were old enough to take the Oath of Allegiance, they could profess with impunity, was void. It may be that decision was based on 23 Eliz., c. 1.

After forty-one years further relief from their disabilities came to Roman Catholics by the passing of the Roman Catholic Relief Act, 1832. By its first section, Roman Catholics are, as to their schools, places for Roman Catholic worship, education and charitable purposes, the property held therewith and the persons employed about the same, placed in the same position as Protestant Dissenters. That necessarily means, I think, that just as Protestant Dissenters could bequeath money to build a church or chapel or to pay a minister to conduct religious worship therein according to their creed, so may Roman Catholics give or bequeath money to have a church or chapel built and a priest paid to conduct these religious services, including, of course, the solemn sacrifice of the Mass, and also to teach and preach the doctrines of their creed, including the doctrine of the existence of Purgatory and the effect of Masses for the soul of the deceased in aiding its release there from Purgatory. These are the kind of things mentioned in the preamble to the Act of 1547. It was admitted by both parties in this case that the Mass said for the repose of the soul of a deceased donor is precisely the same Mass as is said in the ordinary and regular worship; that the name of the person for whose soul the Mass is said is never announced or mentioned; that it depends entirely on the intention of the officiating priest, and that the sums directed to be paid are as Dr. Delany described them. It is admitted that in the service of the Mass as it is ordinarily celebrated, the Host is offered up to the Deity not only for the sins of the officiating priest, but also for those of the faithful living and dead that it may be profitable for his and their salvation to eternal life; that the chalice is offered up that it may ascend with the odour of sweetness for the salvation of the congregation present and for that of the whole world; and that a further prayer is said for the congregation and all who have gone before them with the sign of faith and sleep in the sleep of peace.

It appears to me that this legislation of 1832 is so opposed to all that had gone before that it is almost grotesque to hold that a bequest endowing a priest in order

that he should celebrate the Mass in the ordinary conduct of the religious worship of his creed is valid, and yet that a bequest to him directly to say the same Mass with the same prayers for the repose of the donor's soul is a gift for a superstitious use and void. Yet something very akin to this was decided to be the law in 1835 in *West* v. *Shuttleworth* (1). There a testatrix by several documents taken together bequeathed to certain chapels and to certain priests named specified sums of money for Masses for the repose of her own soul and that of her deceased husband, the residue of her estate to be appropriated by the persons named in the will in such a way as they should think best, calculated to promote the knowledge of the Catholic Christian religion amongst the poor and ignorant inhabitants of Swale Dene and Winstrenston Dale in the county of York. It was held by SIR C. PEPYS, M.R., that this latter bequest was good and valid, and the bequest for Masses void. After citing *De Costa* v. *De Pas* (12) as incorrectly reported (see LORD HARDWICK'S correction in *Moggridge* v. *Thackwell* (11)) he, in delivering judgment, said (2 My. & K. at p. 697):

> "It is truly observed by SIR WILLIAM GRANT in *Cary* v. *Abbott* (5) that there was no statute making superstitious uses void generally, and that the statute of Edward VI related only to superstitious uses of a particular description then existing, and it is to be observed that that statute does not declare any such gift to be unlawful, but avoids certain superstitious gifts previously created."

All that is quite accurate and convincing, but then comes a most unsatisfactory statement of the law.

> "The legacies in question, therefore, are not within the terms of the statute of Edward VI, *but that statute has been considered as establishing the illegality of certain gifts*, and amongst others the giving legacies to priests to pray for the soul of the donor has, in many cases collected in DUKE ON CHARITABLE USES, p. 466, been decided to be within the superstitious uses intended to be suppressed by that statute. I am, therefore, of opinion that these legacies to priests and chapels are void." The italics are mine.

I have examined the cases collected in DUKE at p. 466 and the following pages. They are all based upon the report in 4 COKE of *Adams and Lambert's Case* (4) and give little help. This distinguished judge, the Master of the Rolls, gives no indication whatever as to what it is upon which the opinion of the judges was based that the statute of Edward VI made these gifts illegal.

The next case referred to is *A.-G.* v. *Fishmongers' Co.* (24), decided by LORD LANGDALE, M.R., in 1839. There the testator, who died in the year 1529, devised lands in the city of London to the Fishmongers' Company to the intent that they should perform his will in manner declared. He then provided for obits and anniversaries without limiting any term within which the expenses of these should be confined, and he willed that the company should provide four honest priests studying in the universities to pray for his soul quarterly. He then directed the company to provide thirteen poor men and women to pray specially for his soul, and he provided for a perpetual successor of such poor people, who were to attend his obits and anniversaries and to be paid 8d. weekly. These devises and bequests to pray for the soul were held to be superstitious uses within the Act of 1547, and in giving the judgment the Master of the Rolls said (2 Beav. at pp. 170, 171):

> "It seems to me that the case of *Adams* v. *Lambert* (4), as reported by COKE and MOORE, and the several authorities cited there, and the case of *Pitts* v. *James* (58) as reported by ROLLE and other cases stated in DUKE [171], cannot be read without coming to the conclusion that the establishment and foundations for securing prayers for the souls of the dead were deemed superstitious within the statute of Edward VI [Chantries Act, 1547], and upon these authorities I am of opinion that the directions of the will to which I have referred are such that the payment made in respect thereof became the property of the Crown."

This case came on appeal before LORD COTTENHAM in January, 1841. LORD COTTENHAM says (5 My. & Cr. at p. 15):

> "The fifth section of the 1 Edw. 6, c. 14 [Chantries Act, 1547], gave the King all lands given to the founding or maintenance of any anniversary or obit or other like thing, intent or purpose; and by many decisions referred to in *Adams* v. *Lambert* (4) it was decided that praying for the souls of the dead was a like intent and purpose as an anniversary or obit within the meaning of the Act, although not to be performed by a priest, or in any chapel."

With all respect, I think it is only necessary to read s. 5 of the statute of Edward VI to see that this was a wholly erroneous construction. He says further:

> "and that where the gift was for the benefit of the poor, but connected with such superstitious uses as their praying for souls, the whole went to the King."

Owing to the date of the death of the testator, 1529, of course neither the Master of the Rolls nor LORD COTTENHAM had to consider the effect of the Act of 1832 upon the inferences drawn from the statute of Edward VI.

The next case is that of *Heath* v. *Chapman* (26), decided by KINDERSLEY, V.-C., in the year 1854. In that case a Roman Catholic testator who died on April 16, 1846, by his will dated ten days previous, bequeathed several annuities of different amounts in perpetuity to two churches in Venice, and one in London, the first of these gifts for Masses and requiems for the souls of himself and his deceased sister, the second and third for Masses for souls of the poor dead and for other pious uses. It was held, according to the headnote (2 Drew. 417), that the gift for Masses and for the dead was superstitious and void, that the pious uses could not, as religious uses, be separated from the others, and were, therefore, also void, and that the words "pious uses" could not be construed charitable uses. Consequently, the property given to these uses went to the residuary legatees of the donor. Neither in this case nor in any reported case which I have been able to discover from the death of Henry VIII downward have I found any critical analysis of the provisions of the Chantries Act, 1547, or any clear statement of the principle upon which, or any precise indication of the enactment or enactments by which, the old pious uses of the common law had been converted into superstitious uses. The learned judges who decided these cases, able and distinguished though they were, contented themselves apparently with resting their decision on a presumption. In this respect KINDERSLEY, V.-C., was no exception to the rule, for he says in the course of his judgment (ibid. at p. 423):

> "Now, it is quite clear that, at all events before [the Roman Catholic Charities Act, 1832], it was commonly assumed to be the law, and the assumption was acted on that a gift to a priest for Masses for the repose of the testator's soul or a gift to a priest to say Masses generally, was superstitious and void. . . . That statute [Chantries Act, 1547] declares as to certain uses, not that they are void—it assumes that—but that the property given to such uses is to belong to the Crown, and the courts of law have subsequently put this interpretation on that statute. Not that it actually declares such trusts to be void, but that it stamps all such trusts, whether created before or subsequently to the statute, with the character of illegality on the ground of being superstitious."

With all respect I think it would be difficult to compress into such a limited space more historical and legal inaccuracies. It is, as I have shown, quite erroneous to say that before the Act of 1547 gifts to have Masses said either for the repose of the donor's soul or generally were deemed to be superstitious uses and void. It is equally erroneous to say that this statute assumes that all such gifts are void. The learned Vice-Chancellor seems to have ignored the existence of the five years limit, and the provision of s. 38 as to future grants contained in this Act. And he does not give the name of a single authority establishing the propositions he lays

down. *Adams and Lambert's Case* (4) does not establish them. He says (ibid. at p. 424) that all that was intended by the statute of 1832 to do was: A

> "As to their places of worship, as to their places of education, and as to employment of persons officiating in their ceremonial . . . to put Roman Catholics on the same footing as Protestant Dissenters. But it does not refer at all to the purposes to which the property is devoted which, if superstitious, still render the gift void. No doubt, if property is given for the use of a place of worship, that is good, but the statute leaves quite untouched the case where the property is given for superstitious uses." B

But surely the statute cannot mean that Roman Catholics are placed by it in the position, before the law, of Protestant Dissenters merely as regarded the structure of the schools and places of religious worship, and the staffs employed in each respectively. It must, I think, mean that they are placed in the same position of freedom as were the Protestant Dissenters to give in their schools, should they desire it, instruction in the doctrines of their religion as well as in secular subjects; likewise to conduct in their places of worship the usual religious service of their church, and to preach the doctrine of their creed, and to celebrate the most sacred and vital of the sacraments, the Mass. It cannot be that this statute does not permit the saying of the Mass in their places of worship. I am not quite certain what it is the Vice-Chancellor means by a superstitious use. Is the celebration of the Mass in the ordinary course, according to his view, a superstitious use, or does the saying of it only become a superstitious use when some person specifically gives money or money's worth to have it said for the repose of a soul? For instance, if a devout Roman Catholic should lose his wife, and on the Sunday after her burial should attend Mass and hear himself prayed for and the repose of her soul prayed for also. If he likes that service he may give £20 to have it repeated. That Mass was not a superstitious use before he gave the £20, but does it become a superstitious use after he has given it, so that its character is changed before the law by the payment of this sum of £20? I must say that this distinction, though apparently relied on by Sir J. Romilly in *Re Michel's Trust* (28), is, in my view, unsound and irrational. The teaching of the doctrine of purgatory, of the propriety of attending Mass, of the nature and efficacy of the sacrament, may all be lawfully taught, and a fund for promoting the teaching of them will be administered by the court, though they be at variance with the doctrines of the Established Church. Indeed, as already pointed out, a bequest to secure the teaching of the Roman Catholic religion was held in *West* v. *Shuttleworth* (1) to be good. But Sir John Romilly has some wholesome misgivings on another point. C D E F G

In *Re Michel's Trust* (28), which I have just mentioned, a bequest was made by a Jew to have a particular Jewish prayer said daily. The Religious Disabilities Act, 1846, s. 2, dealt with the Jewish religion in precisely the same way and to the same extent as the Act of 1832 had dealt with the Roman Catholic religion. The gift was held good and not superstitious, for this strange and, it would appear to me, most fanciful reason—namely, that there was nothing to show that the prayers were to be said with the notion that the soul of the testator would be thereby benefited. In giving judgment, however, the Master of the Rolls said (28 Beav. at p. 42): H

> "The case of *Adams* v. *Lambert* (4) was cited, but that case principally relates to what estates devoted to superstitious uses are forfeited to the Crown under the statute. There are many superstitious uses unconnected with prayers for the soul; but in regard to *West* v. *Shuttleworth* (1) and *Heath* v. *Chapman* (26) I have always felt this difficulty: So far as relates to their places for religious worship and property held therewith, Roman Catholics and Jews are now placed in the same position as Protestant Dissenters, and, if it be part of the forms of their religion that prayers should be offered for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it could be I

deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question which practically have authorised them."

I quite concur. It would be most difficult to say it, but this is precisely what the respondents in the present case ask and press your Lordships in effect to say.

In *Re Blundell's Trusts* (27) the same learned judge said, alluding to *Re Michel's Trust* (28) (30 Beav. at p. 362):

> "I expressed my difficulty in the case referred to as to whether gifts for religious ceremonies practised by a dissenting class of religionists might not be permitted, if not opposed to public morality, but I think the decided cases are too strong and that the House of Lords alone can alter the settled law."

I am glad to think your Lordships are about to perform that worthy task.

It is but about two years since this House decided in *Bowman* v. *Secular Society, Ltd.* (2) that a bequest to the defendant society was valid, though one of the chief objects of the society was the promotion, in such ways as might from time to time be determined, of the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action. It is difficult, if not impossible, to distinguish this from Atheism.

I think it is too late in the day to hold in this country that a religious ceremony, believed by the millions of Roman Catholics of Christendom to be a solemn and sacred sacrament, is merely a superstitious rite. I should myself be prepared, if it were needed, to hold that, if not *Adams and Lambert's Case* (4), certainly all the cases which have followed it and purported to be based upon it down to the year 1832 were wrongly decided. For the purpose of the present case that, I think, is scarcely necessary, because, in my opinion, the statute of that year changed fundamentally the entire situation, the whole outlook and underlying principle of the law in reference to the Roman Catholic religion. I am clearly of opinion that all the relevant cases decided from this new point of departure to the present time were wrongly decided, and that the bequests, the subject of controversy in the present case, were not void on the sole grounds that they were gifts for superstitious uses. It has been urged, however, that, though this might be the view of all your Lordships, we are, as I understand it, precluded from allowing this appeal by reason of a provision contained in the Roman Catholic Charities Act, 1860, s. 1. This section was passed to meet the case referred to in MR. COKE's report of *Adams and Lambert's Case* (4), to the effect that where lands are devised the rents and issues to be applied to a good charitable use and also to a superstitious use, nothing certain being limited to the former case, the bad use infected the good and the subject of each was forfeited to the King. The section provides:

> "No existing or future gift or disposition of real or personal estate on any lawful charitable trust for the exclusive benefit of persons professing the Roman Catholic religion shall be invalidated by reason only that the same estate has been or shall be also subjected to any trust or provision deemed to be superstitious, or otherwise prohibited by the laws affecting persons professing the [Roman Catholic] religion."

In my opinion, the words "any trust or provision deemed to be superstitious, or otherwise prohibited by the laws affecting persons of the [Roman Catholic] religion," must mean prohibited by those laws because they are held by them to be superstitious or prohibited for any other reason. To give those words any other meaning it would be necessary to strike out the words "or otherwise," which would, in my view, be quite illegitimate; but surely these words mean prohibited at the time the statute of 1860 was passed, by the law as truly interpreted. This is a remedial Act designed to relieve Roman Catholics from previously existing disabilities. It is not designed to protect and perpetuate the effect of erroneous decisions. And, therefore, if a trust for Masses for the repose of the soul of a testator, created by his will executed in 1836, be held by any tribunal other than

this House to be a superstitious trust prohibited by law within the meaning of this statute, then, if that decision be reversed by this House as being based on an erroneous interpretation of the law, this statute of 1860 cannot apply to the trust at all. Neither do I think that the principle of *Morgan* v. *Crawshay* (36) applies. The Act of 1832 has, in my view, as I have already said, entirely modified the law and created a new point of departure. Only a few cases on the question of superstitious uses have since been reported, and, even if one has to start from the year 1602, there has been no such long and uniform series of clear and positive decisions extending over centuries on the same statute as there was in that case. In the cases I have cited, phrases such as "it has been assumed," "it has been understood," and the like, abound, but in no case can one find a critical analysis of the provision of the Chantries Act, 1547, upon which the decision purports to be based, or any clear indication of the particular section of that statute qualifying the assumption so greatly relied upon. I think the judgment of LORD LOREBURN in *West Ham Union* v. *Edmonton Union* (38) is much in point. On the whole, I am of opinion that the decision appealed from was erroneous and should be reversed, and that the appeal should be allowed.

LORD PARMOOR.—The question in debate is whether the testator's bequests for Masses to "the cathedral" and to the Jesuit Fathers, Farm Street, are void and fall into the testator's residuary estate. It has been held both in the court of first instance and in the Court of Appeal that the gifts for Masses for the soul of the testator are void. The appellants did not desire in their arguments in the courts below, or before your Lordships, to draw any distinction between gifts for Masses simply and gifts for Masses for the soul of the testator, saying that it would be well understood by Roman Catholics that the gifts contained in this will were for Masses for the soul of the deceased.

It is not necessary to examine at any length the Ordinary of the Holy Mass. The Mass is a sacramental service of great solemnity to Roman Catholics. It was described during the argument in this House as the central supreme rite of the religion of Roman Catholics, without which their religion would be a mere husk. This service contains prayers for the dead which, according to the teaching of the Roman Catholic Church, presuppose the doctrine of purgatory, and that those who are in purgatory, being yet living members of Jesus Christ, may be relieved by the prayers of their fellow members here on earth, as also by alms, and Masses offered up to God for their souls. There was no controversy under this head. During the argument your Lordships were referred to certain portions in the Ordinary of the Mass. The Mass proper begins at the offertory, from which point onwards the prayers are invariable and do not change. In these prayers, invariably offered, there are included prayers for the dead, so that no Mass can be celebrated in which prayers for the dead in purgatory are not an integral part. Apart from the doctrine of purgatory, with its accompanying implications of pardons, there is no prohibition of prayers for souls of the dead to be found in the Anglican Liturgy, either in the Canons, or Articles, or the Book of Common Prayer. In the formula of Faith, in the time of Henry VIII, prayers for the dead are enjoined as "pious and proper work." The first Liturgy of Edward VI, 1549, contained thanksgiving for all those saints "who now do rest in the sleep of peace," and prayer for "their everlasting peace," and that "at the day of general Resurrection all they, which be of the mystical Body of the Lord, might be set on His right hand." Afterwards these prayers were removed from the Anglican Liturgy by Act of Uniformity, 1551, but the Anglican Liturgy still retains a thanksgiving for all God's servants "departed this life in His faith and fear," and a prayer that "we with them may be partakers of His heavenly kingdom," and a request that "God should accomplish the number of His elect and hasten His kingdom." The doctrine of purgatory, however, with the accompanying implication of pardons, is, in the twenty-second article, said to be "a fond thing vainly invented and grounded upon no warranty of Scripture, but rather repugnant to the word of God." In *Breeks* v. *Woolfrey*

(59) the question was raised as to the legality of inscriptions: "Pray for the soul of J. Woolfrey." "It is a holy and wholesome thought to pray for the dead." In the same case attention was called to an inscription in 1680, in the cathedral of St. Asaph, to Bishop Barrow: "O vos transeuntes in domum Domini, in domum orationis, orate pro Conservo Vestro, ut inveniat Misericordiam in die Domini." It was argued that it was impossible to dissociate prayers for the dead from the doctrine of purgatory, and that prayers for the dead are so necessarily associated with the doctrine of purgatory as to form part of it. Sir H. Jenner, in giving a judgment, held that the prayers for the dead are not necessarily connected with the doctrine of purgatory, and dismissed the complaint. I desire to express my concurrence in this judgment and in the reasoning on which it is founded.

The first question for consideration is whether a bequest for Masses, with the accompanying implication of purgatory and pardons, is a bequest for a superstitious use. The case of the respondents is based on the judicial interpretation of the Chantries Act, 1547, and it is said that this interpretation has been so long adopted that it cannot now be displaced except by an Act of the legislature. I am not prepared to assent to this proposition, but, in my opinion, the case turns, not on the construction which has been placed on the Chantries Act, but on the effect of the Roman Catholic Charities Act, 1832. It was not argued that, at the present date, either the common law or any statute still in force rendered the hearing or saying of the Mass illegal, and no such argument could be maintained. The common law "knows of no prosecutions for mere opinions": *Harrison* v. *Evans* (41), and the statute of 23 Eliz., c. 1, which imposed a penalty for hearing or saying the Mass, has long been repealed [in 1844]. It has, moreover, been held in other countries in which the common law principles are applicable, but which are not subject to the provisions of the Chantries Act, that a bequest for Masses for prayers for the souls of the dead are not void as being bequests for superstitious uses. It is sufficient to refer to the Irish case of *O'Hanlon* v. *Logue* (39), to the Canadian case of *Elmsley* v. *Madden* (53), to the New Zealand case of *Carrigan* v. *Redwood* (54), and to the American cases of *Holland* v. *Alcock* (56) and *Re Schouler* (57).

The Chantries Act does not in its enacting sections affect the validity of the bequest in debate, and no claim is made under these sections that the amount should be confiscated in favour of the Crown. The only section which deals with personal estate is s. 7, but this section is limited to

> "all and singular such sums of money, profits, commodities, and emoluments which by virtue of any manner of assurance, conveyance, composition, will, devise, or otherwise, heretofore have been given, assigned, limited, or appointed to have continuance for ever, which in any one year within five years next before the beginning of this present Parliament have been paid, &c."

The section, therefore, is in terms limited to existing gifts in operation within the five years' limitation. A similar limitation is applied in the case of real estate, so that both in real and personal property the enacting sections of the Act only extend to the confiscation of existing bequests, such as were operative within the preceding five years. It is not necessary further to consider these sections in detail. There is no question that if the Act could be made applicable the bequests would come directly within the terms of its prohibition. It is said, however, that although the Act is not directly effective in confiscating the bequest for the benefit of the Crown, yet that it indicates the policy that such a bequest should be regarded as void, and that this view of the law has operated over such a long period of time that no contrary decision could now be given without legislative authority. I cannot find any authority to support the conclusion that prior to the Chantries Act prayers for the souls of the dead in purgatory were prohibited or illegal, and on historical grounds it is highly improbable that such was the case. In Coke on Littleton, s. 135, it is said that they which hold in frankalmoign are bound of right before God to make orisons, prayers, and other Divine services for the souls of their grantors or feoffors, or the souls of their heirs, which are dead, and that an abbot

or priest may hold of his lord by a certain divine service in certain way to be done, as to sing a Mass every Friday in the week for the souls, or to find a chaplain to sing a Mass. Frankalmoign is the tenure by which the majority of glebe lands in this country are held. In 23 Hen. 8, c. 10, it was forbidden that trusts or hereditaments for the purpose of having obits or annual funeral services should be performed during any longer period than twenty years. This statute is a Mortmain Act which recognises the obits and annual funeral services, but limits the length of time during which the obligations shall be performed. Later still there is the will of Henry VIII, drawn up in 1544 and proved in 1547, which provides "for daily Masses perpetual so long as the world endure."

The preamble of the Chantries Act does state in distinct terms that

> "a great part of superstition and errors in Christian religion hath been brought into the minds and estimations of men by . . . devising and phantasying vain opinions of purgatory and Masses, satisfactory to be done for them which be departed; the which doctrine and vain opinion by nothing more is maintained and upholden than by the abuse of trentals, chantries, and other provisions made for the continuance of the said blindness and ignorance."

The preamble then proceeds to deal with erection of schools and the dissolution of chantries. In my opinion, the preamble itself indicates not that purgatory and Masses are to be prohibited, but that property dedicated to these uses under the specified conditions is to be confiscable to the Crown, but, whether this is so or not, it is not an admissible canon of construction to use terms of a preamble in order to extend the provisions of an Act of Parliament beyond the limitations clearly expressed in the enacting sections, and thus to introduce an intention which the legislature has not expressed, and which in reality is nothing more than a conjecture as to the supposed policy of the law. In *Kent County Council* v. *Lord Gerard* (60) LORD HERSCHELL says ([1897] A.C. at p. 639):

> "It would not be legitimate in my opinion to strain the language used in order to make it apply to a case to which it does not legitimately in its terms apply, on account of the supposed intention of the legislature and the theory that that intention can only be carried out by giving to the words a meaning which they do not naturally bear."

I have already referred to the enacting sections in the Chantries Act which do confiscate property in favour of the Crown, but which do not affect the bequest in debate in this appeal. There are other provisions in the Act which are inconsistent with construing the statute as implying any general prohibition of Masses for the souls of the dead. Section 19 provides that neither the Act nor any article, clause, or matter contained in the same shall extend to any colleges, hostels, or halls within either of the Universities of Cambridge and Oxford, nor to any chantry founded in any of the colleges, hostels, or halls being in the same universities; nor to the Free Chapel of St. George the Martyr, situate in the Castle of Windsor; nor to the college called St. Maries College of Winchester beside Winchester; of the foundation of Bishop Wickham; nor of the College of Eton; or to certain other specified places other than to such chantries, obits, lights and lamps, or any of them, as at any time within five years next before the beginning of the present Parliament have been had, used, or maintained within the said cathedral churches. The five years' condition is again introduced, but is applied only to the cathedral churches and not to Oxford or Cambridge, or Winchester or Eton. The natural implication is that this provision gives exemption from confiscation under an Act of which the main purpose appears to be not so much to prohibit prayers for the souls of the dead in purgatory as the vesting of certain properties in the Crown. The last section to which I propose to refer is s. 38. This section enacts that it shall not be lawful, by reason of any remainder, use, or condition, to re-enter into, claim, or challenge any lands, tenements, or hereditaments, for the non-doing, non-naming, or non-finding of any such priest or priests, or poor folk as is aforesaid, obit, anniversary, light or lamp, from henceforth to be founded or done, anything

herein contained to the contrary in anywise notwithstanding. The word "obit" has a wide meaning, and would include Masses for the souls of the dead. This section does not say that the Masses referred to are prohibited as illegal, but, on the contrary, it contemplates the possibility of future foundations and takes away the right of re-entry if any person or corporation settled land and gave it upon trusts which involved the so-called superstitious uses. I think the conclusion is that the bequests in debate in this appeal are not prohibited either directly or by implication under the Chantries Act.

There is no doubt that for a long series of years the hearing of Mass or the saying of Mass was made illegal by statute, and that while this illegality was in force a bequest for Masses for the souls of the dead would be void and invalid. The statute 23 Eliz., c. 1, s. 4 (1581) [repealed in 1844 by 7 & 8 Vict., c. 102], made the saying or hearing of the Mass a criminal offence, so that after that date the question would be, not whether a bequest for such a purpose created a superstitious use, but whether the bequest was confiscated to the Crown under the Chantries Act or fell to be applied in some other manner. It is difficult to speak certainly of the date in reference to some of the older cases, but I do not think that prior to 1581 there was any case which can be said to have decided that bequests made subsequent to the passing of the Chantries Act came within its statutory prohibition. *Adams and Lambert's Case* (4) has been quoted in favour of the proposition that the effect of the Chantries Act was that all bequests, whether before or after the Act, were within the policy of the law illegal and thereby confiscable to the Crown. It is not easy to understand what is meant by the policy of the law to be derived from the Chantries Act, or that the will of the legislature can be ascertained in any other way than under the ordinary rules of construction, but the case is obscure on this point, and there is nothing to show that the impugned bequest was not within the specified date in the Chantries Act, and undoubtedly the gifts were for purposes directly within the words of that statute. The first point decided in this case is that consanguinity in blood relationship does not create an exception, and that all persons, be they of the blood or not, are within the Chantries Act, and that lands given for superstitious uses would not be legal for a consideration of blood. The second point decided was that lands given in tail or for life for superstitious uses are within the statute; and, thirdly, that a devise of the land, not to the intent to find a priest, but upon condition to find him, is within the Act; and, fourthly, that all the land in the case is given to the King, which was the principal point in the case and of great consequence. The judges then proceed to consider the five branches of the Act, but I cannot find any suggestion that the bequest in question was not in operation during the five years previous to the Chantries Act, in which case it was directly within its terms. There are two passages on which reliance was placed as showing that the Chantries Act imported a general prohibition of bequests for Masses for the souls of the dead though not in operation for five years before the date of the passing of the Act, but I doubt whether this inference should be drawn or that the case decided more than that lands devised in a particular way before the date of the Act are included within the operation of the enacting sections, construing this section in a wide sense having regard to the terms of the preamble. There are a number of authorities quoted, but these do no more than show instances in which gifts for superstitious uses had been confiscated for the benefit of the Crown. In a number of these cases the gift was undoubtedly prior to the Chantries Act; in others no date is given. In the *Dean of St. Paul's Case* (61) the will of the testator is said to be dated anno. 6 Eliz., c. 2 [1564]. There must be some mistake in this reference, and it is hardly possible that in the sixth year of the reign of Elizabeth a will to assign and convey lands and tenements to the value of £14 a year to the dean and chapter of St. Paul's to find a competent sustentation yearly of ten marks sterling for a priest and his clerk to sing Mass every day for the testator's soul and all Christian souls in the Church of St. Paul; and the said dean and chapter ought to find bread, wine and candles, and all other ornaments for divine service; and all the other

profits of the premises by the executors were assigned to be employed for the yearly obit for the said testator in the said church. The priest appears to have been maintained within the five years of the statute, and at £6 13s. 4d. per annum, and it was found that the claim of the Queen was limited to this annual rent, and that the rest of the land did not belong to the chantry, but to the dean and chapter. A

The next authority referred to in the argument is a treatise published by DUKE in 1676 on the LAW OF CHARITABLE USES. It is difficult to ascertain with accuracy whether the cases collected in DUKE come within the enacting sections of the Chantries Act or not, and, moreover, at this date the statute of Elizabeth which rendered the hearing and saying of the Mass illegal was still in force. In the case to which the Master of the Rolls refers, *Simon Peter's Case* (62), the donor was King Henry VII, and the gift was, therefore, clearly before the Chantries Act and within its provisions. There are other cases referred to by DUKE at p. 466; but in many cases the date is not given and is not capable of exact ascertainment. Whenever an actual date is given, the bequest appears to have been made before the passing of the Chantries Act. B C

The next statute to be considered is the Roman Catholic Relief Act, 1791, which, after enabling Roman Catholics to make a declaration on oath, and reciting among other Acts the Act of 23 Eliz., c. 1 (1581), enacts that from and after June 24, 1791, no person professing the Roman Catholic religion who shall take and subscribe the oath hereinbefore appointed to be taken and subscribed shall be convicted, or shall be liable to be prosecuted upon, the said last-recited statutes or any of them. It is true that the relaxation which this statute allows is limited to Roman Catholics who have made the declaration, but it would be difficult to affirm that whether a particular bequest is a superstitious use or not can depend on whether a testator has or has not made a certain declaration on oath. Section 4 of the Act is more direct. This section, after reciting certain of the old statutes, enacts that after the specified date no person who shall take and subscribe the oath shall be prevented, indicted, sued, impeached, prosecuted, or convicted, in any civil or ecclesiastical court of this realm, for being a Papist, or reputed Papist, or for professing or being educated in the Popish religion, or for hearing or saying Mass. Section 17 of the Act contains a provision that nothing therein contained shall make it lawful to found any religious order, and that all uses, trusts, and dispositions, whether of real or personal property, which immediately before the specified date shall be deemed to be superstitious or unlawful shall continue to be so deemed and taken, anything in this Act contained notwithstanding. D E F

After the passing of this Act, and before the date of the Roman Catholic Charities Act, 1832, *Cary* v. *Abbott* (5) was decided by SIR WILLIAM GRANT. This case is of importance in the chain of judicial authority. SIR WILLIAM GRANT says: G

> "There is no statute making superstitious uses void generally. The statute of Edward VI [the Chantries Act] relates only to superstitious uses of a particular description then existing. The statute of Henry VIII (23 Hen. 8, c. 20) relates only to assurances of land to churches and chapels, which, if for a longer term than twenty years, it declares absolutely void." H

The Roman Catholic Charities Act, 1832, is of great importance. It is called "An Act for the better securing the charitable donations and bequests of His Majesty's subjects in Great Britain professing the Roman Catholic religion," and extends to Roman Catholics the toleration which at this date had been extended to Protestant Dissenters. It recites that it is expedient to remove all doubts respecting the right of His Majesty's subjects professing the Roman Catholic religion in England and Wales to acquire and hold property necessary for religious worship, education, and charitable purposes, and enacts that those who profess the Roman Catholic religion in respect of their schools, places for religious worship, education, and charitable purposes, in Great Britain, and the property held therewith and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the Protestant Dissenters are subject to in England in I

respect of their schools and places for religious worship, education, and charitable purposes, and not further or otherwise. There is a further section that property acquired or held for the purpose of religious worship and educational and charitable purposes in England and Wales shall be subject to the provisions of the Charitable Uses Act, 1735, thus contemplating the holding of the property for the purpose of religious worship, but applying in reference thereto the principle of the Mortmain Act. I think that the effect of this statute is to place Roman Catholics on the same footing of toleration as Protestant Dissenters, and that it removes any illegality which might still be attached to the Roman Catholic religion in reference to their places for religious worship, or charitable purposes, and the persons employed. The preamble of the Act requires the expediency of removing all doubts respecting the rights of His Majesty's subjects professing the Roman Catholic religion in England and Wales to acquire and hold property (inter alia) for religious worship. These words include a right to acquire and hold property for the celebration of Mass as part of the religious worship in the Roman Catholic religion, and a pious or religious use authorised by statute cannot, in my opinion, be regarded as superstitious. Apart, however, from the preamble, the provisions of the enacting section are in themselves sufficient to support the argument of the appellants that the legislature in legalising Roman Catholic places for religious worship, which must necessarily include an altar, the whole purpose of which is the celebration of the Mass, could not have intended to have retained the principle that this essential and sacred service should be regarded as illegal or that a bequest for Masses should be regarded as a superstitious use. The same Act, moreover, legalises Roman Catholic schools in which the tenets of the Roman Catholic Church could and would be taught. It is very difficult to reconcile the statutory recognition of such schools with the continuance of a statutory condemnation of the most solemn of the rites of the Catholic Church, or with the continuance of a statutory disability founded on a judicial interpretation of the Chantries Act rendering all bequests for Masses said as bequests for superstitious uses. The conclusion is that after the passing of this Act the saying and hearing of Masses for the souls of the dead would no longer be regarded as illegal, and that the implication of the policy of law to be derived from the judicial construction of the Chantries Act has been displaced. When once the statutory illegality and disability have been removed, then, unless some disability can be found outside, there is nothing to hinder a bequest of money for Masses for the souls of the dead or to render such bequests a superstitious use. The only outside disability which under such circumstances could attach to the bequest would be derived from the common law, but it cannot be suggested either that a recognised form of Christian faith or that the special tenets held by the Roman Catholic Church on Masses for the souls of the dead can in any sense be regarded as contrary to the common law so as to render bequests for such purposes in the nature of superstitious uses and on that ground void and invalid.

Shortly after the passing of the Act of 1832, LORD COTTENHAM—then SIR CHARLES PEPYS—decided *West* v. *Shuttleworth* (1). In this case the testatrix Townsend made a will and on the same day signed a testamentary paper containing the words "Omitted in my will, chapels and priests," and adding,

> "whatever I have left to priests or chapels, it is my wish and desire that the sums be paid as soon as possible, that I may have the benefit of their prayers and Masses."

It was held that the gift in respect of the priests and chapels was void, and that the next-of-kin was entitled to the benefit of the failure of the gift. In giving his decision LORD COTTENHAM expressed the view that the Chantries Act, although not including within its enacting section the legacies in question, had been considered as establishing the illegality of the legacies to priests and chapels, and that he concurred in this construction of the statute. LORD COTTENHAM says (2 My. & K. at p. 697):

"The legacies in question are not within the terms of the statute of Edward VI, but that statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in DUKE, been decided to be within the superstitious uses intended to be suppressed by that statute. I am therefore of the opinion that these legacies to priests and chapels are void."

This case, however, raises the question of the effect of the Act of 1832, and I do not think that LORD COTTENHAM gave full weight to the alterations which this statute introduced. As stated above, the construction of this statute appears to me to be the crucial issue in the present appeal. LORD COTTENHAM says (ibid. at p. 695):

"This statute puts persons professing the Roman Catholic religion upon the same footing with respect to their schools, places for religious worship, education, and charitable purposes as Protestant Dissenters. . . . This Act makes it unnecessary to consider what was the state of the law before it passed with respect to such dispositions of property in favour of Roman Catholics. It is only necessary to inquire what is now the state of the law with respect to similar dispositions of property in favour of Protestant Dissenters."

This is a clear expression of the opinions held by LORD COTTENHAM in reference to all the disposition of property which would be effected under the terms of the Act. Then LORD COTTENHAM says (ibid. at p. 697):

"The gifts to priests and chapels remain to be considered, and these are not affected by the [Act of 1832], which applies only to schools, places for religious worship, education, or charitable purposes."

For reasons which have already been stated, I am unable to concur in this view expressed by LORD COTTENHAM, and am of opinion that this Act does apply not only to places of religious worship and schools, but to the essential tenets of the Roman Catholic Church which are essentially and inevitably practised in the places of religious worship, and essentially and inevitably taught in Roman Catholic schools. If this construction is right, then it is no longer necessary to consider what was the state of the law before the Act was passed.

The next case in order of date is *A.-G.* v. *Fishmongers' Co.* (24), but the will of Sir Thomas Kneseworth was made in the year 1513, and he died in 1539, so it was unquestionably a case under the Chantries Act, and it was not possible to maintain that the provision of loans for members of the Fishmongers' Company on the condition of saying paternosters and aves and a creed for the testator's soul was not within the operation of the Chantries Act. It is not suggested that there has been a repeal of the enacting section of that Act.

In *Heath* v. *Chapman* (26) KINDERSLEY, V.-C., follows the decision of *West* v. *Shuttleworth* (1). He says that it is quite clear that, at all events before the Act of 1832, it was commonly assumed to be the law, and the assumption was acted upon, that a gift to a priest for Masses for the repose of the testator's soul, or a gift to a priest to say Masses generally, was superstitious and void, and adds:

"The way in which this came to be the law is this: at the time of the passing of the statute of Edward VI [the Chantries Act] such gifts were void."

For reasons already stated, I think that such gifts were not void at the date of the passing of the Chantries Act, and that at that date such bequests were not superstitious either under statutory disability or under any principle known to the common law. Assuming, however, the construction placed by KINDERSLEY, V.-C., on the Chantries Act to be correct, and that there was no doubt of the law, at least down to the statute of William IV, the Vice-Chancellor, following the decision of LORD COTTENHAM in *West* v. *Shuttleworth* (1), placed the same construction on that statute. He says (2 Drew. at p. 424):

"Then what did that statute do? If it had meant to alter the law with respect to superstitious uses, certainly it uses the most singularly inapt words

that could be well imagined for the purpose. But in truth there is no such indication or intention in the Act at all. What it intended was this. As to their places of education, and as to the employment of persons officiating in their ceremonial, it intended to put Roman Catholics on the same footing as Protestant Dissenters. But it does not refer at all to the purposes to which property is devoted, which, if superstitious, still render the gift void. No doubt if property is given for the use of a place of worship, that is good, but the statute leaves quite untouched the case where property is given for superstitious uses. That is the view taken in *West* v. *Shuttleworth* (1), with respect to which I must say that, besides feeling myself bound to follow it, even if I did not entirely agree with it, I do, in fact, entirely subscribe to the correctness of the reasoning in it."

With all submission to the view of the learned Vice-Chancellor, I think that the statute does refer to the purposes to which the property is devoted, and, as stated above, is inconsistent with the doctrine that bequests for Masses for the souls of the dead should be regarded as in the nature of a superstitious use. *Heath* v. *Chapman* (26) is founded on *West* v. *Shuttleworth* (1), and they stand or fall together.

There are two more cases which came before Sir John Romilly. The first is *Re Michel's Trust* (28). It is the will of a Jew who made a bequest to take effect upon the death of his widow. It is not necessary to state the terms of the will at length, but it was argued that the gift was void as a superstitious use, as an anniversary or obit. *Adams and Lambert's Case* (4), *West* v. *Shuttleworth* (1), and *Heath* v. *Chapman* (26) were cited. Sir John Romilly had no doubt as to the validity of the bequest, stating that, with regard to Jewish charities, they are now placed in the same position as those of Protestant Dissenters, and that a similar operation by Act of Parliament had formerly been effected with regard to Roman Catholic charities. He then adds (28 Beav. at p. 42):

"In regard to *West* v. *Shuttleworth* (1) and *Heath* v. *Chapman* (26), I have always felt this difficulty: So far as relates to their places for religious worship and the property held therewith, Roman Catholics and Jews are now placed in the same position as Protestant Dissenters; and, if it be part of the forms of their religion that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it could be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question, which practically have authorised them. In the time of Edward VI and Elizabeth the ceremony of Mass was considered superstitious, and I do not know that the law made any distinction between those said for the general purpose and object of their religion in the worship of God and those which are for more limited objects, which were formerly considered superstitious and which the court now, considering them in a Protestant point of view, still regards as superstitious. I express no opinion on this point, however, as no such case arises here."

I agree in the view indicated by Sir John Romilly. If places of worship are authorised by statute for the use of Roman Catholics, and it is known that the services of the Roman Catholic Church include as an essential part of their liturgy that prayers should be said for the benefit of the souls of the deceased persons in purgatory, it is difficult to say that such a religious ceremony, practised in a place of worship so directly authorised by statute, can be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in which this authority was given, and that bequests for Masses for such prayers can be deemed a superstitious use.

In a subsequent case of *Re Blundell's Trusts* (27) Sir John Romilly thus expresses his opinion (30 Beav. at p. 362):

"I expressed my difficulty in the case referred to (*Michel's Trust* (28)) as to whether gifts for religious ceremonies practised by a dissenting class of religionists might not be permitted, if not opposed to public morality, but I think the decided cases too strong, and that the House of Lords can alone alter the settled law. It is clear that I must act on *West* v. *Shuttleworth* (1), which I cannot overrule."

There are only two cases of later date which have any bearing upon this appeal—*Yeap Cheah Neo* v. *Ong Cheng Neo* (42) and *Bowman* v. *Secular Society, Ltd.* (2). In the first of these cases there is a reference to *West* v. *Shuttleworth* (1), but no discussion as to the reasoning of the decision, and in the second case LORD PARKER refers, but only by way of illustration, to the principle that a trust to procure Masses to be said for the testator's soul is not lawful. In the same case LORD BUCKMASTER, dealing with the Jewish Disabilities Act, says ([1917] A.C. at p. 474):

"There was never anything, apart from statutory disabilities, to prevent Protestant Dissenters from holding property: *A.-G.* v. *Pearson* (23). Of course, while any particular belief was made the subject of penalty by statute, a gift to further the purpose of that belief would be contrary to the statute law; but when once the statutory disability was removed, unless some disability could be found outside, there could be nothing to hinder the gift of money for the purpose of any such association. It is this that explains the case of *West* v. *Shuttleworth* (1), which was a decision on the statute in relief of Roman Catholicism similar to that in relief of Jews (2 & 3 Will. 4, c. 115). Now the Roman Catholic religion—whatever views may be taken of the Reformation—was certainly never contrary to the common law; and therefore, when once the statutory prohibitions were taken away, the receipt of money for the general purpose of their faith, was not forbidden."

The words used, "the general purposes of their faith," are undoubtedly of wide meaning, but, after hearing the full argument addressed to your Lordships in the present case, I desire to express my entire concurrence in the language used by LORD BUCKMASTER, and to add that, in my opinion, all statutory prohibitions have been taken away which could in any way operate to render void a bequest for Masses for the souls of the dead, and that, apart from statutory prohibitions, such bequests cannot be regarded as void or invalid.

There are two matters which remain for consideration under this portion of the appeal. It was argued that whatever might be the meaning and construction of the statutes involved, yet that a long course of judicial interpretation should not, at this date, be set aside by a decision of this House, and that the only remedy applicable was an act of the legislature. The leading case is that of *Morgan* v. *Crawshay* (36). The question in this case was whether the statute of Elizabeth passed in 1601 authorised the rating for poor law purposes of mines other than coal mines. MARTIN, B., in delivering the unanimous opinion of the judges, states the conditions on which the decision was founded—that the Poor Law Act was passed in 1601, and that the point in dispute, whether any other mines except coal mines were rateable to poor rate, had been the subject of very many and very numerous decisions reported in the books, and from the time of its enactment the practice had been uniform, that no mines, except coal mines, had ever been rated, and, although the reported cases did not commence so early, yet so far as they were known there had been one invariable uniform and constant flow of decisions all one way that, except coal mines, no other mines were rateable. Accepting this statement, LORD CHELMSFORD in giving his opinion states (L.R. 5 H.L. at p. 319):

"After this long-continued course of dicta and decisions, unless your Lordships entertained the strongest opinion that the first decision on the subject was erroneous, and all the cases that followed were merely echoes of the first, you would be most unwilling to pronounce a condemnation of the judgments which have been given, and of the practice which has uniformly prevailed for

so long a period, for the exemption of all other mines except coal mines from liability to be rated for the relief of the poor."

This principle is not applicable to the interpretation of the Roman Catholic Charities Act, 1832, which really depends upon the single decision of LORD COTTENHAM in *West* v. *Shuttleworth* (1)—a decision considered doubtful by SIR JOHN ROMILLY although he felt himself bound by authority to act upon it. I desire to refer to *Clyde Navigation Trustees* v. *Laird* (63) and *Associated Newspapers, Ltd.* v. *London Corpn.* (32). In my opinion, your Lordships are bound to determine the true import of the Act of 1832, and that there is no principle as to contemporanea expositio or on any other ground which—in the state of the decisions relevant to this appeal—interferes with the ordinary course of construction. There has been no long line of uniform and immutable decisions, and it is not material in construing the Act of 1832, whether that Act has been in operation for a period of nearly 100 years or has recently been placed in the statute book. It was further argued that the Roman Catholic Charities Act, 1860, did recognise and affirm that there are tenets of the Roman Catholic religion which are superstitious, and that bequests for such tenets are in the nature of superstitious uses. In my opinion, this Act is a remedial Act, having for its object that bequests for lawful purposes are not to be invalidated by the addition of an unlawful purpose, but that the property may be appropriated and applied to lawful purposes. At the date when the Act was passed there was unquestionably in operation the legal decisions of LORD COTTENHAM based on his construction of the Act of 1832, though these decisions had been doubted by SIR JOHN ROMILLY. These decisions did keep alive the doctrine of superstitious uses as applicable to a bequest for Masses for the souls of the dead, and in that state of the law it was desirable that charities for the exclusive benefit of persons professing the Roman Catholic religion should not be invalidated by reason only that the estate has been or shall be also subjected to any trust or provision deemed to be superstitious or otherwise prohibited by the laws affecting the Roman Catholic religion. If, however, the judgment of your Lordships is that the decisions in operation in 1860 should be overruled, it cannot be that the effect of the Roman Catholic Charities Act is to re-create the doctrine of superstitious uses, although the effect may be that the remedies which the Act provides are no longer necessary.

There is a further matter for the consideration of this House on the appeal. The Roman Catholic Relief Act, 1829, contains provisions respecting the suppression or prohibition of the religious orders and societies of the Church of Rome bound by monastic or religious vows, and there is a special section in the Roman Catholic Charities Act, 1860, that nothing contained in that Act shall be taken to repeal or in any way alter such provisions. It was argued on behalf of the respondents that the bequest of £200 to the Jesuit Fathers, Farm Street, for Masses, and the bequest of the residuary estate for the same purpose, were invalid or contrary to the policy of the Act of 1829, and in accordance with numerous decisions in the Irish courts. If on the true construction of the will these bequests to the Jesuit Fathers had been made to a religious order or society of the Church of Rome bound by monastic or religious vows, it would follow that they were void and invalid; but in my opinion, no such bequests have been made, and a gift to members of an order, which is expressed to be given to them, not for the benefit of the order, but upon a separate charitable trust, does not fail on account of a disability affecting the trustee. In my opinion, the judgment of WICKENS, V.-C., in *Cocks* v. *Manners* (47) and of JOYCE, J., in *Re Smith, Johnson* v. *Bright-Smith* (48) should be followed. The appeal should be allowed with costs, and persons professing the Roman Catholic religion will no longer be debarred from making bequests for Masses for the souls of the dead in conformity with a sacred and sacramental rite which is an essential and integral part of a service of great solemnity in the liturgy of the Roman Catholic Church.

LORD WRENBURY.—The sacrifice of the Holy Mass is the most solemn service of the Roman Catholic Church. There is a religious obligation to attend and hear Mass—an essential part of the service is prayer for the souls of the departed. The purpose of those prayers is the relief of the souls in purgatory. The doctrine of purgatory is an essential part of the Roman Catholic faith. A testamentary disposition for the purpose of procuring Masses to be said for the soul of a testator is consequently a disposition necessarily involving an affirmation and belief of the doctrine of purgatory. The question is whether such a disposition is legal.

From the fact that to-day neither the common law nor any statute forbids the saying or hearing of Mass, it does not follow that disposition to procure Masses for the dead is legal. The common law "knows of no prosecution for mere opinions": *Harrison* v. *Evans* (41), 2 BURN'S ECCL. LAW, 9th Edn. at p. 218. The statute law which in 1581 (23 Eliz., c. 1) imposed a penalty for saying or hearing Mass was mitigated in 1791 by the Roman Catholic Relief Act of that year, and has long since been repealed. Anyone may lawfully say or hear Mass whether it is superstitious or not. But it remains that if a statute has regarded it as a mischief that dying men may be induced to disregard the legitimate claims of their children or other dependants and make dispositions in favour of the Church with a view to saving their souls from the pains of purgatory, if a statute has on that ground declared the doctrine of purgatory to be superstitious, a disposition to procure Masses for the dead is illegal. The question is as to the law on this point.

In 1547 the Statute of Chantries contained a preamble in the following words:

> "Considering that a great part of superstition and errors in Christian religion hath been brought into the minds and estimations of men by reason of the ignorance of their very true and perfect salvation through the death of Jesus Christ and by devising and phantasying vain opinions of purgatory and Masses satisfactory to be done for them which be departed; the which doctrine and vain opinion by nothing more is maintained and upholden than by the abuse of trentals, chantries, and other provisions made for the continuance of the said blindness and ignorance."

The operative part of the Act had the effect of giving to the King chantries and lands, &c., which had been assured to the finding of any priest to have continuance for ever, &c., whereby any priest was sustained, &c., "within five years next before the first day of this present Parliament," and lands "heretofore" given to found or maintain any anniversary or obit or other like thing, intent, or purpose to have continuance for ever, and money given "within five years, &c.," for finding, maintaining, &c., any priest or priests of any anniversary or obit, &c., or other like thing, and contained further in s. 38 a contemplation of finding a priest or maintaining an obit, &c., in the future by the use of the words "henceforth to be founded or done." That section (38) is one which prevents a remainderman from entering on lands for the not doing, not naming, or non-finding of a priest, obit, anniversary, &c., "from henceforth to be founded or done." The Statute of Chantries is one not of general application, but a statute which in the cases to which it applies does not annul the disposition or gift, but substitutes the King as the person to take. In this state of things it is possible to regard the preamble either (i) as a recital of a state of facts confined in its operation to the particular matters dealt with expressly in the operative part, or (ii) as a recital which contemplates a general operation, with the result that in the cases not specially dealt with by the operative part the lands, money, &c., are to go in due course of law upon the footing that the disposition declared by the preamble to be superstitious is not to take effect. The appellants say that at common law the doctrine and faith of Roman Catholics were never at any time illegal; that at common law gifts for Masses never were and are not unlawful. The respondents do not contest these propositions. I have found no authority to the contrary, and I take it that this is so. Having regard to the different forms of religious faith which from time to time have been held or established in this country, it would be strange if it were

A otherwise. Under these circumstances it is to the statute law that I must look to find whether the doctrine of purgatory was and is a superstition, and whether a gift for Masses for the dead is consequently illegal. The first question, therefore, for consideration is as to the effect of the Statute of Chantries, introduced, as it is, by the preamble which I have set out.

The earliest guidance I have in approaching this question is to be found in *Adams* B *and Lambert's Case* (4), decided in 1602, fifty-five years after the Statute of Chantries. It was a case upon that Act, and it had to do with dispositions falling within the Act. It has, therefore, no direct application to cases not falling within the different cases mentioned in the enacting part of the Act, and the passages I am about to quote are, therefore, for the present purpose no more than dicta. Further, in 1602, I have no doubt that opinion may not have been so fully formed C as it has been later as to the extent to which resort may be had to a preamble to ascertain or control the law. On the other hand, these dicta are more than 300 years old. They are dicta upon the meaning and intention of an Act of Parliament 360 years old, and they must in my judgment carry very great weight in ascertaining what was the meaning and intention of the Act. The passages to which I refer are to be found in *Adams and Lambert's Case* (4) at the pages which D I am about to note.

> "The intent and meaning of the Act, as appears by the preamble, was to extirpate out of men's minds these superstitious errors, and to take them utterly away" (4 Co. Rep. at p. 106 b).

This was, it is true, said in the matter of contrasting gifts to superstitious uses E which were to have continuance for ever with those which were determinable, but is valuable as showing that resort was had to the preamble to determine the intent and meaning of the Act. Again (ibid. at p. 109 b):

> "the intent of the Act was to prohibit all superstitious uses which were public in churches for the general prejudice which might accrue by them."

Again (ibid. at p. 111 b): F

> "the intention of the Act (as hath been said, and so it ought to be expounded) was to take away all such superstition."

(Ibid. at p. 113 a):

> "by the equity of the said Act, which intended to extirpate all praying for souls."

G Here, again, I must add that it is not easy to say whether all these are utterances of the court, or whether some, and which of them, are observations by COKE. But whether they be the one or the other, they are certainly entitled to great weight, and I attach the greatest importance to them. Starting then with the dates of 1547 and 1602 the next material to which I can resort is in 1835. In that year H LORD COTTENHAM, M.R., decided *West* v. *Shuttleworth* (1), a decision which for success on this appeal the appellants must induce your Lordships to overrule. SIR WILLIAM GRANT, in *Cary* v. *Abbot* (5), had said that there is no statute making superstitious uses void generally. After referring to that passage LORD COTTENHAM, in *West* v. *Shuttleworth* (1), held that gifts to priests or chapels "that I may have the benefit of their prayers and Masses" were void as being within the superstitious uses intended to be suppressed by the Statute of Chantries. He said this: I

> "The legacies in question are not within the terms of the statute of [the Chantries Act], but that statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in DUKE, been decided to be within the superstitious uses intended to be suppressed by that statute." (2 My. & K. at p. 697.)

In *West* v. *Shuttleworth* (1) I do not find that *Adams and Lambert's Case* (4) is noted by the reporter as having been cited. Neither is it noted as having been

cited in *Cary* v. *Abbot* (5), a case to which LORD COTTENHAM refers. But, inasmuch as he refers to DUKE, who, at p. 460, quotes *Adams and Lambert's Case* (4) at considerable length, it is plain that LORD COTTENHAM had *Adams and Lambert's Case* (4) before him. I have no doubt that when LORD COTTENHAM said, "that statute has been considered," he was referring to and must have had in mind, among other decisions, *Adams and Lambert's Case* (4) and the observations upon the statute made in that case to which I have referred.

In 1841 in *A.-G.* v. *Fishmongers' Co.* (*Kneseworth's Will*) (24) LORD COTTENHAM after dealing with the case on another ground, said: "Even if that were not so, the gift was superstitious and void under" the Statute of Chantries; and, again, in *A.-G.* v. *Fishmongers' Co.*, *Preston's Will* (64), his Lordship quotes from *Adams and Lambert's Case* (4) the following passage:

> "For inasmuch as all the profits are limited to superstitious uses it was the intent of the [Chantries Act] to give all the land to the King by a reasonable construction upon the coherence and intention of all the parts of the Act."

To complete the historical statement, LORD COTTENHAM'S decision in *West* v. *Shuttleworth* (1) was followed in 1854 in *Heath* v. *Chapman* (26) (when KINDERSLEY, V.-C., said that the statute "gives to the Crown certain property devoted to such uses, but it stamps all such uses as superstitious"); in 1860 in *Re Michel's Trust* (28); and in 1861 in *Re Blundell's Trusts* (27). Down to the present time this course of authority has remained undisturbed. In *Yeap Cheah Neo* v. *Ong Cheng Neo* (42) the decision in *West* v. *Shuttleworth* (1) was referred to in the Privy Council and treated as good law, and in *Bowman* v. *Secular Society, Ltd.* (2) LORD PARKER in this House states (by way of illustration merely) that a trust to procure Masses to be said for the testator's soul is unlawful.

The question which has most weighed with me in this case is the following: There is a statute passed in 1547—an opinion was expressed upon its true construction in 1602—the construction accepted in 1602 was acted upon judicially in 1835—that judicial decision has been accepted ever since. Is it—I will not say competent to your Lordships, for you have no doubt authority to overrule LORD COTTENHAM'S decision of 1835—but is it expedient and in accordance with principles upon which this House has often acted, that you should substitute your own opinion upon construction (assuming that you doubt or do not agree with the construction so long since adopted) for an opinion of such antiquity, and which has so long stood unchallenged? I think not. As regards real property, authority is not wanting that a court competent to overrule a decision of long standing which has been long accepted will not overrule it if it will affect titles taken on the footing of the decision. The principle is not, I think, confined to cases of that kind. Here dying men must for centuries have made their wills on the footing that they could not legally make disposition of real estate or of personal estate so as to provide for the saying of Masses for their souls, and must have disposed of their property otherwise for that reason. Where gifts have been made to provide Masses they must have been, and in fact have been, successfully attacked on that ground. Certainty in the law is a thing greatly to be desired. Acquiescence in the existing law as determined by existing decisions of long standing is preferable, I think, to a disruption of existing rights.

Let me give instances in which such principles as the above have been followed. LORD ELDON, in *A.-G.* v. *Bristol Corpn.* (35), where the question was as to the true construction of a deed, said:

> "Length of time is a very material consideration when the question is what is the effect and true construction of the instrument."

But for the present purpose I would refer rather to cases where the question was as to the construction of a statute. In *Morgan* v. *Crawshay* (36), the statute 43 Eliz., c. 2, s. 1, having made "coal mines" rateable for poor rate, the question was whether iron mines were rateable. Your Lordships' House held that they were not. There had been decisions extending back to 1762 that mines other than

A coal mines were not rateable. In 1831 LORD TENTERDEN, in *R.* v. *Sedgeley* (*Inhabitants*) (43), had said (2 B. & Ad. at p. 73):

> "I must confess that much that has been said is by no means satisfactory to my own mind, and that I feel great difficulty in an endeavour to reconcile the several dicta with each other. But it is not necessary to do this. The rule of construction has been established and acted upon for a long time and ought to be adhered to unless we could say positively that it is wrong and productive of inconvenience."

In *Morgan* v. *Crawshay* (36), in your Lordships' House, LORD CHELMSFORD was, I think, of opinion that the previous decisions were right, while LORD WESTBURY, on the other hand, would have been much inclined to quarrel with them, but both agreed that they should not be disturbed. LORD WESTBURY said (L.R. 5 H.L. at p. 319):

> "We must bow to the uniform interpretation which has been put upon the statute of Elizabeth, and must not attempt to disturb the exposition which it has received."

He concluded by saying (ibid. at p. 320):

> "I hope, therefore, that your Lordships will concur in the conclusion that upon that ground alone this appeal ought to be dismissed."

Re Wright, Ex parte Willey (33) is again a case upon the construction of a statute —namely, the Bankruptcy Act, 1869. It is not a decision of this House, but of the Court of Appeal. SIR GEORGE JESSEL, M.R., after stating his practice to be to form and express his own opinion upon the construction of an Act, went on to say that there was one peculiar case which was exceptional (23 Ch.D. at p. 127).

> "Where a series of decisions of inferior courts have put a construction upon an Act of Parliament and thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course that requires two things—antiquity of decision and the practice of mankind in conducting their affairs."

In *Tancred Arrol & Co.* v. *Steel Co. of Scotland, Ltd.* (37) the question was as to the effect of a contract to one of whose provisions a well-settled proposition of Scottish law was said to be applicable. This House held that it was applicable, and LORD HERSCHELL used these words (15 App. Cas. at p. 141):

> "That doctrine having been laid down so long ago, whether it rests upon any sound basis or not, it would be most improper to depart from it now, because one would be really altering the contract between the parties, for we have a right to suppose that they have entered into it upon the basis of that which for nearly a century has been understood to be the law."

In *Associated Newspapers, Ltd.* v. *London Corpn.* (32) your Lordships by a majority overruled *Sion College* v. *London Corpn.* (31) (a decision then fifteen years old) because the majority of your Lordships were of opinion that decisions in 1790, 1800, and 1828, upon which that case proceeded, had not the result which the Court of Appeal in the *Sion College Case* (31) attributed to them. LORD SUMNER did not take that view of the earlier decisions, and he said ([1916] 2 A.C. at p. 451):

> "I conceive that the case fails within LORD WESTBURY'S well-known words in *Morgan* v. *Crawshay* (36) (L.R. 5 H.L. at p. 320) . . . and that after the lapse of 126 years this long-standing construction should not be overruled."

Had your Lordships taken the view which LORD SUMNER took of the earlier decisions, you would all, I think, have acquiesced in that sentence. Lastly, in *Bowman* v. *Secular Society, Ltd.* (2) ([1917] A.C. at p. 454), LORD SUMNER again says that if a maxim

> "expresses a positive rule of law once established, though long ago, time cannot

abolish it nor disfavour make it obsolete. The decisions which refer to such a maxim are numerous and old, and although none of them is a decision of this House, if they are in agreement, and if such is their effect, I apprehend they would not now be overruled, however little reason would incline your Lordships to concur in them."

The cases to which I have referred seem to me fully to bear out my statement that the principle of maintaining a view of the law based upon authoritative opinion or judicial decision of long standing is not confined to cases in which titles would be affected by its review. The principle is one of general application to all cases in which the court which has power to overrule finds that mankind have for many years conducted their affairs upon the footing of a certain recognised state of the law. It is a principle which recognises the importance of certainty and finality—and which, under circumstances, refuses to disturb after a certain lapse of time a doctrine "whether," to use LORD HERSCHELL'S words, "it rests upon any sound basis or not." To apply these considerations to the present case. The question is as to the true construction of a statute of 1547 (372 years ago). In *Adams and Lambert's Case* (4), a case decided in 1602 (317 years ago), views were expressed upon its construction, meaning, and intention in the terms which I have quoted. In *West* v. *Shuttleworth* (1) LORD COTTENHAM, eighty-four years ago, referring to those considerations, decided the exact point now before your Lordships for decision. In 1834, 1860, and 1861, the decision in *West* v. *Shuttleworth* (1) was followed, not always, I agree, without adverse comment. In 1875 the authority of the decision was recognised in the Privy Council (*Yeap Cheah Neo* v. *Ong Cheng Neo* (42), L.R. 6 P.C. at p. 396). In 1917 the doctrine that a gift to procure Masses to be said for the testator's soul is void (the doctrine that is laid down in *West* v. *Shuttleworth* (1)) was in your Lordships' House stated to be good law. In these circumstances I am not prepared to review the law and to say that *West* v. *Shuttleworth* (1) is wrong. Were I much more persuaded than I am that if the matter were res integra the decision ought to be the other way, I should still be of opinion that upon principle and upon authority that decision ought to be maintained. I may say, however, that the Roman Catholic Charities Act, 1860, does, in my opinion, recognise and affirm that there are tenets of the Roman Catholic religion which are superstitious, and that trusts which are superstitious are not lawful charitable trusts. The Act provides machinery for this court to substitute other trusts to take effect "in lieu of the superstitious trusts." In these circumstances I do not find it necessary to consider and determine for myself exactly what reliance can be placed upon the language of the preamble to the Chantries Act, or to follow the respondents' contention upon the Roman Catholic Relief Act, 1829, and see whether these gifts were to persons bound by monastic vows. I rest my judgment upon the point which I have principally discussed, and hold that the decision in *West* v. *Shuttleworth* (1) ought not to be disturbed. If complete freedom of religious belief, which all would, I think, to-day be desirous of giving, ought to be supplemented by removing illegality from dispositions such as are in question in this case, the matter is, I think, one for the legislature. This appeal ought, in my judgment, to be dismissed.

Solicitors: *Witham, Roskell, Munster & Weld*; *Herbert Z. Deane.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

A

PAYZU, LTD. *v.* SAUNDERS

[Court of Appeal (Bankes and Scrutton, L.JJ., and Eve, J.), May 6, 7, 8, June 27, 1919]

B [Reported [1919] 2 K.B. 581; 89 L.J.K.B. 17; 121 L.T. 563; 35 T.L.R. 657]

Damages—Mitigation—Duty to mitigate loss—What it is reasonable to do in mitigation a question of fact—No right to recover in respect of damage due to failure to mitigate.

Where one party to a contract has broken the contract the other party must C take all reasonable steps to mitigate the loss consequent on the breach, and, if he fails to do so, he is debarred from recovering in respect of any part of the damage which is due to his neglect to take such steps. What it is reasonable for a person to do in mitigation of his damage is a question of fact and not of law.

Per Scrutton, L.J.: In commercial contracts it is generally reasonable to D accept an offer by the party in default.

Notes. Referred to: *Banco de Portugal* v. *Waterlow & Sons, Ltd.* (1931), 100 L.J.K.B. 465; on appeal, [1932] All E.R.Rep. 181; *Houndsditch Warehouse Co.* v. *Waltex, Ltd.*, [1944] 2 E.R. 518; *Pilkington* v. *Wood*, [1953] 2 All E.R. 810.

As to duty of plaintiff to mitigate damages, see 11 Halsbury's Laws (3rd Edn.) 289 et seq.; and for cases see 17 Digest (Repl.) 108–111.

E

Cases referred to:

(1) *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Railways Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 56 Sol. Jo. 734, H.L.; 17 Digest (Repl.) 108, *226*.

(2) *Dunkirk Colliery Co.* v. *Lever* (1878), 9 Ch.D. 20; 39 L.T. 239; 26 W.R. 841, C.A.; 17 Digest (Repl.) 108, *225*.

F

Appeal from an order of McCardie, J.

The following statement of facts is taken from His Lordship's judgment. The defendant was a dealer in silk, and on Nov. 9, 1917, she agreed to sell to the plaintiffs a large quantity of silk—200 pieces at the price of 4s. 6d. and 200 pieces at the price of 5s. 11d., the total amount of the contract being about £3,500. G Delivery was to be between January, 1918, and September, 1918; the payment was to be 2½ per cent. discount one month. The meaning of those words in the trade is, that goods delivered up to the 20th of the month shall be paid for subject to the discount of this 2½ per cent. on or about the 20th of the next month. In the very first month of the contract, however, the defendant, at the express request of the plaintiffs, delivered certain goods prior to the date of the first contract obligation. H Those goods amounted in value, less the 2½ per cent. discount, to £76 14s. 2d. On Dec. 21, 1917, the plaintiffs drew a cheque for that amount, noted the cheque on the counterfoil, and also noted it in the cash-book. At that time the plaintiffs' staff was greatly depleted by reason of the war; the managing director was seriously ill, and another director was also suffering from illness. The cheque so drawn was either not posted, or, if posted, failed to reach the defendant. The circum- I stances disclosed in the evidence are curious, but, after considering the facts, I am not satisfied that there was any dishonesty of conduct which could be charged against the plaintiffs. The cheque, if it had been received by the defendant and paid into the bank, would have at once been met by the plaintiffs' bankers in spite of the fact that a substantial overdraft already existed. At the beginning of January the defendant telephoned to the plaintiffs inquiring why the cheque had not been received. The plaintiffs answered that the cheque had in fact been sent on Dec. 21, and the defendant then informed the plaintiffs that the cheque had not been received. Thereupon the plaintiffs stopped payment of the cheque of

Dec. 21 and they prepared another cheque of Jan. 9. Owing to the difficulties of obtaining the signature of one of the directors, there was some little delay with regard to the matter; but on Jan. 16 a second cheque for £76 14s. 2d. was sent to the defendant as for goods delivered in November less 2½ per cent. discount. The defendant did receive that cheque which the plaintiffs had dispatched with a letter asking for further deliveries of goods. The defendant had formed a suspicious view with regard to this matter and hence she wrote the following letter:

> "Sir.—We are in receipt of your order by telephone; but before executing this order, we must insist on cash cover as we cannot do business on the terms you are taking. The account just paid was due net. You deduct 2½ per cent. which we will overlook this time. Then again the cheque was dated Jan. 9."

Further correspondence ensued between the parties, and on Feb. 4, 1918, the plaintiffs, it is agreed, accepted the defendant's repudiation of the contract. At that time the market had risen further. The plaintiffs went to much trouble in trying to buy elsewhere, and undoubtedly incurred expense in doing so, but they were unable to purchase goods from any quarter. They claimed damages as from the middle of February, 1918, and they based that claim upon the market price which prevailed at that date. McCardie, J., held that the delay in payment by the plaintiffs did not amount to a repudiation of the contract by them, and therefore, the defendant was liable in damages for breach of contract; that the plaintiffs, however, were under a duty to mitigate any loss they might suffer through the defendant's breach and should have accepted the defendant's offer to supply the goods for cash which offer was bona fide. By not accepting, the plaintiffs had sustained a greater loss than they might have, and therefore, the damages must be limited to the loss they would have suffered if they had accepted the defendant's offer. The plaintiffs appealed as regards the damages.

J. B. Matthews, K.C., and *H. J. Turrell* for the plaintiffs.
Compston, K.C., and *R. J. Willis*, for the defendant, were not called on to argue.

BANKES, L.J.—At the trial of this action the defendant raised two points: first, she contended that she had committed no breach of the contract of sale, and secondly that, assuming there was a breach, she had nevertheless offered and was always ready and willing to supply the pieces of silk, the subject of the contract, at the contract price for cash; that it was not reasonable on the part of the plaintiffs to refuse to accept that offer, and that therefore they cannot claim damages beyond what they would have lost by paying cash with each order instead of having a month's credit and a discount of 2½ per cent. We must take it that this was the offer made by the defendant. The case was fought and McCardie, J., has given judgment upon that footing. It is true that the correspondence suggests that the defendant was at one time claiming an increased price. But in this court we must take it that the offer was to supply the goods at the contract price, with this difference only, that payment was to be made by cash instead of being on credit. In these circumstances the only question which arises is whether the plaintiffs can establish that as matter of law they were not bound to consider any offer made by the defendant because of the attitude she had taken up.

Upon this point McCardie, J., referred to *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London, Ltd.* (1) ([1912] A.C. at p. 689), where Lord Haldane, L.C., said:

> "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James, L.J., in *Dunkirk Colliery Co.* v. *Lever* (2) (9 Ch.D. at p. 25): 'The person who has broken the contract is not to be exposed to additional cost by

A reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.' "

It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law, but must be one of fact in the circumstances of each particular case. There may be cases where as matter of fact it B would be unreasonable to expect a plaintiff in view of the treatment he has received from the defendant to consider an offer made. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he would be justified in refusing the offer, and that it would be unreasonable to ask him in this way to mitigate the damages in an action C of wrongful dismissal. But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case. Counsel for the plaintiffs complained that the defendant had treated his clients so badly that it would be unreasonable to expect them to listen to any proposition that she might make. I do not agree. In my opinion each party to the contract was ready to accuse the other of conduct unworthy of a high commercial reputation, D and there was nothing to justify the plaintiffs in refusing to consider the defendant's offer. I think the learned judge came to a right conclusion on the facts, and that the appeal must be dismissed.

SCRUTTON, L.J.—I am of the same opinion. Whether it be more correct to say that a plaintiff must minimise his damages, or to say that he can recover no E more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same. The plaintiff must take "all reasonable steps to mitigate the loss consequent on the breach" and this principle "debars him from claiming any part of the damage which is due to his neglect to take such steps": *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London,* F *Ltd.* (1), per LORD HALDANE, L.C. Counsel for the plaintiffs has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience. In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the G party in default. However, it is always a question of fact. About the law there is no difficulty.

EVE, J.—I agree. But for the difficulty introduced by the defendant's demand for a higher price than that named in the contract, I think this is a plain case. That difficulty is more apparent than real. It was not raised in the court below, and there is not enough evidence to enable us to give effect to it, assuming it to H be a matter of substance.

Appeal dismissed.

Solicitors: *W. H. Martin & Co.*; *S. Myers & Son.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

R. *v.* CREAMER

[Court of Criminal Appeal (Darling, Avory, Lush, Shearman and Sankey, JJ.), February 24, 1919]

[Reported [1919] 1 K.B. 564; 88 L.J.K.B. 594; 120 L.T. 575; 83 J.P. 120; 35 T.L.R. 281; 26 Cox, C.C. 393; 14 Cr. App. Rep. 19] B

Criminal Law—Receiving stolen property—Money taken by wife from husband while he was absent on military service—Need to prove wife had taken money in circumstances amounting to larceny—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 36 (2). C

The appellant was convicted of receiving, well knowing it to have been stolen, money which had been taken by a married woman from her husband.

Held: in the absence of evidence to show that the wife had taken the money in circumstances which would warrant a conviction against her for larceny the conviction of the appellant for receiving the money could not be upheld.

Per **Curiam**: A husband and wife do not cease to live together within s. 36 of the Larceny Act, 1916, merely because the husband is temporarily absent on military service. D

Notes. Applied: *Walters* v. *Lunt*, [1951] 2 All E.R. 645. Considered: *R.* v. *Moore*, [1954] 2 All E.R. 189. Referred to: *Eadie* v. *I.R.Comrs.*, [1924] All E.R.Rep. 760; *Jones* v. *Evans*, [1945] 1 All E.R. 19.

As to larceny by a wife from her husband, see 10 Halsbury's Laws (3rd Edn.) 771, 772; and as to receiving, see ibid., 812, 813; and for cases see 15 Digest (Repl.) 1075–1077, 1142 et seq. For the Larceny Act, 1916, see 5 Halsbury's Statutes (2nd Edn.) 1011. E

Case referred to:

(1) *R.* v. *James*, [1902] 1 K.B. 540; 71 L.J.K.B. 211; 86 L.T. 202; 66 J.P. 217; 50 W.R. 286; 18 T.L.R. 284; 46 Sol. Jo. 247; 20 Cox, C.C. 156, C.C.R.; 15 Digest (Repl.) 1076, *10,608*. F

Also referred to in argument:

R. v. *Kenny* (1877), 2 Q.B.D. 307; 46 L.J.M.C. 156; 36 L.T. 36; 41 J.P. 264; 25 W.R. 679; 13 Cox, C.C. 397, C.C.R.; 15 Digest (Repl.) 1075, *10,603*.

Chudley v. *Chudley* (1893), 69 L.T. 617; 10 T.L.R. 63; 17 Cox, C.C. 697, C.A.; 27 Digest (Repl.) 344, *2860*. G

Marshall v. *Malcolm* (1917), 87 L.J.K.B. 491; 117 L.T. 752; 26 Cox, C.C. 129; 82 J.P. 77, D.C.; 3 Digest (Repl.) 443, *352*.

Jones v. *Davies*, [1901] 1 K.B. 118; 70 L.J.Q.B. 38; 83 L.T. 412; 65 J.P. 39; 49 W.R. 136, D.C.; 3 Digest (Repl.) 443, *351*.

Drew v. *Drew* (1888), 13 P.D. 97; 57 L.J.P. 64; 58 L.T. 923; 36 W.R. 927; 27 Digest (Repl.) 359, *2966*. H

Appeal on a point of law against a conviction at the Folkestone Quarter Sessions for receiving money knowing it to have been stolen.

The indictment charged the appellant and Jane Tidey (the wife of Arthur Tidey) with stealing in or about September, 1917, a cash-box, £170 in bank-notes, £500 in Treasury notes, and £22 10s. in cash, the property of Arthur Tidey; the second count charged them with receiving the property well knowing it to have been stolen. In 1916 Jane Tidey and her husband were living together in a house at Folkestone. The husband, Arthur Tidey, kept a garage and drove motor cars. In October, 1916, Tidey joined the army, and soon afterwards went to France. Before leaving he put the notes and cash specified in the indictment in a cash-box, which was locked and placed in a bag, also locked. The bag was placed in a locked wooden box and left in Tidey's bedroom. Tidey took away with him the three keys. Mrs. Tidey continued to live in the same house. After her husband had gone to France in I

October, 1916, she became acquainted with a Canadian soldier stationed at Shorncliffe. In November, 1917, the husband, Arthur Tidey, came home on leave for a fortnight. He then discovered that the wooden box in his bedroom had been broken open, and that the bag and the cash-box were missing. The explanation given by his wife was that she had taken the money to her mother for safety on account of air raids. The husband accepted the explanation and made no further inquiries. While on leave he frequently met the appellant at the house, but without any suspicions as to the relations between his wife and the appellant. They were in fact very intimate, and in December, 1917, or January, 1918, immoral intercourse commenced. In May, 1918, Mrs. Tidey left Folkestone and went with the appellant to Seaford. They lived there together as man and wife till November, 1918, the wife continuing to correspond affectionately with her husband in France. He returned to Folkestone in the early part of November, 1918, and found his wife gone. In the wooden box was the bag in which the cash-box had been placed. The lock of the bag was forced and both cash-box and money were missing. At the trial Mrs. Tidey admitted that she took the cash-box and the money, but claimed that the money was her own. There was no evidence that any part of the money was taken later than Nov. 17, 1917. There was evidence that the appellant had received some of it, and his defence was a belief that the money belonged to Mrs. Tidey. Neither prisoner was represented by counsel at the trial. In summing up the case to the jury the recorder told them to consider whether it was established that the money belonged to the husband, and, if so, whether the wife had stolen it, and whether the appellant received any part of the money knowing it to have been stolen. The attention of the jury was not called to the provisions of s. 36 of the Larceny Act, 1916. Mrs. Tidey was convicted of stealing and did not appeal. The appellant was convicted of receiving.

By s. 36 of the Larceny Act, 1916, as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935:

> "(1) A wife shall have the same remedies and redress under this Act for the protection and security of her own . . . property as if [she were] a feme sole: Provided that no proceedings under this Act shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband, while they are living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife.
>
> (2) A wife doing an Act with respect to any property of her husband, if done by the husband in respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall be in like manner liable to criminal proceedings by her husband."

H. D. Roome for the appellant.
Talbot, K.C., and *J. W. W. Weigall* for the Crown.

DARLING, J., delivered the following judgment of the court.—The appellant was convicted of receiving money which was said to have been stolen by a married woman from her husband. Nothing can be said in favour of the appellant on the merits of the case or on moral grounds. The woman took the money, which represented her husband's savings and amounted to some hundreds of pounds, and spent it in the company of the appellant with whom she has committed adultery.

The first point which arises for our decision is: Was it proved that when the money was stolen the husband and wife were not living together? The prosecution say they were living apart at that time. The money was stolen some time previous to November, 1917. It was given in evidence that immoral relations between the appellant and the wife began either in December, 1917, or January, 1918. In determining whether a husband and wife are living together, the law has regard to what is called the consortium of husband and wife, a kind of association only

possible between husband and wife. A husband and wife are living together not only when they are residing together in the same house, but also when they are living in different places, even if separated by the high seas, provided the consortium has not been determined. In the present case there had been no adultery at the time when the money was taken; it cannot, therefore, be said that at that time the consortium was determined, and it is immaterial to point out that the wife was living at Folkestone and the husband was on active service in France. From a legal point of view they were still living together.

At common law a wife could not steal her husband's property. The prosecution of a wife for stealing her husband's goods first became possible under the provisions of ss. 12 and 16 of the Married Women's Property Act, 1882. In s. 36 of the Larceny Act, 1916, those sections are reproduced. Section 36 provides that no proceedings under the Act shall be taken by a husband against his wife while they are living together, nor while they are living apart as to any act done by the wife while they were living together, unless his property has been wrongfully taken by the wife when leaving or deserting or about to leave or desert her husband. Now, it has been contended here to-day that the effect of the statute of 1916 is to do away with the disability of a married woman to steal her husband's goods, and to provide that after the passing of that Act a wife can be guilty of larceny, but can only be prosecuted if she was not living with her husband when the goods were taken, or at the time of the proceedings, an exception to this rule being that the goods were taken when the wife was leaving or deserting or about to leave or desert her husband. We think that the expression "no proceedings shall be taken" in s. 36 really means that no crime is committed by a wife who takes her husband's goods unless they are taken under the conditions mentioned in the proviso to s. 36. Any other view of the meaning of s. 36 would be inconsistent with the judgment of the Court for Consideration of Crown Cases Reserved in *R.* v. *James* (1). That judgment was delivered in writing after careful consideration by all the judges concerned, and contains the following passages:

> "We think it is clear that in the case of an indictment against the wife for stealing the goods of her husband, upon proof that the husband and wife were living together at the time when the criminal proceedings were taken, a good defence would be established, and so, if the act relied upon as constituting larceny were proved to have been done by the wife while the husband and wife were living together, there could be no larceny unless it could be proved that the property had been wrongfully taken by the wife when leaving or deserting or about to leave or desert her husband."

I specially draw attention to the words "there could be no larceny."

It has been argued to-day for the Crown that, even in the absence of proof of the wife's liability, she had in reality stolen the money, and that therefore there could be a conviction for receiving the money against the appellant. Reference was made to a passage in Lush on Husband and Wife (3rd Edn.), p. 522, where it is said:

> "It is important to observe that the Act [i.e., the Married Women's Property Act, 1882] does not state that a husband cannot steal his wife's property nor a wife her husband's; only that no 'proceedings shall be taken in respect thereof.' It is conceived, therefore, that a person could now be indicted for receiving from the wife property belonging to her husband which she had stolen, even while living with him."

Lush, J., has informed us that he subsequently came to the conclusion that the passage referred to could not be regarded as a sound statement of law. It clearly is in conflict with the passage quoted from *R.* v. *James* (1). It is to be regretted that the recorder in the present case did not explain to the jury the law relating to the theft by a wife of her husband's property, as, if he had done so, the finding

of the jury might have deprived the appellant of the protection afforded by the proviso to s. 36, but, there being no such finding, this court cannot say whether or not the wife had committed the crime of larceny, and it is therefore impossible to uphold the verdict of receiving. The appeal must be allowed and the conviction quashed.

Appeal allowed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

NORBURY NATZIO & CO., LTD. *v.* GRIFFITHS

[COURT OF APPEAL (Pickford, Warrington and Scrutton, L.JJ.), March 27, April 15, 1918]

[Reported [1918] 2 K.B. 369; 87 L.J.K.B. 952; 119 L.T. 90]

Practice—Parties—Adding persons as parties—Joinder as co-defendant—Action against one only of joint contractors—Jurisdiction of court to order plaintiff to join other joint contractor as defendant—Form of order.

Where an action is brought upon a joint contract against one only of two joint contractors the court may on application, whether the plaintiff consents or not, make an order directing the plaintiff to join the other joint contractor as co-defendant. The joint contractor sued has a primâ facie right to have his alleged co-contractor joined as co-defendant, but in making the order the court will not prejudice the consideration at the trial of the questions whether the contract upon which the plaintiff sues is joint or several or whether the defendant in making a counterclaim makes it in the same right as that in which he opposes the plaintiff's claim, and will frame the order so as to protect the plaintiff in regard to costs if it should appear at the trial that the contract is not a joint one and that the co-defendant is not liable.

Form of order in *Fardell Traction Haulage Co., Ltd.* v. *Basset* (1) (1899), 15 T.L.R. 204, adopted.

Notes. Considered: *Atid Navigation Co.* v. *Fairplay Towage and Shipping Co.*, [1955] 1 All E.R. 698. Applied: *Amon* v. *Raphael Tuck and Sons*, [1956] 1 All E.R. 273.

As to joinder of defendants, see 30 HALSBURY'S LAWS (3rd Edn.) 314 et seq., 394, 395; and for cases see DIGEST (Practice) 429 et seq.

Cases referred to:

(1) *Fardell Traction Haulage Co., Ltd.* v. *Basset* (1899), 15 T.L.R. 204, C.A.; Digest (Practice) 430, *1258*.

(2) *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.*, [1893] 1 Q.B. 422; 4 R. 286; 41 W.R. 486; sub nom. *Wilson, Son & Co.* v. *Killick*, 62 L.J.Q.B. 245; 68 L.T. 312, C.A.; Digest (Practice) 424, *1197*.

(3) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, 515, 516; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; Digest (Practice) 430, *1253*.

Also referred to in argument:

Batchellor v. *Lawrence* (1860), 9 C.B.N.S. 543; 30 L.J.C.P. 39; 3 L.T. 508; 6 Jur.N.S. 130; 9 W.R. 373.

Pilley v. *Robinson* (1887), 20 Q.B.D. 155; 57 L.J.Q.B. 54; 58 L.T. 110; 36 W.R. 269, D.C.; Digest (Practice) 430, *1255*.

Montgomery v. *Foy Morgan & Co.*, [1895] 2 Q.B. 321, 324; 65 L.J.Q.B. 18; 73 L.T. 12; 43 W.R. 691; 11 T.L.R. 512; 8 Asp.M.L.C. 36; 14 R. 575, C.A.; Digest (Practice) 425, *1208*. A

McCheane v. *Gyles* (*No. 2*), [1902] 1 Ch. 911; 71 L.J.Ch. 446; 86 L.T. 217; 50 W.R. 387; 46 Sol. Jo. 359; Digest (Practice) 429, *1246*.

Norris v. *Beazley* (1877), 2 C.P.D. 80, 85; 46 L.J.Q.B. 169; 35 L.T. 846; 25 W.R. 320; Digest (Practice) 429, *1243*. B

Pender v. *Taddei*, [1898] 1 Q.B. 798; 67 L.J.Q.B. 703; 78 L.T. 581; 46 W.R. 452, C.A.; 40 Digest (Repl.) 449, *356*.

Appeal by the defendant from an order of BRAY, J., at chambers.

The defendant and one Vassey were the executors of the will of J. J. Griffiths, deceased, the father of the defendant, and were jointly entitled thereunder to the deceased's printing business. By a contract dated Sept. 29, 1913, the defendant C and Vasey jointly contracted to sell the business to the plaintiffs, and it was agreed that as to all finished stock the plaintiffs should dispose of it at agreed prices and pay to the vendors the amount realised, and that as to all work in progress at the time of the sale the plaintiffs should complete it at agreed rates specified in a schedule to the contract, deliver it to the respective customers, collect the prices, and pay the proceeds to the vendors, deducting their own charges for D completion at the scheduled rates. Pursuant to this contract the business was assigned by deed. By arrangement the plaintiffs, after the date of the sale, printed a revised catalogue for a certain firm at a special rate different from the rate scheduled to the contract. On Oct. 8, 1917, the plaintiffs began this action against the defendant alone for a sum of £516 9s. 4d. for work done and materials supplied by them as publishers in printing the revised catalogue, alleging that under the E arrangement relating to the catalogue the defendant alone had contracted for the work and was liable to pay for it. The defendant delivered a defence in which he admitted that the sum claimed was due to the plaintiffs from the executors of the defendant's father, of whom the defendant was one; and he also delivered a counter-claim by the defendant and Vasey as co-claimants for an account and payment of amounts, exceeding the amount of the plaintiffs' claim, alleged to be F due from the plaintiffs to them as joint contractors under the contract of sale. On Feb. 5, 1918, on the application of the plaintiffs, the master made an order striking out both the defence and the counter-claim as being embarrassing and irregular. The defendant on appeal to the judge in chambers applied that the order of the master should be set aside and that the plaintiffs should be ordered to join Vasey as co-defendant, in order that the two co-defendants could bring a G counter-claim against the plaintiffs, and that the defence and counter-claim should be amended accordingly.

J. B. Matthews, K.C., and *S. C. N. Goodman* for the defendant.

Russell Davies for the plaintiffs.

PICKFORD, L.J. (after stating the facts, continued:) The appeal was supported H by an affidavit of the defendant, which went to show that the defendant and Vasey were liable as joint contractors for the amount of the plaintiffs' claim. I will not go at length into the matters stated in the affidavit lest I should appear to be intimating a view as to what the decision on the facts ought to be. BRAY, J., allowed the plaintiffs ample time to answer that affidavit, but they did not do so. The learned judge made an order which, after reciting that the plaintiffs refused I to add Vasey as a co-defendant, went on to provide that no order was made on the appeal of the defendant except that an amended defence be delivered by the defendant in seven days, and that the costs of the application be costs in the cause. We are told that the judge made that order because he thought that in the absence of consent by the plaintiffs he had no jurisdiction to make the order asked for. I think counsel for the plaintiffs accepted that view, and admitted that it was not in the exercise of his discretion that the judge declined to make the order asked for. I therefore deal with the case as an appeal from an order of the judge, made

not in the exercise of his discretion, but because he thought that he had no jurisdiction to grant the application of the defendant. The question is whether in the circumstances the court ought to order Vasey to be joined as a co-defendant.

On the question whether the court has jurisdiction to make the order without the consent of the plaintiffs, I am satisfied that where an action is brought upon a joint contract against one only of the joint contractors, the court or judge has undoubtedly jurisdiction, whether the plaintiff consents or not, to make an order directing the plaintiff to join the co-contractor as a co-defendant. As regards the right of the defendant to have the order made, it has been stated in the Court of Appeal in several cases, as, for example, by LORD ESHER, M.R., in *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (2), that in such a case the defendant has a primâ facie right to have the other joint contractor joined as a co-defendant. The court, no doubt, has a discretion whether it will make the order or not. There may be cases in which it will rightly decline to do so, but, in the absence of special circumstances showing that it ought not to do so, its practice is to make it. If the plaintiffs had admitted that the contract was joint, the court would not have much trouble in deciding to make the order. In this case, however, the allegation of the defendant that there is another person who is his co-contractor is not admitted by the plaintiffs, and we have to consider whether in these circumstances we ought to allow him to have that person joined. It is not as a rule possible for the court to decide at this early stage whether the contract is in fact a joint contract. It is not, however, necessary to do so. It is sufficient that the defendant makes out a reasonable and probable case of joint contract: *Fardell Traction Haulage Co., Ltd.* v. *Basset* (1). I think that the defendant has set up a reasonable case of joint contract, though I do not say that he will be able to make it out at the trial. It seems to me, therefore, that the court ought not to refuse to make the order for the joinder of Vasey as a co-defendant. The defendant's particular reason for having his co-contractor joined, namely, that they may raise a joint counter-claim against the plaintiffs, which exceeds the amount of the claim, is proper and reasonable, for the plaintiffs ought not in the circumstances to be allowed to recover from the defendant the amount of their claim, unless the defendant has an opportunity of raising his counter-claim. I think the order should be made. I wish, however, to make it quite clear that I am not intimating any opinion whether the contract is in fact joint or several. Neither am I expressing any view as to whether the defendant is a party to the contract, upon which he desires to bring his counter-claim, in the same right as that in which he is a party to the contract out of which the plaintiffs' claim arises; it may be that he is a party to the one contract in his personal capacity and to the other as executor. Nor do I say anything to prevent the plaintiffs asking that the question whether the contract on which the claim is made is joint or several should be tried before the counter-claim. The order will not prejudice the decision of any of those questions. In other respects the order should follow that which was made in *Fardell Traction Haulage Co., Ltd.* v. *Basset* (1) in order to secure that neither the plaintiffs nor Vasey shall be prejudiced by the order, in case it should appear that Vasey ought not to have been joined as a co-defendant.

WARRINGTON, L.J.—I agree. I have nothing to add to the judgment of PICKFORD, L.J., whose caution I desire to imitate in not saying anything to prejudice the consideration at the trial of the two questions whether the contract upon which the plaintiffs sue is joint or several, and whether the defendant is a party in the same right to the contract upon which he desires to bring his counter-claim as to that upon which the plaintiffs claim.

SCRUTTON, L.J.—I agree. In substance the defendant desires to have Vasey joined as a co-defendant with him in the action on the ground that the contract upon which the action is brought was made with himself and Vasey as joint contractors, and not merely with himself alone as a several contractor. He also

wishes this to be done in order that he and Vasey may be able to bring a counter-claim against the plaintiffs in respect of a contract which the plaintiffs entered into with them as co-contractors. A

The course of legal history in this country no doubt shows that the tendency has been to make the rules of procedure so flexible as to ensure as far as possible that trouble shall not be occasioned by objections taken on merely technical grounds. Formerly, when an action was brought upon a joint contract and all the co-contractors were not joined as defendants, the defendant pleaded in abatement alleging the non-joinder of his co-defendants, and under that plea, on its being proved that the contract was joint, there was an abatement of the action, unless the plaintiff agreed to join all the joint contractors as co-defendants. The plea in abatement has been abolished by the Judicature Acts and the rules of the Supreme Court, but the rules substituted a new procedure under which no cause is to be defeated by reason of the non-joinder of parties, and the court may in every cause deal with the matter so far as regards the rights and interests of the parties actually before it, and may order that any parties be added who ought to have been joined or who may be necessary. In *Kendall* v. *Hamilton* (3) LORD PENZANCE, in the course of his dissenting judgment, after mentioning that the Judicature Act and the rules had abolished all objections and defences arising out of the mis-joinder or non-joinder of parties, observed that when the plea in abatement was swept away the legal right of a joint contractor to have the other joint contractor joined in any action brought upon the joint promise was swept away too and the creditor became entitled to sue the parties severally, subject no longer to the will of the defendant, but to the discretion of the court exercised for the furtherance of justice. LORD BLACKBURN in the same case went so far as to say that he could not agree with the opinion of LORD PENZANCE that the Judicature Act had taken away the right of the joint contractor to have the other joint contractor joined as a defendant or had made it a mere matter of discretion in the court to permit it, and that he himself thought that the right remained though the mode of enforcing it was changed. I think that the Judicature Act and the rules have undoubtedly given the court a discretion as to whether or not it will order that the joint contractors be joined as defendants. Thus, for example, where, as in *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (2), the co-contractor is a foreigner resident in another country, the court in its discretion may decline to order that he be added as a co-defendant, and may allow the action to be tried without him. In *Fardell Traction Haulage Co., Ltd.* v. *Basset* (1) the court went even further in the exercise of its discretion, and, being unable at that stage of the proceedings to decide whether or not the contract was in fact joint, held that, as the defendant had made out a reasonable case of joint contract, an order ought to be made joining the alleged joint contractor as a co-defendant, but at the risk of the defendant as to costs in case it should appear at the trial that the contract was not joint and that the co-defendant was not liable. So here, I think, the court ought to make the order asked for. B C D E F G H

I also desire to say that in making the order we are not deciding the question whether or not the contract sued upon was in fact made with the defendant and Vasey jointly, that being a question to be determined at the trial. Neither do we decide whether the defendant makes his counter-claim in the same right as that in which he opposes the plaintiffs' claim, that also being a question which must be left open for consideration at the trial. It is also clearly a matter to be dealt with at the hearing what should be the order of procedure in dealing with the questions involved. I

If the judge in making the order under appeal meant to decide that the court had no jurisdiction to make an order compelling the plaintiffs to join Vasey as a co-defendant without the consent of the plaintiffs, I think he was wrong. If he was, I think the probable explanation is that the relevant authorities were not cited to him. They certainly should have been brought to his notice, for no judge

A is bound to look up for himself all the cases bearing upon every point that arises before him.

Appeal allowed.

[The order of the court, which followed the order made in *Fardell Traction Haulage Co., Ltd.* v. *Basset* (1), was in these terms:

B "It is ordered that this appeal be allowed and that the said order of BRAY, J., be set aside. It is therefore now ordered that the said S. A. Vasey be joined as a co-defendant in this action, and that the defendants be then at liberty to bring a counter-claim jointly against the plaintiffs, and that the plaintiffs are not to be prejudiced by such joinder if it should be held that the contract sued upon was not a joint contract, and that the said S. A. Vasey is not liable C thereon, and in that case the defendant Fred Griffiths is to pay his co-defendant S. A. Vasey his costs subject to any right of contribution one may have against the other. And it is also ordered that the costs of this appeal be taxed by the taxing master and paid by the plaintiffs to the defendant Fred Griffiths in any event."]

Solicitors: *G.* and *W. Webb*; *Busk, Mellor & Norris*, for *Slater, Heelis & Co.*, D Manchester.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

E

WHITEHALL COURT, LTD. *v.* ETTLINGER

[KING'S BENCH DIVISION (Earl of Reading, C.J.), November 20, 21, 1919]

[Reported [1920] 1 K.B. 680; 89 L.J.K.B. 126; 122 L.T. 540; F 36 T.L.R. 80; 64 Sol. Jo. 147]

Landlord and Tenant—Requisition of leased property—Frustration—Tenant's liability to pay rent.

By two leases, dated June 3 and Nov. 21, 1915, the plaintiffs let two flats to a tenant for a term of three years from June 24, 1915, the tenant covenanting to pay the rents of £475 and £200 per annum. In May, 1917, the military G authorities, acting under the Defence of the Realm Regulations, requisitioned the flats, and continued in occupation of the flats until after the expiration of the two leases on June 24, 1918. The tenant paid the rent to the landlords up to the date of the requisition in May, 1917, but he declined to pay rent subsequent to that date.

H **Held:** the tenant was not evicted by title paramount when he moved out of the premises in compliance with the order of the military authorities, neither did the requisition frustrate the leases, and, therefore, the requisition did not terminate the tenancy, and the tenant remained liable under his covenant to pay the rent notwithstanding the requisition of the flats by the military authorities.

I Per **Curiam**: the agreement contained in a lease is not only a contract; it also creates an estate by demise for a term of years.

Notes. The Landlord and Tenant (Requisitioned Land) Act, 1942 [13 HALSBURY'S STATUTES (2nd Edn.) 957], now gives a tenant a limited power of disclaiming a lease of requisitioned land. LORD READING'S observations on the question whether a lease can be frustrated should now be read subject to the dicta in the cases cited in 23 HALSBURY'S LAWS (3rd Edn.) 553, para. 1214, note (o).

Approved: *Matthey* v. *Curling*, [1922] All E.R.Rep. 1. Considered: *Swift* v. *Macbean*, [1942] 1 All E.R. 126; *Cricklewood Property and Investment Trust, Ltd.*

v. *Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252. Referred to: *Duke of Westminster* v. *Howard* (1940), 85 Sol. Jo. 106; *Leighton's Investment Trust, Ltd.* v. *Cricklewood Property and Investment Trust, Ltd.*, [1942] 2 All E.R. 580; *Denman* v. *Brise*, [1948] 2 All E.R. 141. A

As to effect of requisition on a tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 553, 701–704; and for cases see 30 DIGEST (Repl.) 489.

B

Case referred to:

(1) *London and Northern Estates Co.* v. *Schlesinger*, [1916] 1 K.B. 20; 85 L.J.K.B. 369; 114 L.T. 74; 32 T.L.R. 78; 60 Sol. Jo. 223; 30 Digest (Repl.) 362, *14*.

Also referred to in argument:

Halsey v. *Lowenfeld*, [1916] 2 K.B. 707; 85 L.J.K.B. 1498; 115 L.T. 617; 32 T.L.R. 709, C.A.; 2 Digest (Repl.) 274, *635*. C

Harrison v. *Lord North* (1667), 1 Cas. in Ch. 83; 22 E.R. 706, L.C.; 31 Digest (Repl.) 275, *4087*.

F. A. Tamplin Steamship Co. v. *Anglo-Mexican Petroleum Products Co.*, [1915] 3 K.B. 668; 84 L.J.K.B. 2095; 31 T.L.R. 540; affirmed, [1916] 1 K.B. 485; 85 L.J.K.B. 241; 114 L.T. 259; 32 T.L.R. 201; 13 Asp.M.L.C. 284, C.A.; affirmed, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 115 L.T. 315; 32 T.L.R. 677; 21 Com. Cas. 299; 13 Asp.M.L.C. 467, H.L.; 12 Digest (Repl.) 442, *3361*. D

Blackburn Bobbin Co. v. *T. W. Allen & Sons*, [1918] 2 K.B. 467; 87 L.J.K.B. 1085; 119 L.T. 215; 34 T.L.R. 508, C.A.; 12 Digest (Repl.) 452, *3400*.

Metropolitan Water Board v. *Dick, Kerr & Co.*, [1917] 2 K.B. 1; 86 L.J.K.B. 675; 116 L.T. 201; 81 J.P. 181; 33 T.L.R. 242, C.A.; affirmed, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1, H.L.; 12 Digest (Repl.) 456, *3410*. E

Re Shipton, Anderson & Co. and Harrison Bros. & Co., [1915] 3 K.B. 676; 113 L.T. 1009; sub nom. *Shipton, Anderson & Co.* v. *Harrison Bros. & Co.*, 84 L.J.K.B. 2137; 31 T.L.R. 598; 21 Com. Cas. 138, D.C.; 12 Digest (Repl.) 450, *3391*. F

Action tried by EARL OF READING, C.J., without a jury.

The plaintiffs sued the defendant, Miss Stella Violet Ettlinger, the executrix of Karl Ettlinger, for £405 19s., being the rent of two flats for the period from May to December, 1917. The plaintiffs were the owners of a block of buildings in Whitehall Court which they let out in flats. By two leases, dated June 3 and Nov. 21, 1915, the plaintiffs let to Karl Ettlinger, for three years from June 24, 1915, two flats, one at a rent of £200 per annum and the other at £475 per annum. Each of the leases contained a covenant on the part of the lessee to pay the rent reserved thereby. There was also a provision that the landlords would supply and the tenant would purchase from them only all food, wines, spirits, and all other consumable and domestic stores and fuel which the tenant might require for use on the premises at the current tariff prices from time to time in force at Whitehall Court. In December, 1916, Ettlinger received notice from the War Office, acting under the Defence of the Realm Regulations, that they required possession of the flats. Ettlinger objected to giving up the flats, and in May, 1917, they were requisitioned by the War Office, acting under their powers in that behalf, under the Defence of the Realm Regulations. When the flats were requisitioned, Ettlinger was informed by the authorities that any claim he might have on account of loss suffered by him by reason of having to give up the flats must be made in due form to the Defence of the Realm War Losses Commission. He was further told that, if the claim was duly made, the authorities would recommend to the Defence of the Realm Commission that he should be indemnified against the obligation under his agreement during the period of occupation by the authorities. Ettlinger paid the rent up to the date on which the War Office requisitioned the

G H I

flats, but he refused to pay any rent after that date, and he said that the landlords were not entitled to claim from him any rent accruing due while the flats were in the possession of the military authorities. The leases came to an end in June, 1918, on which date the military authorities were still in possession of the flats. Ettlinger made no claim before the Defence of the Realm War Losses Commission, but he alleged that the landlords ought to claim the rent from the military authorities during the time they were in occupation of the flats. While the action was pending, Ettlinger died, and the action was continued against his executrix. The defendant relied on the Courts (Emergency Powers) Act, 1917, as an alternative defence.

Holman Gregory, *K.C.*, and *G. W. Ricketts* for the plaintiffs.
H. M. Giveen for the defendant.

EARL OF READING, C.J.—The question which I have to determine in this case is whether or not the plaintiffs are entitled to recover from the defendant the rent under the leases, and the covenants to pay rent contained therein, into which Mr. Ettlinger had entered with the plaintiffs.

I have come to the conclusion that there is nothing in the circumstances of this case which would justify me in saying that the estate created by the leases was determined when the military authorities requisitioned these flats. If I were dealing with a commercial contract, or an agreement between the parties which did not carry with it the creation of a term or a demise, as in this case, there would be great force in the argument of counsel for the defendant. It is said on behalf of the defendant that there was here an eviction by paramount authority. If that were so, counsel for the defendant would have made good the contention on which the defendant's case was rested. But I am not satisfied that what happened in this case was an eviction at law. When Mr. Ettlinger moved, as he did, by force of circumstances—that is, by the order of the military authorities—and went to a hotel, he was not evicted by title paramount. There was no eviction by the government, and there was no determination of the estate. It might very well be that he would have returned in a short period, or he might have remained away a longer period, or, as it happened, until the end of the term; but I am not satisfied that this case is brought within the principle which has been referred to, namely, that this is an eviction by title paramount. I do not think that there was a determination of the estate of Mr. Ettlinger by the act of the War Office in calling on him to give up possession of the premises. There is nothing in the notice, to which my attention was drawn, to show that the War Office required the occupation of these flats for an indeterminable time. This appears to be the way in which matters were left right up to the end of the term in June, 1918. Nothing further was done. There was always the notice first given that the premises were requisitioned, and that possession would be required by a certain time, and that it was not necessary to make an arrangement. This, as I follow the history of the matter, was the state of things right up to the expiration of the term. I must assume that this is what took place. As it was contended on behalf of the plaintiffs, it was a requisition of the premises for the time being, but that is all it is; consequently, I cannot come to the conclusion that the first point is made good.

Counsel for the defendant has referred to the law as laid down in BACON'S ABRIDGMENT, vol. 7, p. 58, and repeated afterwards in GILBERT ON RENTS (1758), p. 145, that:

> "If the lands demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction; but, notwithstanding such recovery or eviction, the tenant shall pay the rent that became due before the recovery; because the enjoyment of the land being the consideration for which the tenant was obliged to pay the rent, so long as the consideration continued, the obligation must be in force; there being the same reason that the tenant should pay

the rent, for part of the time contracted for, as for the whole term, if he had enjoyed the land so long." A

Now the previous observations would apply to this statement of the law. The whole question is whether it can be said that there has been an eviction by title paramount.

With regard to the second point, that the whole tenancy was determined, it seems to me to depend on the same considerations. It was argued that, looking at the whole circumstances of this case, and treating the lease as an ordinary contract, applying the general principles which are not in dispute, I ought to hold the whole tenancy to be at an end, but I find myself in the same difficulty with regard to that argument as I did with regard to the first part of the case. I was referred to an observation by LUSH, J., in *London and Northern Estates Co.* v. *Schlesinger* (1), where he said ([1916] 1 K.B. at p, 24): B C

"It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this order disqualified him from personally residing in the flat it affected the chattel interest which was vested in him by virtue of the agreement." D

I find the same difficulty in this case. I only desire to say that, so far as any question of fact is raised by the case, if I were dealing with an ordinary contract, I should feel great force in the argument addressed to me by counsel on behalf of the defendant; but I can find no authority and no justification for saying that I must apply the doctrines laid down in the citations made by counsel for the defendant. The agreement here is not only a contract. It also creates an estate E by demise for a term of years. This is a case in which the plaintiffs are entitled to recover their rent from the defendant. Fortunately, this decision still leaves the tenant free to claim from the Defence of the Realm War Losses Commission an indemnity in respect of his payment of rent. Mr. Ettlinger was not able to enjoy the occupation of the premises as he thought to do; nevertheless he had agreed to pay the rent, and I cannot find sufficient ground for saying that he was F excused from carrying out his agreement to pay the rent. Therefore, I must give judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors: *Benham, Barrett, Synnott & Wade*; *Stanley, Woodhouse & Hedderwick.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re WRAGG. WRAGG *v.* PALMER

[Chancery Division (P. O. Lawrence, J.), March 26, April 7, 1919]

[Reported [1919] 2 Ch. 58; 88 L.J.Ch. 269; 121 L.T. 78; 63 Sol. Jo. 535]

Trust—Investment—Power to invest "in or upon such stocks, funds, shares, securities, or other investments of whatsoever nature and wheresoever as they . . . in their absolute discretion think fit . . . as if they were absolutely entitled beneficially"—Investment in real estate.

Trust—Appropriation of real estate towards satisfaction of shares of residue—No express power in trust instrument—Investment in real estate authorised.

Will—"Investments"—"Invest."

In the absence of an express power to appropriate real estate in or towards satisfaction of shares of residue, trustees as such may effect such an appropriation only if they are authorised by the trust instrument either (i) to invest trust money in the purchase of real estate or (ii) to retain real estate the subject of the trust unconverted throughout the trust, so that in either case the real estate, after the appropriation, would be an authorised investment in the hands of the trustees. A mere power to postpone sale, after a trust for sale, is not sufficient to authorise such an appropriation. *Re Cooke's Settlement, Tarry* v. *Cooke* (1), [1913] 2 Ch. 661, explained.

Whether the investments authorised under a trust are confined to trust investments must depend on the construction of the trust instrument in each case.

A testator by his will devised and bequeathed his estate to trustees upon trust to sell and convert and to hold the residue of the proceeds in trust for his children, directing that the share of each daughter should be retained upon certain trusts for her and her children, and power was given to the trustees to invest in or upon such stocks, funds, shares, securities, or other investments of whatsoever nature and wheresoever as they should in their absolute discretion think fit to the intent that they should have the same full and unrestricted powers of investing as if they were absolutely entitled beneficially. The estate consisted partly of real property which the trustees desired to appropriate in satisfaction of the settled shares of the testator's daughters in the residuary estate.

Held: having regard to the wide meaning given to the word "investments" by the terms of the investment clause, to the word "wheresoever," and to the fact that in ordinary parlance real estate was spoken of as an investment, the trustees had a power to invest the trust moneys in the purchase of real estate, and so could effect a valid appropriation of the testator's real estate in satisfaction of the shares of the testator's daughters.

Re Cooke's Settlement, Tarry v. *Cooke* (1), [1913] 2 Ch. 661, distinguished.

Dictum in *Re Braithwaite, Braithwaite* v. *Wallis* (2) (1882), 21 Ch.D. 121, considered.

Per **Curiam**: the verb "to invest," when used in an investment clause, includes as one of its meanings "to apply money in the purchase of some property from which interest or profit is expected, and which property is purchased in order to be held for the sake of the income which it will yield," while the noun "investment," when used in such a clause, includes as one of its meanings "the property in the purchase of which the money has been so applied."

Notes. Considered: *Re Power's Will Trusts, Public Trustee* v. *Hastings*, [1947] 2 All E.R. 282; *Re Harari's Settlement Trusts, Wordsworth* v. *Fanshawe*, [1949] 1 All E.R. 430.

As to appropriation by personal representatives, see 16 HALSBURY'S LAWS (3rd Edn.) 372–376; and for cases see 23 DIGEST (Repl.) 407. As to investment of trust funds, see 33 HALSBURY'S LAWS (2nd Edn.) 232–244; and for cases see 43 DIGEST 926–941. As to the meaning of "investments" in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 250.

Cases referred to:

(1) *Re Cooke's Settlement, Tarry* v. *Cooke*, [1913] 2 Ch. 661; 83 L.J.Ch. 76; 109 L.T. 705; 58 Sol. Jo. 67; 43 Digest 919, *3588*.

(2) *Re Braithwaite, Braithwaite* v. *Wallis* (1882), 21 Ch.D. 121; 52 L.J.Ch. 15; 48 L.T. 857; 31 W.R. 180; 43 Digest 837, *2834*.

(3) *Re Beverly, Watson* v. *Watson*, [1901] 1 Ch. 681; 70 L.J.Ch. 295; 84 L.T. 296; 49 W.R. 343; 17 T.L.R. 228; 45 Sol. Jo. 259; 24 Digest (Repl.) 647, *6383*.

(4) *Re Brooks, Coles* v. *Davies* (1897), 76 L.T. 771; 24 Digest (Repl.) 646, *6377*.

(5) *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855; sub nom. *Robinson* v. *Murdoch*, 45 L.T. 417; 30 W.R. 162, H.L.; 24 Digest (Repl.) 646, *6376*.

(6) *Re Craven, Watson* v. *Craven*, [1914] 1 Ch. 358; 83 L.J.Ch. 403; 109 L.T. 846; 58 Sol. Jo. 138; 24 Digest (Repl.) 647, *6386*.

(7) *Lewis* v. *Nobbs* (1878), 8 Ch.D. 591; 47 L.J.Ch. 662; 26 W.R. 631; 43 Digest 926, *3643*.

(8) *Re Brown, Brown* v. *Brown* (1885), 29 Ch.D. 889; 54 L.J.Ch. 1134; 52 L.T. 853; 33 W.R. 692; 1 T.L.R. 471; 43 Digest 930, *3676*.

(9) *Re Smith, Arnold* v. *Smith*, [1896] 1 Ch. 171; 65 L.J.Ch. 269; 74 L.T. 14; 24 Digest (Repl.) 611, *6090*.

(10) *Re Hazeldine, Public Trustee* v. *Hazeldine*, [1918] 1 Ch. 433; 87 L.J.Ch. 303; 118 L.T. 437; 62 Sol. Jo. 350; 43 Digest 932, *3699*.

(11) *Re Pope's Contract*, [1911] 2 Ch. 442; 80 L.J.Ch. 692; 105 L.T. 370; 43 Digest 942, *3788*.

(12) *Re Gent and Eason's Contract*, [1905] 1 Ch. 386; 74 L.J.Ch. 333; 92 L.T. 356; 53 W.R. 330; 43 Digest 928, *3660*.

Also referred to in argument:

Re Rayner, Rayner v. *Rayner*, [1904] 1 Ch. 176; 73 L.J.Ch. 111; 89 L.T. 681; 52 W.R. 273; 48 Sol. Jo. 178, C.A.; 43 Digest 919, *3587*.

Re Cooper's Trusts, [1873] W.N. 87; 43 Digest 942, *3787*.

Re Dick, Lopes v. *Hume-Dick*, [1891] 1 Ch. 423; 60 L.J.Ch. 177; 64 L.T. 32; 39 W.R. 225, C.A.; affirmed sub nom. *Hume* v. *Lopes*, [1892] A.C. 112; 61 L.J.Ch. 423; 8 T.L.R. 406; sub nom. *Dick-Hume* v. *Lopes*, 66 L.T. 425; 40 W.R. 593, H.L.; 43 Digest 942, *3791*.

Re Smith, Smith v. *Thomson*, [1896] 1 Ch. 71; 65 L.J.Ch. 159; 73 L.T. 604; 44 W.R. 270; 43 Digest 936, *3749*.

Originating Summons.

John Downing Wragg carried on a business as manufacturer of sanitary pipes known as Thomas Wragg & Sons, Ltd., and on his death on Feb. 19, 1917, his estate consisted of 10,457 ordinary shares of £5 each and 1,052 preference shares of £5 each in Thomas Wragg & Sons, Ltd., valued for probate respectively at £51,168 and £4,208. Other personal property was valued at his death at £62,020, and his real estate was valued at £53,480. The testator by his will dated Feb. 17, 1917, appointed his sons, Horace Wragg and Herbert Wragg, and his brother, the plaintiff, Joseph Wragg, executors and trustees, and after giving to each of them who should act as such a legacy of £100 free of legacy duty, and to each of his children all sums of money which he or she might owe to him at his decease, gave, devised, and bequeathed all the residue of his personal estate and all his real estate to his trustees upon trust to sell and convert the same and out of the proceeds thereof to pay his debts, funeral and testamentary expenses, and to stand possessed of the residue of such proceeds in trust for all his children in equal shares, and he directed his trustees to retain the share of each of his daughters

upon trust to invest the same and to pay the income thereof to such daughter during her life and after her death upon certain trusts therein declared in favour of her children with an accruer clause in favour of the testator's other children in the event of such daughter dying without leaving issue her surviving. The trustees were authorised to carry on any trade or business in which the testator should be engaged at his death, either solely or as a partner during such period as they should think fit, and for that purpose to retain and employ therein the capital or share of capital which should at his death be employed therein with power to employ managers, and certain other powers necessary for carrying on such business. The testator also authorised his trustees in their uncontrolled discretion to postpone during such period as they should think fit the sale, calling in, and conversion of his residuary estate or any part thereof, but directed that his real estate should for the purposes of transmission be considered as converted from the time of his death. By cl. 8 of his will the testator expressly authorised his trustees in their discretion to continue any investments which he might have at his death, notwithstanding that they might not be of the nature of trust investments, and desired his trustees to keep and retain his preference shares in Thomas Wragg & Sons, Ltd., as one of the investments for his trust estate, and gave them the fullest powers to take up further shares in any of the limited companies with which he should be connected at his death. By cl. 10 the trustees were authorised to invest any moneys forming part of the trust estate under his will in their names, and at their discretion, in or upon such stocks, funds, shares, securities, or other investments of whatsoever nature and wheresoever, and whether involving liability or not, or upon such personal credit without security, as they should in their absolute and uncontrolled discretion think fit, and with the like absolute power of varying such investments from time to time to the intent that his trustees should have the same full and unrestricted powers of investing and transposing investments in all respects as if they were absolutely entitled beneficially thereto. The testator died on Feb. 19, 1917, and his will was proved by the three executors thereby appointed. Horace Wragg, one of such executors, died intestate on Mar. 9, 1917, and letters of administration to his estate were granted to the defendants Herbert Wragg and Jennie Laurie Wragg. The testator left seven children surviving him, five of whom were daughters, so that five-sevenths of his estate had to be retained and invested. Thomas Wragg & Sons, Ltd., was and is a prosperous private company, which was incorporated in the year 1900, and has paid dividends of upwards of 10 per cent. per annum on its ordinary shares for many years, but the evidence was that the shares would be very difficult to realise, and a sale of them might result in serious loss. The trustees were desirous of appropriating some of the ordinary shares and some of the testator's real estate to the settled shares of the testator's daughters. This summons was taken out by the plaintiff, Joseph Wragg, as executor and trustee of the testator's will, to determine whether under the terms of the will such an appropriation could be made.

Henry Johnston for the plaintiff executor.

G. M. Hilyard, for adult beneficiaries, supported the plaintiff.

C. G. Church, for the legal personal representatives of Horace Wragg, also supported the plaintiff.

Owen Thompson, for the infant children of Mrs. How, one of the married daughters of the testator, submitted that the plaintiff had no power to appropriate the real estate.

J. F. H. Bethell, for the infant child of a married daughter, adopted the last argument.

Cur. adv. vult.

April 7, 1919. **P. O. LAWRENCE, J.,** read the following judgment.—The principal question which the court is asked to determine on this summons is whether the trustees of the will of the testator have power to appropriate portions of the testator's real estate in or towards satisfaction of the settled shares of the testator's

daughters in the residuary estate of the testator. The testator by his will dated Feb. 17, 1917, after appointing his sons Horace Wragg (since deceased) and the defendant Herbert Wragg and his brother, the plaintiff, Joseph Wragg, to be his executors and trustees, devised and bequeathed the residue of his personal estate and all his real estate to his trustees upon trust to sell and convert and out of the proceeds to pay his debts, funeral, and testamentary expenses, and to stand possessed of the residue of such proceeds in trust for all his children in equal shares, and directed that his trustees should retain the share of each of his daughters upon trust to invest the same and to pay the income thereof to such daughter during her life, and after her death upon certain trusts therein declared in favour of her children, with an accruer clause in favour of the testator's other children in the event of such daughter dying without leaving issue her surviving. The testator died on Feb. 19, 1917, leaving seven children him surviving—viz., two sons, Horace Wragg and the defendant Herbert Wragg, and five daughters, two of whom are married and have issue. The testator's son Horace Wragg died on Mar. 9, 1917, intestate, and the defendants Herbert Wragg and Jeanne Laure Wragg are his legal personal representatives. The testator's debts, funeral and testamentary expenses, have been paid, and the estate has become a clear trust estate. Part of the testator's estate consists of real estate and the trustees are desirous of appropriating portions of such real estate in or towards satisfaction of the several settled shares of the testator's daughters.

There is no express power of appropriation contained in the will. The trustees cannot effect the desired appropriation under s. 4 (1) of the Land Transfer Act, 1897, because even if such section had been otherwise available, it only applies to an appropriation by "the personal representatives of a deceased person." An expression which by virtue of s. 24 (2) means "executors or administrators of a deceased person." In the present case the executors must be taken to have assented to the devise of the testator's real estate to themselves as trustees. And it is, therefore, not the executors as such but the devisees in trust who desire to make the appropriation. I have been referred to several cases dealing with the power of trustees to effect an appropriation of real estate in or towards satisfaction of shares of residue, and, so far at all events as this court is concerned, I must treat it as settled law that, in the absence of an express power, such an appropriation can only be validly effected if the trustees are authorised by the instrument creating the trust either (i) to invest moneys forming part of the trust estate in the purchase of real estate (see *Re Beverly, Watson* v. *Watson* (3), [1901] 1 Ch. at p. 688), or (ii) to retain the real estate the subject-matter of the trust unconverted throughout the trust (see *Re Brooks, Coles* v. *Davies* (4), *Fraser* v. *Murdoch* (5), 6 App. Cas. at p. 877, and *Re Craven, Watson* v. *Craven* (6), [1914] 1 Ch. at p. 373), so that in either case the real estate after the appropriation would be an authorised investment in the hands of the trustees. A mere power to postpone the sale following upon a trust to sell is not, however, sufficient to authorise an appropriation. In the absence of an express power to appropriate or to invest in the purchase of real estate there must in order to authorise an appropriation be a definite power to retain the real estate unconverted throughout the trust (see *Re Craven, Watson* v. *Craven* (6), [1914] 1 Ch. at p. 373). I do not think that Astbury, J. (as was suggested during the argument), intended, in *Re Cooke's Settlement, Tarry* v. *Cooke* (1), to decide anything contrary to what I stated as being my view of the law. *Re Cooke's Settlement, Tarry* v. *Cooke* (1) was a case where the court was asked to sanction a particular scheme of appropriation under exceptional circumstances, and the learned judge came to the conclusion that under the special circumstances, and upon the true construction of the will in that case, the court had jurisdiction to sanction the appropriation.

The question in the present case, in my opinion, resolves itself into a pure question of the construction of the will of the testator. Are the trustees by the terms of the will authorised either to invest the trust moneys constituting the settled shares in the purchase of real estate or to retain the testator's real estate

unconverted throughout the trust? Clause 10 of the testator's will is relied on as authorising the trustees to invest in the purchase of real estate. By that clause the testator authorises his trustees to invest any money forming part of the trust estate in or upon such investments "of whatsoever nature and wheresoever" as his trustees should in their absolute and uncontrolled discretion think fit, to the intent that his trustees should have the same full and unrestricted powers of investing as if they were absolutely entitled to the trust moneys beneficially. It has been suggested that, having regard to what HALL, V.-C., is reported as having said in *Re Braithwaite, Braithwaite* v. *Wallis* (2), the trustees in this case can only select such investments as are authorised by law for the investment of trust funds. I do not think that that case compels me to give any such limited meaning to cl. 10 of the testator's will. In my opinion it must depend in each case upon the construction of the particular instrument whether the investments authorised are confined to what are strictly trust investments or not. If authority were wanted for this proposition I need only refer to *Lewis* v. *Nobbs* (7), *Re Brown, Brown* v. *Brown* (8), *Re Smith, Arnold* v. *Smith* (9), and *Re Hazeldine, Public Trustee* v. *Hazeldine* (10). In my judgment, if real estate can properly be called "an investment" there cannot be any reasonable doubt that under the investment clause in this case the purchase of real estate is authorised. It was contended that by reason of the words "stocks, funds, shares, and securities" which immediately precede the words "or other investments" these latter words ought to be restricted to investments ejusdem generis with stocks, shares, and securities. In my opinion, that would be placing too narrow a construction upon cl. 10, regard being had first to the words "of whatsoever nature and wheresoever" which immediately follow, and, secondly, to the express declaration by the testator as to his intent at the end of the clause. I can hardly conceive that any language could have been used which would have given a wider meaning to the word "investments" than the language which the testator has used in this clause. Moreover, I think that the words "and wheresoever" were rightly relied on as at least supporting the contention that the clause contemplated that the investments might consist of immovables (such as real estate) having definite locality.

Without attempting to give an exhaustive definition of the words "invest" and "investment," I think that the verb "to invest" when used in an investment clause may safely be said to include as one of its meanings "to apply money in the purchase of some property from which interest or profit is expected, and which property is purchased in order to be held for the sake of the income which it will yield"; whilst the noun "investment" when used in such a clause may safely be said to include as one of its meanings "the property in the purchase of which the money has been so applied." No doubt in many cases the context in which the word "investments" occurs requires that this word should be confined to investments consisting of stocks, shares, and securities, but where the word "investments" is used without any such context or where, as in this case, the instrument in which it occurs expressly provides that the word is not to have any such restricted meaning I think that it includes real estate purchased as an investment. In a recent case before me, where the value of a freehold dwelling-house was in issue, the expert valuers on each side spoke of the difference between the value of the property if put up for sale subject to an existing lease, in which case they said it would only be bought as an investment and consequently would realise a smaller price, and the value of the same property if put up for sale with vacant possession, in which case it would realise a larger price as it would attract not only investors but also prospective occupiers. Moreover, in the judgment of NEVILLE, J., in *Re Pope's Contract* (11), the following sentence occurs ([1911] 2 Ch. at p. 446): "It is obvious that the purchase of this house . . . is treated merely as one of the investments that the trustees may make." These instances—if indeed examples are needed—show that in ordinary parlance real estate is spoken of as an investment if bought in order to be held for the sake of the income or profit accruing from it. The expression "investing in house property" is one which every lawyer must

frequently have heard, and who could doubt that in such a case the house property purchased is properly described as "an investment." A

In *Re Gent and Eason's Contract* (12) it was held by FARWELL, J., that an express power to vary and transpose investments following an investment clause authorising the purchase of real estate conferred a power of sale over the real estate so purchased, and in *Re Pope's Contract* (11) NEVILLE, J., came to a similar conclusion where the power to vary investments was only implied. Whilst these B cases do not actually determine the question I have to decide they undoubtedly go to show that the word "investment" is not inapt to describe real estate, at all events in cases where the investment clause expressly authorises the purchase of real estate. I have on the whole come to the conclusion that on the true construction of cl. 10 of the testator's will the trustees are authorised to invest the trust moneys in the purchase of real estate, and that consequently they can effect C a valid appropriation of the testator's real estate in or towards satisfaction of the settled shares of the testator's daughters in the residuary estate. Having come to this conclusion, I am relieved from considering the further point which was argued, viz.: that on the construction of cll. 5 to 8 of the testator's will the trustees were given express power to retain the testator's real estate unconverted throughout the trust. This argument, in my opinion, raises points of considerable difficulty and D I express no opinion on it. The summons also asks whether the trustees have power to appropriate the ordinary shares which the testator held in Thomas Wragg & Sons, Ltd. at the time of his death. In my judgment there can be no reasonable doubt that they had such power by reason both of the express power to retain any investments which the testator might have at his death contained in cl. 8, and also of the express power to invest in such shares as they in their absolute and E uncontrolled discretion should think fit contained in cl. 10, and I hold accordingly.

In the result, I propose to make a declaration that on the true construction of the will of the testator the plaintiff and the defendant Herbert Wragg as trustees of the said will have the power to appropriate (a) ordinary shares in Thomas Wragg & Sons, Ltd., and (b) real estate of the testator in or towards satisfaction of the shares of the testator's daughters and deceased son Horace Wragg in the testator's F estate. The costs of all parties as between solicitor and client will come out of the testator's residuary estate.

Solicitors: *Long & Gardiner*, for *Francis & How*, Chesham; *Andrew, Wood, Purves & Sutton*, for *Dewes & Musson*, Ashby-de-la-Zouch.

[Reported by GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law*.]

A

SLINGSBY *v.* ATTORNEY-GENERAL

[Court of Appeal (Swinfen Eady, Bankes, L.JJ. and Neville, J.), April 15, 16, 17, 1918]

B [Reported [1918] P. 236; 87 L.J.P. 146; 119 L.T. 104]

Solicitor—Costs—Bill—"Instructions for brief"—Details to be given thereunder.
Solicitor—Costs—Attendance on counsel—No fee payable to counsel—No fee allowable to solicitor.

A bill of costs carried in for taxation should contain under the heading "Instructions for brief" a summary statement of the details of the matters C to which regard is to be had under this item, and, in cases in which perusal has not previously been charged, should there state the length of the documents perused, the names of the witnesses who have been attended, and the places to which journeys have been made, with the time occupied in each and the amount of the travelling expenses. Steps taken in advance of litigation threatened and contemplated, but not begun, and consultations with counsel D as to evidence, should not be charged under "Instructions for brief," and no fee may be allowed to a solicitor for attendances on counsel where no fee is payable to counsel: *Re Catlin* (1) (1854), 18 Beav. 508, applied.

Statement in King on Costs on the High Court Scale, p. 37, approved.

Solicitor—Costs—Bill giving insufficient detail—Onus of showing charges fair and reasonable—Bill giving insufficient detail—Proper and improper items E *inextricably mixed—Taxing officer's duty to reject and require re-modelled bill.*

The burden is upon the party bringing in a bill of costs and claiming to be allowed the amount charged therein to show that the same is fair and reasonable and ought to be allowed; and it is not for the taxing officer to allow the amount claimed merely because it has been paid or because the unsuccessful F party to proceedings has not adduced evidence to show that the charge is excessive.

The charges made under the heading "Instructions for brief" in a bill of costs brought in for taxation as between party and party included items which could not properly be charged thereunder and were inextricably mixed with the other items. The bill also included a lump sum item: "Payments to American G lawyers, £3,890," in respect of which numerous items were set out, but not priced individually.

Held: the taxing officer had not before him the material on which to exercise his discretion properly, and so should reject the bill and tell the solicitor to remodel it, to state under "Instructions for brief" short particulars of the work H done in respect of which a lump sum charge was claimed and could properly be allowed under this heading, and under "Payments to American lawyers" to give details with items and prices of the amount sought to be allowed.

Notes. On a review of a taxation the judge is now expressly empowered, by r. 35 of the Supreme Court Costs Rules, 1959, to review the amount allowed on any item of costs, notwithstanding that no question of principle may be involved.

I Considered: *Pelster* v. *Pelster and Samuel*, [1936] 3 All E.R. 783. Referred to: *Re Stahlwerk Becker Akt.* (1919), 36 R.P.C. 211; *The Lord Strathcona (No. 3)*, [1926] W.N. 270; *Francis* v. *Francis and Dickenson*, [1955] 3 All E.R. 836.

As to contents of a bill of costs, see 31 Halsbury's Laws (2nd Edn.) 174–177; as to taxation of costs as between party and party, see ibid. 214–223; as to review of taxation, see ibid. 227–230; and for cases see 42 Digest 149–157, 204–210, and 210–215 respectively.

Cases referred to:

(1) *Re Catlin* (1854), 18 Beav. 508; 52 E.R. 200; 42 Digest 249, *2803*.

(2) *In the Estate of Ogilvie, Ogilvie* v. *Massey*, [1910] P. 243; 79 L.J.P. 113; 103 L.T. 154, C.A.; 42 Digest 216, *2430*. A

(3) *Hill* v. *Peel* (1870), L.R. 5 C.P. 172; sub nom. *Tamworth, Penrhyn and Falmouth and Southampton Cases*, 39 L.J.C.P. 89; sub nom. *Hill* v. *Peel, Tamworth Case, Broad* v. *Fowler, Penrhyn and Falmouth Case, Pegler* v. *Gurney, Southampton Case*, 22 L.T. 98; 18 W.R. 605; 20 Digest 180, *1581*. B

Also referred to in argument:

London, Chatham and Dover Rail. Co. v. *South Eastern Rail. Co.* (1889), 60 L.T. 753; Digest (Practice) 933, *4730*.

Carter v. *Apfel* (1912), 57 Sol. Jo. 97; 42 Digest 213, *2374*.

Appeal by Commander C. H. R. Slingsby, as next friend and guardian ad litem of Charles Eugene Edward Slingsby, an infant, from the decision of COLERIDGE, J., on a summons by the next friend to renew a taxation of the bill of costs of the solicitors for the parties cited, whose costs as between party and party had been ordered to be paid by the next friend, the action by the infant having failed. C

The facts sufficiently appear from the judgments.

Schiller, K.C., and *E. W. Hansell* for the appellant, the person liable to pay the costs. D

J. M. Gover, for the respondents, the parties cited.

SWINFEN EADY, L.J.—This is an appeal of the next friend of the infant, from an order of COLERIDGE, J., on a summons to review a taxation. In so far as that summons was refused the next friend appeals. The proceedings were instituted in the name of the infant, Charles Eugene Edward Slingsby, by Commander Slingsby, his next friend, seeking to have a declaration of the infant's legitimacy pursuant to the provisions of the Legitimacy Declaration Act, 1858. On appeal the proceedings failed, and costs were ordered to be paid by the next friend, and it is the bill of costs brought in for taxation under that order to which the present proceedings relate. The next friend under the terms of the order must pay the party and party costs of the proceedings incurred and directed to be paid. The bill of costs as brought in contains two items to which the present application relates. One is an item in the bill of £1,365 brought in as a lump sum [for "instructions for brief"]; the other is an item which appears in the bill of £3,890, ["payments to American Lawyers"], and it is with reference to part of those two items that the present appeal is brought. The first item, "instructions for brief," occupies in the bill several pages, giving certain details with regard to the "instructions for brief." It is followed by the claim of £1,365, as a lump sum item. The taxing officer has dealt with that by taxing off £630 and allowing £735, as a lump sum for the charges. Objection is taken to his taxation, and he deals with it in this way. His answer is: "I have carefully considered this case, which in my opinion was an extremely difficult and complicated one, and I am of opinion that the sum allowed is a proper figure." That is the whole answer to the objection. E F G H

It is well settled that the court will not interfere with the exercise of a discretion by a taxing officer where he has not acted upon any wrong principle or applied any wrong consideration, and the allowance to be made for the "instructions for brief" is a matter peculiarly within the discretion of the taxing officer. This was said by BUCKLEY, L.J., in *Estate of Ogilvie, Ogilvie* v. *Massey* (2) ([1910] P. at p. 245): I

> "On questions of quantum the decision of the taxing officer is, generally speaking, final. It must be a very exceptional case in which the court would even listen to an application to review his decision."

That accurately states what is the practice. It is not absolutely final even on a question of quantum. For instance, a large sum might be allowed, but from the

very fact of the amount the court might see that the taxing officer must have acted on a wrong principle or have taken something into consideration that he ought not to have done to arrive at so large a sum. It doubtless requires an exceptional case, but exceptional cases occasionally arise.

In the present case the bill of costs has been improperly made out, and the taxing officer has not had before him the proper material upon which he could reasonably exercise his discretion. It is made out by including in general terms, and sometimes specifically, a large number of details which are obviously wrong. It is only one lump sum charged, but a large number of details are obviously erroneous, which ought not to be included in the costs. The bill of costs is assumed to be the bill of costs incurred in the litigation, litigation for a declaration of legitimacy. That litigation commenced with the presentation of the petition, and that petition was presented on May 2, 1913 and served in the following month of June, 1913. Previous to that petition being presented there had been various proceedings of different kinds that had taken place in the United States of America, Mrs. Slingsby claiming to have been delivered of the infant in question as her natural and lawful child. There were proceedings taken with regard to the register or registration of the child's birth, and, the child having been alleged to have been born in the month of September, 1910, proceedings were instituted in 1911, and continued into 1912; proceedings in the nature of an official inquiry before Dr. Snow with regard to the correctness of the register from which the certificate of birth was taken terminated in December, 1912, when Dr. Snow altered, or directed to be altered, the register. Those are the proceedings before Dr. Snow. Then there were proceedings with regard to a certain Dr. Fraser having given as alleged a false certificate with regard to a child. There were likewise proceedings of a criminal nature either instituted or attempted to be instituted; they ultimately were taken to the Court of Appeal in California, and by a decision of the Court of Appeal given on Oct. 25, 1913 a demurrer to those proceedings was eventually made. Then there was a third set of proceedings, proceedings before the grand jury with regard to the inquiry which the district attorney had embarked upon, in which witnesses either had been or were about to be examined in America upon a commission then issued to take evidence in these proceedings, and such witnesses were subpœnaed to attend before the grand jury. In opposition, proceedings were taken in order to procure a judicial decision that the proceedings so instituted before the grand jury by the district attorney ought to be stayed as really tending to interfere with the due administration of justice and to intimidate the witnesses, and so on. Those proceedings were taken in America, and all those proceedings were in addition to the examination of witnesses on a commission to take evidence for the purpose of the present issue.

In the "instructions for brief" a large number of entries are contained with regard to the earlier part of the proceedings, the earlier steps that were taken a considerable time before May 2, 1913, when these proceedings were instituted. There were also charges with regard to the steps to be taken in advance of the litigation threatened and then contemplated but not begun, including a case to eminent counsel to advise on evidence, a charge for preparing the case for counsel, Sir Robert Finlay, to advise as to further evidence, and very lengthy correspondence with various persons. Page after page of this bill contains particulars leading up to the lump sum and forming part of the charge, "instructions for brief," that are obviously not right to be so charged. I will merely mention another instance. There are charges after the institution of the present proceedings that ought not to form part of any charge for "instructions for brief," that is a long consultation with leading counsel and two junior counsel with regard to the evidence.

The item "instructions for brief" is intended to cover and ought to cover those items the nature of which is stated by MASTER KING on p. 37 of his book, COSTS ON THE HIGH COURT SCALE:

"A summary statement in the bill carried in for taxation of the details of the matters to which regard is to be had under this item—that is, under the item "instructions for brief"—facilitates the task of arriving at a proper allowance."

Then he refers to *Hill* v. *Peel* (3). I have already observed on that when it was cited in the course of the argument. Then he continues thus:

"The length of the documents perused (in cases in which persual has not previously been charged), the names of the witnesses who have been attended, the places to which journeys have been made, with the time occupied in each and the amount of the travelling expenses, should be stated."

If those details are given in the bill it enables the taxing officer to form a considered judgment on a sum that is proper to be allowed under the heading of "instructions for brief." That has not been done in the present case, and the items are so involved and so mixed with items that are manifestly not properly included at all that it is clear to my mind that the taxing officer had not before him the material on which a proper discretion could be exercised.

It has been settled by *Re Catlin* (1) so far back as the year 1854 that with regard to the attendance on counsel it is not proper to allow for such attendances where no fee is payable to counsel. The case is often referred to as it settles numerous principles of practice in the Taxing Office. The Master of the Rolls dealt with certain items (18 Beav. at p. 516). They were various attendances on counsel from time to time, no fee being payable to counsel in respect of any of the attendances, and it was urged on behalf of the solicitor that these charges were proper; the work was done and ought to have been allowed and not taxed off, SIR JOHN ROMILLY, M.R., said (ibid. at p. 517):

"It is urged by Mr. Catlin that counsel frequently send for the solicitor to confer on various matters of importance to the client, but do not charge any conference fee; but that the time of the solicitor is taken up, and that he ought to be allowed for his attendances. After some hesitation, I think that the first five of these items were properly disallowed. It is, I am informed, the invariable practice to strike them off, and that it has never been considered right and that it is not usual to charge for those conversational attendances. I am also induced to believe that it might lead to dangerous results to alter the practice in this respect."

That, as I have already stated, was in 1854, and MASTER KING says that since that time that has been the invariable practice. He refers to *Re Catlin* (1) (KING ON COSTS ON THE HIGH COURT SCALE at p. 129). He says:

"On the other hand, no allowance is made for conversational attendances on counsel, even at his request, where no fee is charged, though there seems to be a good deal in Mr. Catlin's contention that the time of the solicitor is taken up and that he ought to be allowed for his attendances, and [SIR JOHN ROMILLY] sustained the disallowance after some hesitation and apparently rather with regard to precedents than to propriety. There is no reason why generosity on the part of counsel should necessarily induce a similar sacrifice on the part of the solicitor, particularly since the process is not reciprocal."

He adds:

"But the practice is well settled in accordance with the decision of *Re Catlin* (1)."

That has been the invariable practice in the taxing office. I only mention that as an illustration because items of that sort are mixed up with those in question. In my opinion what the officer should have done, was to reject the bill, brought in as this is, and tell the solicitor to bring in a bill redrawn with regard to items so inextricably mixed up one with the other that it would be impossible to say what is really chargeable or what sum ought fairly to be allowed in respect of the items chargeable.

A The other item objected to is a portion of the lump sum charge of £3,890. That is brought into the bill of costs as one lump sum item, £3,890 ["payments to American lawyers"] but it was accompanied by a statement of how the amount was arrived at, and it is a statement occupying some forty-nine pages. That figure of £3,890 is made up of certain charges by different firms of American lawyers and payments made by one or other of those firms. It includes charges of Messrs. B Pooley and Co., a firm of solicitors in Victoria, British Columbia; a firm of Andrew Thorne, or a firm of which Mr. Andrew Thorne was a member, at San Francisco; and a third firm of Knight and Haggarty. It includes the charges of those three firms and disbursements made by those firms. The taxing officer dealt with it in this way: The item works out at, I think, 19,446 dollars or thereabouts, and he took off 6,483 dollars or thereabouts, leaving the item at 9,963 dollars. It works C out at a little under £2,000 in other words, he took off about £1,897, and allowed the item at about £1,993. In answer to the objection with regard to this, the taxing officer said this:

> "In this case the bulk of the evidence was taken in America, and the charges for the work done there, in my opinion, are payable unless it is very clearly D shown either that the charges are excessive according to the scale of charges payable in that country, or that any particular charge related to an issue not relevant to the matter before the court."

With regard to the other portions of the same item, he said that proceedings were relevant to the issue before the court, or, varying the language, he said: "I cannot E say that this item was irrelevant to the issue, and I allow it." That is repeated in another place: "I cannot say that this item was irrelevant to the issue, and I allow it."

It is right to say that the taxing officer has gone wrong in principle. It is a claim to be allowed considerable sums, payment to foreign lawyers, in a party and party taxation, and the burden is on the party bringing in the bill of costs and claiming to be allowed the amount charged therein to show that the amount is fair and F reasonable and ought to be allowed. It is not for the taxing officer to allow the amount merely because it has been paid, or because the other side have not produced evidence to show that the charge is excessive. It is for the party claiming to be allowed a charge to prove that it is a fair and reasonable charge.

The charges in the present case, included in various items, extend to and include G considerable work not being subsequent to the commencement of these proceedings or being part of the proceedings at all. It is not necessary to go through in detail the various items, but sometimes they are items which strike one as being extravagant as being in the bill of costs, not only with regard to the question of the time at which the work was done, but with regard to the nature of the details of the work —that is to say, influencing the Press either by writing or suggesting articles to the H Press as to matters relating to the proceedings in California.

With regard to those items, I am of opinion that the taxing officer has gone wrong on principle, and that the same course with regard to these items ought to be adopted as in the case of the other items, and that the bill ought to be remodelled by the solicitors, and they should be required to bring in a statement of the charges that they seek to be allowed in respect of this party and party taxation, with details I of the work and details of the charges. In certain cases a sum has been put by the American lawyer against certain items, but, as showing how unfair a way that is of dealing with the bill, it comes to this, that the bill is brought in containing a large lump sum without showing the details, how much was charged for the various items. Then a reference is made to the lawyer in America, part of the items being of a wrong date, anterior to the litigation, and he gives his view of how much ought to be deducted from his bill from that lump sum charge in respect of those anterior charges, and then, having ascertained that, a deduction from the lump sum charges is made. In my opinion that is not proceeding upon a proper

principle. Details of charges should be given, with the sum charged for the various matters, and upon that the master should exercise his discretion. I have not forgotten the argument that was pressed upon us by counsel for the solicitors that it was a case in which a large number of witnesses were to be examined, and that a broad view ought to be taken of the matter and a considerable sum allowed as "instructions for brief" by way of a lump sum; but it must be remembered that the great bulk of the witnesses were examined in America, and that it was the American lawyers who were conducting that part of the case. So far as the witnesses called in England by the parties cited are concerned, we were told that there were only two—an expert doctor, who was called as a medical expert, and one of the parties cited, one of the parties to the proceedings.

The proper course, therefore, will be in general terms to allow the appeal, refer the matter back to the officer to review his taxation in respect of these two items, "instructions for brief" and "payments to the American lawyers," and then bring in details with items and prices of the amount sought to be allowed, as far as the latter case is concerned, and as regards the "instructions" merely to give the short particulars of the work he claims he has done in respect of which a lump sum charge is to be allowed and is proper to be allowed as and for "instructions for brief."

BANKES, L.J.—I agree. If I could be satisfied that the registrar had dealt with these questions on the right principle, I would not for one moment interfere or attempt to interfere with the exercise of his discretion, however much I disagreed with the result at which he had arrived; but it appears to me manifest on these materials that the registrar has proceeded upon an entirely wrong principle. The bill that the registrar had to deal with was a bill which commenced with the items now in question. The first of them which had a definite charge was under June, 1913, and there was no definite charge for any work done at any date prior to that time. The only reference to work done prior to that date was under the general heading of "instructions for brief," for which there were no detailed charges made in respect of various matters mentioned, but there was a lump sum charge of £1,300 odd. We are told—and if this is accurate I think that it indicates that the registrar did proceed upon a wrong principle—that the registrar proceeded by saying that on this taxation costs incurred before the date of the presentation of the petition cannot be charged against Commander Slingsby. There were no such charges before that date as separate charges. The only reference to work done before the date was under the general heading of "instructions for brief." I cannot understand what was in the registrar's mind if he really did make this ruling, unless it was that he thought he was justified in taking into consideration all these various unpriced items under the general head of "instructions for brief," if they were items having reference to a date subsequent to May 2. If he took that view, and if he did give this ruling in these items, he acted on a wrong principle.

The next point is this. The bill under the head of "instructions for brief" is made out in a way which did not present to the registrar materials upon which he could, in my opinion, properly exercise his discretion, and I think that the course which he ought to have taken was the one indicated by the lord justice, to have sent back the bill in order that it might be prepared in a way which would give him the materials upon which he could exercise his discretion, because what he has said is—and this again indicates to my mind that he proceeded on a wrong principle—that the case was, in his opinion, extremely difficult and complicated. Consider what the position was under this head, and the information which he had before him in this bill. The position was that the great part of the work of getting up the case and getting the evidence had to be done in America, and it was done by two firms of solicitors, but particularly by a Mr. Thorne and his firm so far as San Francisco was concerned. Of course, therefore, it was a matter which the

registrar ought or might be asked to take into account in considering what charges ought to be allowed in a party and party bill, the preparation that had to be made in this country in reference to the commission, and the taking of the evidence upon commission. In the bill there are priced items in respect of work done in this country with reference to taking out the commission, and priced items with reference to the communications with Mr. Thorne in reference to the taking of the the necessary evidence on the commission, and there is also an entry for which a very small charge is made under the date of August 13, attending Mr. Thorne in London, and therefore indicating that Mr. Thorne must have been in London on that date for the purpose presumably of being instructed before the evidence was taken upon commission. The bulk of the work, however, as I have already indicated, had to be done necessarily in America, and for that a separate charge has been made independently by the American lawyers, and that has been considered separately by the registrar and paid for. What work remained to be done in this country by the solicitors which could be properly charged in a party and party bill was either in respect of the necessary preparation for the taking of the evidence on commission, or after that evidence had been obtained in relation to the preparation for trial. These are two matters which it seems to me that the registrar was entitled to take into consideration if he was directing himself properly, if I may use that expression, which is another way of saying if he was acting on a right principle.

If those were the matters, it seems to me very difficult for him to have come to the conclusion that the case was an extremely difficult and complicated one, and that again leads me to the conclusion that he has not had the materials which enabled him or upon which he did direct his mind to the real points, but that he rather, in the absence of the material which would have kept him within a right principle, has allowed himself to consider generally the nature of the case and the importance of the case, and, from some points of view, the complicated character of the case. Those were not matters which upon any proper principle, it seems to me, he ought to have taken into consideration when he was considering these particular items of preparations for brief, and under those circumstances I agree that the matter ought to go back with the materials upon which the registrar is to be asked to exercise a discretion as to what are the proper party and party matters to be taken into consideration under this particular head of "instructions for brief," and then with those matters before him he will no doubt consider the question and award such a sum as in his discretion is proper.

NEVILLE, J.—I agree that this bill ought to go back to the taxing officer. I think that the charges made by the bill are not sufficiently precise, and that the observations of the registrar in answer to the objections are unsatisfactory.

SWINFEN EADY, L.J.—The appeal will be allowed with general costs here and below for the appellant, with a set-off. The costs should include the costs of the objections, but not the costs of the taxation thrown away. There will have to be another taxation now upon a new bill of costs. The bill will have to be remodelled and carried in in the right form. There will be a wholly new taxation.

Appeal allowed.

Solicitors : *Janson, Cobb, Pearson & Co.*; *Gray & Dodsworth.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

PHILLIPS *v.* BROOKS, LTD.

[KING'S BENCH DIVISION (Horridge, J.), April 11, May 1, 1919]

[Reported [1919] 2 K.B. 243; 88 L.J.K.B. 953; 121 L.T. 249; 35 T.L.R. 470; 24 Com. Cas. 263]

B

Sale of Goods—Passing of property—Contract of sale induced by fraud—Pledge of goods to third party acting bona fide, without notice, and for value—Right of seller to recover goods from third party.

N. visited the shop of the plaintiff, who was a jeweller, and chose some pearls and an emerald ring. While writing a cheque in payment for these articles he represented to the plaintiff that he was Sir George Bullough, with an address C in St. James' Sq., London, and signed the cheque in that name. The plaintiff had heard of Sir George Bullough as a man of means, and on referring to the directory found that Sir George Bullough lived at the address given by N. He, therefore, allowed N. to take away the ring. In fact, the cheque was worthless and N. was subsequently convicted of obtaining the ring from the plaintiff by false pretences. N. had pawned the ring with the defendants, pawnbrokers, D who took it bona fide and without notice in the course of business, giving value for it. In an action by the plaintiff for the return of the ring or its value,

Held: the plaintiff intended to contract with N. although he would not have made the contract, but for the fraudulent mispresentation, and, therefore, the property in the ring passed to N. who could give a good title to any third party acquiring it bona fide, without notice, and for value, and the action E failed.

Notes. Considered: *Lake* v. *Simmons*, [1927] All E.R.Rep. 49. Applied: *Dennant* v. *Skinner*, [1948] 2 All E.R. 29. Considered: *Ingram* v. *Little*, [1960] 3 All E.R. 332. Referred to: *Said* v. *Butt*, [1920] All E.R.Rep. 232; *London Jewellers, Ltd.* v. *Attenborough*, [1934] All E.R.Rep. 270.

As to effect of misrepresentation on contract and as to sale or pledge under F voidable title, see 26 HALSBURY'S LAWS (3rd Edn.) 853, and ibid., vol. 34, pp. 81–83 respectively; and for cases see 35 DIGEST 97–99, and 39 DIGEST 532–535.

Cases referred to:

(1) *Edmunds* v. *Merchants' Despatch Transportation Co.* (1883), 135 Mass. *283*.

(2) *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; 26 W.R. G 406; 14 Cox, C.C. 93; 47 L.J.Q.B. 481, H.L.; 39 Digest 534, *1454*.

(3) *Hardman* v. *Booth* (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L.J.Ex. 105; 7 L.T. 638; 9 Jur. N.S. 81; 11 W.R. 239; 158 E.R. 1107; 39 Digest 534, *1453*.

(4) *Smith* v. *Wheatcroft* (1878), 9 Ch.D. 223; 47 L.J.Ch. 745; 39 L.T. 103; 27 W.R. 42; 35 Digest 98, *71*. H

Also referred to in argument:

Re International Society of Auctioneers and Valuers, Baillie's Case, [1898] 1 Ch. 110; 67 L.J.Ch. 81; 77 L.T. 523; 46 W.R. 187; 42 Sol. Jo. 97; 4 Mans. 393; 35 Digest 99, *75*.

R. v. *Adams and Haden* (1884), 1 Den. 38, C.C.R. 15 Digest (Repl.) 1045, 10, I *295*.

R. v. *Hazelton* (1874), L.R. 2 C.C.R. 134; 44 L.J.M.C. 11; 31 L.T. 451; 39 J.P. 37; 23 W.R. 139; 13 Cox, C.C. 1, C.C.R.; 15 Digest (Repl.) 1181, *11,950*.

R. v. *Martin* (1879), 6 Q.B.D. 34; 49 L.J.M.C. 11; 41 L.T. 531; 44 J.P. 74; 28 W.R. 232; 14 Cox, C.C. 375, C.C.R.; 15 Digest (Repl.) 1233, *12,592*.

R. v. *Jackson* (1813), 3 Camp. 370; 15 Digest (Repl.) 1181, *11,944*.

Attenborough v. *St. Katharine's Dock Co.* (1878), as reported in 3 C.P.D. 450; 26 W.R. 583, C.A.; 39 Digest 533, *1450*.

A *R.* v. *Buckmaster* (1887), 20 Q.B.D. 182; 57 L.J.M.C. 25; 57 L.T. 720; 52 J.P. 358; 36 W.R. 701; 4 T.L.R. 149; 16 Cox, C.C. 339, C.C.R.; 15 Digest (Repl.) 1037, *10,195*.

R. v. *Middleton* (1873), L.R. 2 C.C.R. 38; 42 L.J.M.C. 73; 28 L.T. 777; 37 J.P. 629; 12 Cox, C.C. 417, C.C.R.; 15 Digest (Repl.) 1044, *10,282*.

B **Action** tried by HORRIDGE, J., without a jury.

The plaintiff, who was a jeweller, sued the defendants, who were pawnbrokers, for the return of a ring, or, alternatively, its value, and damages for its detention.

On or about April 15, 1918, a man entered the plaintiff's shop and asked to see some pearls and some rings. He selected pearls at the price of £2,550 and an emerald ring at the price of £450. He then produced a cheque book and wrote out
C a cheque for £3,000, which he signed "George Bullough." In signing it he remarked to the plaintiff: "You see who I am; I am Sir George Bullough," and he gave the plaintiff an address in St. James' Square. The plaintiff had heard of Sir George Bullough as a man of means. He referred to a directory, and found that Sir George Bullough lived at the address given by the man. The plaintiff then asked the man whether he would like to take the articles with him. The man
D replied: "You had better have the cheque cleared first; but I should like to take the ring as it is my wife's birthday to-morrow." The plaintiff then allowed him to take the ring away with him. In due course the plaintiff presented the cheque, which was returned, marked "No account." The man who gave the cheque turned out to be a swindler named John North. North was subsequently convicted of obtaining the ring from the plaintiff by false pretences. In the meantime, on or about
E April 16, North pledged the ring, in the name of Firth, with the defendant, who, bonâ fide and without notice, advanced £350 upon it. In giving evidence the plaintiff stated that when he handed over the ring he thought he was contracting with Sir George Bullough. If he had known who the man really was he would not have allowed him to have the ring. He also stated in re-examination that he had no intention of making a contract with any other person than Sir George Bullough.

F *Douglas Hogg*, *K.C.*, and *H. D. Roome* for the plaintiff.

J. B. Matthews, *K.C.*, and *Valetta* for the defendants.

Cur. adv. vult.

May 1, 1919. **HORRIDGE, J.**, read the following judgment.—This is an action brought by the plaintiff, who is a jeweller, in Oxford Street, London, for the return
G of a ring or its value, and for damages for detaining the same. The value of the ring was agreed as being £450 and no evidence was given before me of any damage, apart from the value of the ring which was taken. I have carefully considered the evidence of the plaintiff, and have come to the conclusion that, although he believed the person to whom he was handing the ring was Sir George Bullough, he in fact
H contracted to sell and deliver it to the person who came into his shop, and who was not Sir George Bullough, but a man of the name of North, who obtained the sale and delivery by means of the false pretence that he was Sir George Bullough. It is quite true the plaintiff in re-examination said he had no intention of making any contract with any other person than Sir George Bullough; but I think that I have myself to decide what is the proper inference to draw where a verbal contract is made and an article delivered to an individual describing himself as somebody
I else. After obtaining the ring the man North pledged it in the name of Firth with the defendants, who bonâ fide and without notice advanced £350 upon it. The question, therefore, in this case is whether or not the property had so passed to the swindler as to entitle him to give a good title to any person who gave value and acted bonâ fide without notice.

This question seems to have been decided in an American case of *Edmunds* v. *Merchants' Despatch Transportation Co.* (1). The headnote in that case contains two propositions, which I think adequately express my view of the law. They are as follows: (i) If A., fraudulently assuming the name of a reputable merchant in a

certain town, buys, in person, goods of another, the property in the goods passes to A. (ii) If A., representing himself to be a brother of a reputable merchant in a certain town buying for him, buys, in person, goods of another, the property in the goods does not pass to A. The following expressions used in the judgment of MORTON, C.J., seems to fit the facts in this case:

> "The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling, and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name or practised any other deceit to induce the vendor to sell."

Further on, MORTON, C.J., says:

> "In the cases before us there was a de facto contract purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods."

The rule laid down by LORD CAIRNS, L.C., in *Cundy* v. *Lindsay* (2) is as follows (3 App. Cas. at p. 464):

> "If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who has professed to sell it by a de facto contract—that is to say, a contract which has purported to pass the property to him from the owner of the property—there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it and to set it aside, because these circumstances so enabling the original owner of the goods or of the chattel to reduce the contract and to set it aside will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced."

The question whether or not the property would pass if a fraudulent person had gone himself to the firm from whom he wished to obtain the goods and had represented that he was someone else was raised in the argument in *Cundy* v. *Lindsay* (2). In the speech of LORD PENZANCE, he says (ibid. at p. 471).

> "Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be someone else of credit and stability, and under this belief to have actually delivered goods into his hands. My Lords, I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can, I think, be parallel with that which your Lordships have now to decide."

LORD HATHERLEY, in his speech, seems to me to have rather put the case of a man's obtaining goods by representing that he was a member of one of the largest firms in London, which would be a case of representation as to authority to contract, as he says (ibid. at p. 469):

> "Now I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm."

The illustration given by LORD HATHERLEY and the facts in *Hardman* v. *Booth* (3) seem to me to be cases which fall within the second proposition in the headnote in *Edmunds* v. *Merchants' Despatch Transportation Co.* (1), namely, representation by a person present that he was an agent for somebody else so as to induce the

seller to make a contract with a third person whom the person present had no authority to bind.

It was argued before me that the principle quoted from POTHIER (TRAITÉ DES OBLIGATIONS, s. 19) in *Smith* v. *Wheatcroft* (4) (9 Ch.D. at p. 230), namely,

> "Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract,"

applies. I do not think, however, that that passage applies to this case because I think the seller intended to contract with the person present, and there was no error as to the person with whom he contracted, although the plaintiff would not have made the consent if there had not been a fraudulent misrepresentation. Moreover, *Smith* v. *Wheatcroft* (4) was an action for specific performance and was between the parties to the contract, and had no relation to rights acquired by third parties innocently under the contract, and misrepresentation would have been an answer to the enforcement of the contract. In this case there was a passing of the property and the purchaser had a good title, and there must be judgment for the defendants, with costs.

Judgment for defendants.

Solicitors: *Isadore Goldman & Son*; *Attenboroughs.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

DOOLAN *v.* HENRY HOPE & SONS, LTD.

[COURT OF APPEAL (Swinfen Eady and Bankes, L.JJ., and Neville, J.). April 30, 1918]

[Reported 87 L.J.K.B. 671; 119 L.T. 14; 11 B.W.C.C. 93]

Workmen's Compensation—Accident—Novus actus interveniens—Loss of eye—Eye struck by chip of brick—Subsequent gonorrhoea infection—Loss of eye due to gonorrhoea infection—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A workman while engaged in the performance of his work was struck in the left eye by a chip of brick from the wall into which he was inserting some hot water fittings. The eye became infected and watery, and subsequently the workman lost the sight of that eye. Evidence was given that the accident itself was slight, and that the cause of the injury was a gonorrhoea infection which could not have been conveyed by the brick. At no time prior to the injury had the workman suffered from either syphilis or gonorrhoea except when on this particular occasion his left eye became infected. The ways in which the workman's eye might have been infected were by the touch of the four persons who had examined him before he went into hospital, or by contact with some infected article such as a handkerchief, a sponge, or a towel, and such an article might have been used at the workman's works or at his home.

Held: there was material on which the court could find that the loss of the eye was caused, not by the chip from the brick, but by the gonorrhoea infection, and that this infection was a novus actus interveniens; the injury was therefore not due to an "accident" within s. 1 of the Workmen's Compensation Act, 1906, and the workman was not entitled to an award of compensation under the Act.

Notes. The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, and that Act was itself repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall "be against personal injury caused . . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1906. See also s. 7 (1) of the 1946 Act.

Followed: *Laverick* v. *William Gray & Co., Ltd.* (1919), 121 L.T. 289. Applied: *Williams* v. *Graigola Merthyr Co., Ltd.* (1924), 132 L.T. 227. Considered: *Hogan* v. *Bentinck West Hartley Collieries, Ltd.*, [1949] 1 All E.R. 588. Referred to: *Comery* v. *New Hucknall Colliery Co.* (1919), 12 B.W.C.C. 1; *Carr* v. *Port Glasgow Burgh* (1923), 16 B.W.C.C. 331; *Rothwell* v. *Caverswall Stone Co.*, [1944] 2 All E.R. 350.

As to "accidents" within the Workmen's Compensation Acts, see 27 HALSBURY'S LAWS (3rd Edn.) 802 et seq.; and for cases see 34 DIGEST 331, 345, 346. For the National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd. Edn.) 797.

Case referred to:

(1) *Dunham* v. *Clare*, [1902] 2 K.B. 292; 71 L.J.K.B. 683; 86 L.T. 751; 66 J.P. 612; 50 W.R. 596; 18 T.L.R. 645; 4 W.C.C. 102, C.A.; 34 Digest 341, *2759*.

Also referred to in argument:

Brown v. *George Kent, Ltd.*, [1913] 3 K.B. 624; 82 L.J.K.B. 1039; 109 L.T. 293; 29 T.L.R. 702; 6 B.W.C.C. 745, C.A.; 34 Digest 347, *2795*.

Adams v. *Thompson* (1911), 5 B.W.C.C. 19, C.A.; 34 Digest 267, *2273*.

Chandler v. *Great Western Rail Co.* (1912), 106 L.T. 479; 5 B.W.C.C. 254, C.A.; 34 Digest 328, *2673*.

Sherwood v. *Johnson* (1912), 5 B.W.C.C. 686, C.A.; 34 Digest 328, *2675*.

Saddington v. *Inslip Iron Co., Ltd.* (1917), 87 L.J.K.B. 184; 118 L.T. 138; 62 Sol. Jo. 120; 10 B.W.C.C. 624, C.A.; 34 Digest 272, *2307*.

Lakey v. *Blair & Co., Ltd.* (1916), 10 B.W.C.C. 58, C.A.; 34 Digest 351, *2828*.

Bellamy v. *J. Humphries & Sons, Ltd.* (1913), 6 B.W.C.C. 53, C.A.; 34 Digest, 331, *2690*.

Stapleton v. *Dinnington Main Coal Co., Ltd.* (1912), 107 L.T. 246; 5 B.W.C.C. 602, C.A.; 34 Digest 326, *2661*.

Appeal from an award of the judge of Birmingham County Court sitting as an arbitrator under the Workmen's Compensation Act.

An arbitration under the Workmen's Compensation Act, 1906 was requested between a workman and his employers as to the amount of compensation payable to the former under that Act in respect of the personal injury caused to him by "accident arising out of and in the course of" his employment. The case came on to be heard at the County Court of Warwick holden at Birmingham before His Honour JUDGE AMPHLETT, when evidence to the following effect was adduced. The applicant deposed that at the date of the accident he was employed as a hot-water fitter by the respondents. He was a bachelor, twenty-four years of age, and had been employed by them for eight years. On Saturday, Nov. 3, 1917, at about 11.15 a.m., he was chipping a hole in a brick wall for the purpose of inserting pipes for a hot-water installation, using a hammer and chisel. A piece flew off the chisel and struck him in the left eye. He went to the engine shop and asked a fellow workman named Freedman to look into his eye. Freedman examined the eye, opened it and looked into it. The applicant came back and put his tools up, and stood in the yard for half an hour in much pain, and then went home and asked his mother to look into his eye. She examined his eye, but as her sight was defective she told him to wait for his brother, who came in between 1 and 1.30 p.m. and examined the eye. The pain was easier during the afternoon; but it increased in the evening, and the applicant went to a chemist and got a lotion. The chemist opened the eye and then

A gave him the lotion to use. On the Monday following he went to the Eye Hospital. He there saw Dr. Wood Wight, who said, "You have had a blow in the eye." The applicant replied that he had had a piece of brick fly into it. The doctor took him to another room, and a lady doctor came and examined his eye, and she gave him a ticket to come in as an in-patient. He remained so till Dec. 7, He went in on Nov. 5. He lost the sight of his eye. The sight had gone by Nov. 11. The other B eye was slightly affected. He was in the general ward till Nov. 11, when he lost his sight, and was then drafted to a private ward. There were about fifteen people in the general ward. During the first six days the eye was attended to by nurses, the same as attended to others. He walked about at first as some of the others did. He used a lavatory in common with the others, comprising five or six basins. He had a separate towel and sponge. All the patients washed in the same C room. Before the accident he had had no trouble with his eyes. He had never suffered from any venereal disease. He had not done anything likely to infect him. In January he was examined by Dr. Assinder. In cross-examination the applicant stated that up to the time when he went to the hospital on Nov. 3 about four persons had touched his eye. On Nov. 5 he had a discharge from the eye. His eye got worse. He lost his sight entirely by Nov. 11. He had no trouble with the D other eye. He told Dr. Wood Wight about the accident.

Eric Walter Assinder, M.D., deposed that he held an official appointment under the Corporation of Birmingham under the Venereal Diseases Act. He was pathologist to the Health Committee in connection with the administration of that Act. On Jan. 12, 1918 he first saw the applicant. He examined him for syphilis. E There was no trace of it. He had previously examined him for gonorrhoea. He examined the eye on Jan. 12. The sight had then gone. The cause was inflammation, which had destroyed the vision. If the applicant met with an injury, infection might have been caused after the injury—by anybody touching the eye whose fingers were infected or by using infectious articles. Inflammation might set up any time after three days. It would then be acute. If the applicant was struck in F the eye, inflammation would be set up. He thought that this would make the infection more serious. On Nov. 11 a specimen of the discharge was handed to him by Dr. Alexander—a lady doctor—taken from the applicant's eye. He found that it was a gonorrhoea discharge. In cross-examination Dr. Assinder stated that when he saw the eye first he could not say what was the nature of the injury to the eye. The eye might have become affected through mucous surface without injury. G The most likely way of conveying infection was by finger or kerchief or something of the kind. The infection might come from a person who touched the eye. It was practically certain that it must be conveyed in some such way. It would not be conveyed by a piece of brick. He thought that there was infection probably some time after the blow by the piece of brick.

Edward Wood Wight, who gave evidence on behalf of the respondents and who H was a surgeon at the eye hospital, deposed that he did not see the applicant on Nov. 5, but he saw him a day or two afterwards. He found the eyelid very much swollen, with a copious discharge. He did not find any injury; nor did he expect to find one. He thought that the injury to the eye was due to a very virulent infectious germ (coccus gonorrhoea). He sent a sample to Dr. Alexander, who confirmed his opinion. The eye became rapidly worse and the cornea became infected. I In the result the cornea melted away and a portion of the sight was lost. That was usually the case with an eye infected as this was. The other eye became infected afterwards, but he was able to get that eye better. It was practically all right. The coccus infection might be conveyed to the eye by finger or kerchief or the like. It would be most unlikely that it could be conveyed by a piece of brick. He would think that infection took place a day or two before Nov. 5, the date of the admission of the applicant to the hospital. The first complaint of having had a blow in the eye was made on Nov. 6. A blow in the eye from a brick would not cause the conditions which he found. In cross-examination Dr. Wood Wight stated that the actual

cause of the loss of vision was infection by a germ. A blow would cause an eye to run. It would be natural to get anybody to examine the eye. Inflammation might be set up by a variety of poisons. Wounds often inflamed from poisons getting in. He thought that the infection was contracted a day or two before the applicant came to the hospital. Inflammation might have got into the eye when somebody was examining it. In his opinion the applicant had infection when he came into the hospital. There were no cases that he was aware of patients suffering from gonorrhoea at the time.

Jameson Evans, eye specialist, deposed that on Dec. 16 he saw the applicant. He agreed that he was suffering from gonorrhoea infection of the left eye. Gonorrhoea germs were possible to be conveyed before or after an injury through the mucous membrane being touched by anybody. Such a germ would not be at all likely to be conveyed by a piece of brick. The introduction would be independent of the applicant's work. Infection might be conveyed by anybody touching the eye. Infection was the cause of the injury to the eye. No blow from a brick could cause such symptoms.

His Honour JUDGE AMPHLETT came to the conclusion that there was a novus actus interveniens, for which the respondents could not be held responsible, and which was the direct and the sole cause of the accident which had arisen, and that therefore the accident in respect of which compensation was sought did not arise "out of and in the course of" the workman's employment, and he dismissed the application.

From that decision the workman appealed.

J. S. Pritchett for the workman.
E. W. Cave for the employers.

SWINFEN EADY, L.J.—I agree with the view which the learned county court judge expressed in saying that it was a very lamentable case, and the case has received very careful consideration. The appeal is from His Honour JUDGE AMPHLETT, sitting at Birmingham, by a workman who claimed compensation for injury by accident which took place on Saturday, Nov. 3, 1917.

[His Lordship stated the facts and continued:] The evidence given with regard to what the workman was suffering from was given by Dr. Assinder, who holds an official appointment under the corporation of Birmingham and is a pathologist to the Health Committee of Birmingham, by Dr. Wood Wight, who is a surgeon to the eye hospital, and by Dr. Jameson Evans, who is an eye specialist. They all agree that the workman was suffering from gonorrhoea infection of the left eye. The infection spread to his right eye. The right eye was cured by proper treatment, but the workman ultimately lost the sight of his left eye. It should be said at once in favour of the workman that he was examined both for gonorrhoea and for syphilis by Dr. Assinder, who found no trace of syphilis. He had been previously examined for gonorrhoea, and there is no suggestion in the case from beginning to end that the workman had suffered from gonorrhoea except when, on this particular occasion, the eye had become infected. The evidence adduced before the learned county court judge indicates the manner in which and the sources by which the workman might have become infected, and it is put in the alternative. Apparently four persons touched his eye or eyelid, Freedman, the workman's mother, his brother, and the chemist. Although those four persons had touched the workman's eye it does not follow that the infection was conveyed by the touch of any of those persons. It might also have been conveyed by contact with some infected article, such as, as the learned county court judge said, a handkerchief, a sponge, or a towel, and such article might have been used at the works or might have been used at home—there is nothing to indicate one or the other. The result has been, as I have said, that the workman lost the sight of his left eye.

I am struck with this, that in the first place the injury to the eye caused by the original mischief—the chip from the brick wall—appears to have been of the

A slightest character. No one who examined the eye ever found any substance in it or in the eyelid. Freedman saw the eye watering, but that was all. And I am much struck with this fact, that in the medical evidence you find no reference to any injury from which the workman was suffering except this gonorrhoea inflammation. There is no reference to the original accident, no reference to the effects of the original blow—of the original blow having been aggravated by the subsequent B arrival of the microbe that entered the eye. There is no attempt to trace the connection between the original accident and the entry of the microbe, subject only to this, that it might have been introduced by wiping the eye with a cloth or sponge or handkerchief or something of that kind. From beginning to end I find no suggestion in cross-examination put to any of the doctors as to whether the true view was not that the eye was injured and then inflamed, and that it was the inflamma- C tory condition of the eye that led to or facilitated the entrance of, or otherwise caused the entrance of, this microbe, this coccus. Nothing of the sort was put to any of the witnesses. From beginning to end when the medical evidence is looked at it proves the admission of the workman to the hospital suffering from gonorrhoea inflammation of the eye. But the evidence goes a little further. Not only is it the fact that there is no suggestion, but the medical evidence goes further in saying D that the doctor found no injury to the eye. Dr. Wood Wight says that he found the eyelid very much swollen with a copious discharge. The learned County Court judge finds the discharge commenced as early as the Monday following the Saturday, two days after the accident, when he went to the hospital, and the judge found that the eye had then commenced to discharge. But Dr. Wood Wight went further. He said: "I did not find any injury" to the eye. "I did not expect to find one." E And then: "This injury to the eye was due to a very virulent infectious germ, coccus gonorrhoea." The learned County Court judge finds the accident, such as it was on the Saturday, to have been of a very trifling character. Certainly the evidence points to that, because the original accident is not cross-examined to or pressed upon the doctors as to whether any effect whatever of it was remaining at the time when this germ entered the eye. The judge said, "Whilst engaged in this F work some small amount of brickdust appears to have got into his left eye, not sufficient of itself to cause more than discomfort for a short period of time." Then, unfortunately, some substance was applied to or touched his eye with the result that this coccus entered and the inflammation was set up.

The learned county court judge finds this: He said that there was here novus actus interveniens—that is to say, the mere entry of this coccus, "which was the G direct and indeed the sole cause of the accident which has arisen." I think that the learned county court judge in considering that matter was properly applying himself to the real issue before him. What he had to consider was whether the injury to the workman's eyelid, leading to the destruction of his eye, was caused by the original accident, aggravated it may have been, the original mischief being subsequently increased by the entrance of the coccus, or whether the two were not H severable. His Honour had to consider whether, the accident being of a very trifling description, the cause and the sole cause of the loss of the workman's eye was not the gonorrhoea inflammation—being an entirely independent cause. The learned county court judge upon the whole of the evidence found that it was. If that were so, then if there was evidence on which he could have come to that finding—and it is manifest there was—I am of opinion that this Court is not I entitled to review his findings of fact. There is no misdirection to be found in the judgment. He properly applied himself to the question which he had to determine, and that being so we cannot interfere and the appeal fails, and must be dismissed with costs.

BANKES, L.J.—I agree. The question for this Court is not whether on the facts the Court would have come to the same conclusion of fact, but whether the learned county court judge misdirected himself upon the evidence which was laid

before him, and with respect to the case as presented to him. In my opinion he did not. Very often this class of case presents great difficulties. But it seems to me that the real question which the arbitrator had to decide in the present case and has to decide in similar cases is this: Is the workman's condition of which he is complaining in fact due to the original injury, whatever it was, aggravated by infection or disease, or is his condition in fact due to infection or disease quite independent of the original injury? If the answer to the first question is in the affirmative, then it seems to me that on the authorities the workman is entitled to succeed. But, on the other hand, if the answer to the second question is in the affirmative, then the workman is not entitled to succeed in such a case—the injury is due to novus actus interveniens, and there has been, to use the language of the Master of the Rolls in *Dunham* v. *Clare* (1) ([1902] 2 K.B. at p. 296), a break in the chain of causation.

Reading the learned county court judge's judgment in the present case carefully, and bearing in mind what the evidence was, and the case as presented to him, it appears to me there was no misdirection, and that the learned judge was quite seised of what he had to direct his mind to, and he first dismissed the contention put forward on behalf of the workman, which, as presented, it seems to me had no foundation to support it. The learned judge said:

> "Mr. Pritchett asked me to find that this consequence would not have occurred except for the accident, and I have no hesitation in so finding. But this does not with deference conclude the question raised before me."

If he correctly stated the question it is obvious that the learned judge was right in the statement he there made. He went on to deal with his view of the original injury. He spoke of a foreign substance having got into the workman's eye, and one knows from experience what intense pain that may create without really causing any serious injury or causing any serious inflammation. Then he went on to say: "But here it seems to me that there was novus actus interveniens, for which the respondents cannot be held responsible." And then he continued thus: "And it was the direct and, indeed, the sole cause of the accident." That indicates to me that the learned county court judge had present to his mind what was the correct interpretation to be put on that expression, and therefore on those grounds the appeal fails.

NEVILLE, J.—I have felt considerable difficulty during the course of the arguments in the present case, and I cannot honestly say that I come to the conclusion that I do come to with mental satisfaction. But, on the whole, it seems to me impossible to say that, having regard to the views that have been taken in this connection by the courts, the learned county court judge had not evidence before him upon which he could arrive at the finding that he has, that his trouble was the direct and, indeed, the sole cause of the accident which has arisen, and I think under those circumstances I cannot do otherwise than concur with the other members of the court.

Appeal dismissed.

Solicitors: *Caporn & Campbell, for Bowman & Ekin*, Birmingham; *Griffith & Gardiner*, for *Shakespeare & Vernons*, Birmingham.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

A

ANGHINELLI *v.* ANGHINELLI

[Court of Appeal (Swinfen Eady, M.R., Warrington and Duke, L.JJ.), May 13, 1918]

B [Reported [1918] P. 247; 87 L.J.P. 175; 119 L.T. 227; 34 T.L.R. 438; 62 Sol. Jo. 548]

Judicial Separation—Jurisdiction—Parties resident within the jurisdiction but domiciled abroad.

The Divorce Court has jurisdiction to entertain a suit for judicial separation where both parties are resident within the jurisdiction, although they are C domiciled abroad.

Semble: Such decree does not alter the status of the parties.

Notes. Distinguished: *Eustace* v. *Eustace*, [1923] All E.R. Rep. 281. Referred to: *Graham* v. *Graham*, [1922] All E.R.Rep. 149; *Mitford* v. *Mitford and von Kuhlmann*, [1923] All E.R. 214; *Sim* v. *Sim*, [1944] 2 All E.R. 344; *Forsyth* v. *Forsyth*, [1947] 1 All E.R. 406.

D As to jurisdiction of Divorce Court based on residence, see 7 Halsbury's Laws (3rd Edn.) 105, 106; and for cases see 11 Digest (Repl.) 475, 476.

Cases referred to:

(1) *Niboyet* v. *Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, *1021*.

E (2) *Armytage* v. *Armytage*, [1898] P. 178; 67 L.J.P. 90; 78 L.T. 689; 14 T.L.R. 480; 11 Digest (Repl.) 475, *1052*.

(3) *Carden* v. *Carden* (1837), 1 Curt. 558.

(4) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, *1011*.

Also referred to in argument:

F *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 31 W.R. 433, H.L.; 11 Digest (Repl.) 481, *1084*.

Bates v. *Bates*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 22 T.L.R. 408; 50 Sol. Jo. 389, C.A.; 11 Digest (Repl.) 482, *1087*.

Re Mackenzie, Mackenzie v. *Edwards-Moss*, [1911] 1 Ch. 578; 80 L.J.Ch. 443; 105 L.T. 154; 27 T.L.R. 337; 55 Sol. Jo. 406; 11 Digest (Repl.) 357, *256*.

G *Barber* v. *Barber* (1858), 21 Howard's Rep. 582.

Appeal from an order of Horridge, J., at chambers.

In 1912 a domiciled Italian, who came to this country in 1902, when he entered the employment of an English firm as foreign traveller, was married to an Englishwoman in this country. After the marriage the husband and wife took a house H and cohabited together in this country. In February, 1918, the wife presented a petition for judicial separation on the ground of the husband's cruelty and abusive conduct. The husband entered an appearance under protest, and in March, 1918, he presented an act on petition in which he alleged that he was born of Italian parents and had his domicil of origin in Italy and had never abandoned it; that his time had been principally occupied in travelling for an English firm I in various parts of Europe, Africa, and America; that he took a house in England at the request of the wife's parents in order to afford her a temporary home; but that he never intended to make a permanent home in this country and always, and still, intended to return to Italy to make his permanent home there so soon as his business arrangements would admit of his doing so. The husband accordingly prayed that the wife's petition should be dismissed on the ground that the court had no jurisdiction to entertain it. Thereupon a summons was taken out by the wife against the husband to show cause why his act on petition should not be dismissed, and why the wife should not have leave to proceed with her

petition for judicial separation. The registrar made an order dismissing the husband's act on petition and giving leave to the wife to proceed with her petition. The husband appealed to HORRIDGE, J., sitting in chambers, who affirmed the order of the registrar dismissing the husband's act on petition. The husband now appealed to the Court of Appeal.

Hume-Williams, K.C., and *T. Boston Bruce* for the husband.

Sir E. Marshall-Hall, K.C., and *W. O. Willis* for the wife, were not called on to argue.

SWINFEN EADY M.R.—This is an appeal from an order of HORRIDGE, J., affirming a decision of the registrar dismissing an act on petition of the respondent, the husband. The petition was presented by the wife praying for a decree for judicial separation. The husband is a domiciled Italian, and was married to the petitioner on April 20, 1912. There is one child of the marriage. The petition for judicial separation was presented by the wife on Feb. 22, 1918, alleging cruelty. In her petition she alleged that she, being a domiciled Englishwoman, married her husband, who was a domiciled Italian, and that after the marriage they lived together at a certain house in London. She then sets out the acts of cruelty complained of, and prays for a decree for judicial separation. The husband by his act on petition alleged that he was born of Italian parents in Italy and had there his domicil of origin, which he had never abandoned; and he prayed that the petition might be dismissed on the ground that the court had no jurisdiction to entertain it. A summons by the petitioner to dismiss the respondent's act on petition came before the registrar, who dismissed it, and his decision was affirmed by the judge.

The ground on which the husband alleges that the court has no jurisdiction is that, he being domiciled in Italy, the effect of the decree, if granted, might be to affect the status of the parties. Accordingly, he asks the court to lay down the rule that in all proceedings in the matrimonial courts the jurisdiction must be founded on domicil; and that, as domicil governs the form of divorce, so it must govern all matrimonial proceedings which may ultimately affect the status of the married parties. The appellant contended that the effect of a decree for judicial separation might be to enable the wife to acquire a domicil apart from her husband and thus affect the status of the parties, and it was contended that the judgment was erroneous and that the court had no jurisdiction.

The jurisdiction of the Divorce Court is conferred by the Matrimonial Causes Act, 1857. By s. 2 it is provided as follows:

> "All jurisdiction now vested in or exercisable by any ecclesiastical court or person in England in respect of divorces à mensâ et thoro, suits of nullity of marriage, suits for restitution of conjugal rights or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, shall belong to and be vested in Her Majesty; and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty in a court of record to be called 'The Court of Divorce and Matrimonial Causes'."

By s. 7 it is declared that:

> "No decree shall hereafter be made for a divorce à mensâ et thoro; but in all cases in which a decree for a divorce à mensâ et thoro might now be pronounced the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce à mensâ et thoro now has."

Section 22 enacts that:

> "In all suits and proceedings other than proceedings to dissolve any marriage the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable

A to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

The effect of those sections is to transfer to the Divorce Court the jurisdiction formerly exercised by the ecclesiastical courts, and to require that court in all B suits and proceedings other than those for dissolution of marriage to act upon the same principles and rules as did the ecclesiastical courts. Therefore the only question which arises on this appeal is whether before the Act of 1857 the ecclesiastical courts would have allowed to be maintained a suit for divorce à mensâ et thoro where the parties were resident here but domiciled abroad. The authorities clearly establish that they would, and they even go further and hold that where C the parties are domiciled abroad and the offences complained of were committed abroad, but the parties had since come to reside in this country, the court might give this relief.

The grounds upon which the ecclesiastical courts proceeded are fully stated in *Niboyet* v. *Niboyet* (1), where JAMES, L.J., said (4 P.D. at pp. 4, 5):

"Can there be any doubt that before the English Act of Parliament transferring D the jurisdiction in matrimonial causes from the Church and her courts to the Sovereign and her courts, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a divorce à mensâ et thoro, and in either case for proper alimony? The jurisdiction of the Court Christian was a jurisdiction over Christians who, in theory, by virtue of their baptism, became members of the one Catholic E and Apostolic Church. The Church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word 'domicil' in the sense of the secular domicil—viz., the domicil affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or in itinere, no doubt, was an important element; but that residence had no connection with, and little analogy to, F that which we now understand when we endeavour to solve what has been found so often very difficult of solution, the question of a person's domicil. If a Frenchman came to reside in an English parish, his soul was one of the souls the care of which was the duty of the parish priest, and he would be liable for any ecclesiastical offence to be dealt with by the ordinary, pro salute animæ."

G In like manner COTTON, L.J., referring to the jurisdiction of the ecclesiastical courts, said (ibid. at p. 22):

"Moreover, the diocesan courts, whose jurisdiction is vested in the Court of Divorce, looked to the residence not to the domicil of the respondent for the purpose of deciding whether a suit could be entertained; and I see no reason for supposing that an ecclesiastical court, acting pro salute animæ, would have H declined to interfere against an offending husband or wife in respect of an act committed within the local limits of its jurisdiction because the parties, though resident within those limits, were domiciled elsewhere. There is in my opinion no sufficient reason for limiting the right and liability to sue and be sued in the Court of Divorce to persons domiciled in England; and my opinion is that I under the circumstances of this case the Court of Divorce has jurisdiction to entertain a petition for judicial separation against the respondent."

It is quite true that BRETT, L.J., differed on the question as to the jurisdiction of the court to grant a divorce. But the statement as to the power of the court to grant a decree for judicial separation remains unaffected.

Subsequently, the same point was considered afresh in *Armytage* v. *Armytage* (2). In that case a wife petitioned for judicial separation on the ground of cruelty. The offences alleged were committed in Italy, and the husband's domicil was in Australia. But both parties came to England, and the wife, being apprehensive

that the acts of cruelty would be repeated in England, commenced a suit. The whole case proceeded on the footing that if the matrimonial offence had been committed within the jurisdiction the court would have had jurisdiction to deal with it. The husband alleged that no matrimonial offence had been committed within the jurisdiction, but it was held, notwithstanding that, that, as the parties were then resident in England, the court had jurisdiction to entertain the suit. GORELL BARNES, J., went very fully into the question as dealt with both by English and foreign writers on international law, and summed up the result as follows ([1898] P. at p. 192):

> "I conclude from the writers to whom I have referred that most of them are disposed to consider that the courts of the country in which the parties are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party."

Then he referred to s. 22 of the Act of 1857, and said (ibid. at p. 194):

> "In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an ecclesiastical court, that court would have interfered, if the parties were within the jurisdiction at the commencement of the suit, to protect the injured party against the other party in respect of the adultery or cruelty of the latter, and I can find no authority for the suggestion made by the respondent's counsel that such interference would be limited to cases where the offence complained of was committed within the jurisdiction."

The court, therefore, being bound by the principle upon which the ecclesiastical courts acted, the question resolves itself into this: Would the ecclesiastical courts have entertained a suit for divorce à mensâ et thoro where the parties were resident here but domiciled abroad? The answer is, obviously, Yes. No single authority has been cited to suggest the contrary. There is *Carden* v. *Carden* (3), in which, as appears from the judgment, what the court was considering was the question of residence and not domicil, and it was held that it was residence within the diocese before the issue of the citation which gave the court jurisdiction. Then it is contended that the court could not, having regard to the principles of the jus gentium, give effect to this rule in any questions which might involve altering the status of foreigners. The answer is that given by GORELL BARNES, J., in *Armytage* v. *Armytage* (2)—namely, that the court is bound by the statute. Further, I do not consider it to be settled that a decree for judicial separation will affect the status of married parties. A doubt was expressed on that point in *Armytage* v. *Armytage* (2). So that, without supporting the view that it will affect the status of the parties, the court is bound by the statute of 1857 to deal with the case upon the same rules and principles as those upon which the ecclesiastical courts would have dealt with it before that date. The decision of the learned judge in the court below was therefore right, and this appeal must be dismissed.

WARRINGTON, L.J.—The question here is whether the court has jurisdiction to grant a decree for judicial separation where the parties, though resident in England, are said to be domiciled abroad. In the present case the acts of cruelty complained of were, as to most of them, committed in this country. The point was decided in *Armytage* v. *Armytage* (2), and, indeed, the decision there goes even further, for most of the acts of cruelty alleged there were not committed in this country. That case has never been questioned since it was reported in 1898. It would require a very strong reason to justify our overruling it. But, in my opinion, the decision in *Armytage* v. *Armytage* (2) was right. A decree for judicial separation takes the place of a divorce à mensâ et thoro, and the jurisdiction exercised by the court in pronouncing a decree for judicial separation is part of the jurisdiction transferred to the Divorce Court by ss. 6, 7, and 22, of the Matrimonial Causes Act, 1857. [HIS LORDSHIP read the sections, and continued:]

The question really is: What were the principles and rules under which the ecclesiastical courts exercised their jurisdiction before 1857? They were stated

by JAMES, L.J., in *Niboyet* v. *Niboyet* (1) in the passage in his judgment which has been read by the Master of the Rolls. In *Le Mesurier* v. *Le Mesurier* (4) LORD WATSON, referring to *Niboyet* v. *Niboyet* (1), said ([1895] A.C. at p. 531):

> "The main reason assigned for their decision by the learned judges of the majority was, that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court although he was not domiciled in England, and to ask either for restitution of conjugal rights or for a divorce à mensâ et thoro and in either case for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe s. 27 of the Act of 1857 as giving the English court jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court."

No attempt is here made to controvert the statements made by JAMES, L.J., and LORD WATSON, and those statements must be accepted as accurate statements of the law. If that be so, then there is an end of the case, because it follows that the jurisdiction of the court is the jurisdiction previously exercised by the ecclesiastical courts and must follow their principles. In my judgment the decision in *Armytage* v. *Armytage* (2) is right in principle, and the judgment of HORRIDGE, J., is also right, and ought to be affirmed. It is said that the principle on which domicil is said to give jurisdiction is that in the case of dissolution of marriage the status of the parties is affected, and that on that principle the same principle should be applied to petitions for judicial separation. I am not, however, prepared to accept the view that a decree for judicial separation does affect the status of the parties.

DUKE, L.J.—I agree. It is suggested that a wife said to be domiciled abroad could not come to a court here to obtain the relief which is sought in the present case. I should have deplored it if I thought it had been found to be so. And, in my opinion, the luminous judgment of JAMES, L.J., in *Niboyet* v. *Niboyet* (1), which has been referred to, has dispelled that view. I agree that there is no ground for interfering with the decision of HORRIDGE J.

Appeal dismissed.

Solicitors: *Mackrell, Maton, Godlee & Quincey*; *Reed & Reed.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

COHEN *v.* ROTHFIELD

[COURT OF APPEAL (Scrutton, L.J., and Eve, J.), December 4, 11, 1918]

[Reported [1919] 1 K.B. 410; 88 L.J.K.B. 468; 120 L.T. 434; 63 Sol. Jo. 192]

B

Practice—Stay of proceedings—Proceedings in Scotland—Actions arising out of same transactions and between same parties in England and Scotland—Burden of proof—Need to prove continuance of both actions oppressive or vexatious—Prejudice to plaintiff in Scottish court.

The jurisdiction of the English courts to restrain a defendant to an action in England from proceeding in Scotland with an action in which he is plaintiff, which arises out of the same transaction and is between the same parties as in the English action, and in which he is asking for substantially the same relief, will only be exercised when the circumstances are such as to satisfy the court that continued prosecution of both actions would be oppressive or vexatious, and that no advantage can be gained by the defendant to the English action proceeding with the action in which he is plaintiff in another part of the King's dominions; but in exercising this jurisdiction the court will lean heavily against any interference which would prevent a defendant in an English action from continuing the only proceeding which he as plaintiff can control.

C

D

Per EVE, J.: The basis of the jurisdiction is a jurisdiction in personam and has nothing to do with any conflict between the tribunals.

Notes. Applied: *Orr-Lewis* v. *Orr-Lewis*, [1949] 1 All E.R. 504. Considered: *Sealey (otherwise Callan)* v. *Callan*, [1953] 1 All E.R. 942.

E

As to restraints on foreign proceedings, see 7 HALSBURY'S LAWS (3rd Edn.) 172–174; and for cases see 11 DIGEST (Repl.) 542 et seq.

Cases referred to:

(1) *McHenry* v. *Lewis* (1882), 22 Ch.D. 397; 52 L.J.Ch. 325; 47 L.T. 549; 31 W.R. 305, C.A.; 11 Digest (Repl.) 542, *1512*.

(2) *Hyman* v. *Helm* (1883), 24 Ch.D. 531; 49 L.T. 376; 32 W.R. 258, C.A.; 11 Digest (Repl.) 547, *1545*.

F

(3) *Vardopulo* v. *Vardopulo* (1909), 25 T.L.R. 518; 53 Sol. Jo. 469, C.A.; 11 Digest (Repl.) 548, *1555*.

(4) *Re Connolly Bros., Ltd., Wood* v. *Connolly Bros., Ltd.*, [1911] 1 Ch. 731; 80 L.J.Ch. 409; sub nom. *Re Connolly Bros., Ltd., Wood* v. *Connolly Bros., Ltd.*, 104 L.T. 693, C.A.; 39 Digest 14, *113*.

G

(5) *Bushby* v. *Munday* (1821), 5 Madd, 297; 56 E.R. 908; 11 Digest (Repl.) 547, *1548*.

(6) *Re Derwent Rolling Mills Co., Ltd., York City and County Banking Co., Ltd.* v. *Derwent Rolling Mills Co., Ltd.* (1905), 21 T.L.R. 81, 701, C.A.; 10 Digest (Repl.) 820, *5356*.

(7) *Re Warrand* (1892), 93 L.T. Jo. 82.

H

(8) *Carter* v. *Hungerford* (1915), 59 Sol. Jo. 428, C.A.; 24 Digest (Repl.) 839, *8322*.

(9) *Jopson* v. *James* (1908), 77 L.J.Ch. 824, C.A.; 11 Digest (Repl.) 543, *1513*.

(10) *Thornton* v. *Thornton* (1886), 11 P.D. 176; 55 L.J.P. 40; 54 L.T. 774; 34 W.R. 509, C.A.; 11 Digest (Repl.) 543, *1522*.

(11) *Re Norton's Settlement, Norton* v. *Norton*, [1908] 1 Ch. 471; 77 L.J.Ch. 312; 99 L.T. 257, C.A.; 11 Digest (Repl.) 542, *1510*.

I

Appeal by the defendant from an order of SHEARMAN, J., restraining the defendant from proceeding with an action in the Scottish courts.

The facts appear sufficiently from the judgments.

By his affidavit in support of his summons for an injunction to restrain the defendant from proceeding with the Scottish action, the plaintiff stated that: "The defendant has at all material times resided and still resides at Newcastle, and his

sole connection with Scotland is that he now carries on a moneylending business in Glasgow, and is at his office there, travelling from Newcastle for the purpose during two or three days each week. Except that I am now away as a soldier I reside at Sunderland. The books relating to my business (including that formerly carried on at Glasgow) being as far as production by me is concerned, the whole of the books to be produced on taking any account, are kept at Stockton, where my principal place of business is situate. Further, a large portion of the moneys obtained by the defendant and not accounted for were obtained from Newcastle customers of my business, and to the best of my belief upon the taking of a full account it will be found that Newcastle transactions are involved as much as, if not more than, Glasgow transactions; and I say that to the best of my belief the Scottish action has not been brought bonâ fide but in order to put difficulties in the way of my obtaining a full account. I am advised and believe that in this action the defendant will obtain any relief to which he may be entitled, and I respectfully submit in the circumstances that this is a case in which the court may properly restrain the defendant from proceeding with the Scottish action pending the trial and determination of this action." On Nov. 20, SHEARMAN, J., ordered that the defendant be restrained until after the trial of the English action or further order from proceeding with his action in Scotland. The defendant appealed.

J. B. Mathews, K.C., and *C. Zeffertt* for the defendant.
Disturnal, K.C., *Lowenthal* and *Simey* for the plaintiff.

Cur. adv. vult.

Dec. 11, 1918. The following judgments were read.

SCRUTTON, L.J.—This is an appeal by one Rothfield, a moneylender, from an order of SHEARMAN, J., in chambers staying Rothfield from proceeding with an action brought by him as plaintiff against one Cohen in Scotland, on the ground that its substance is included in an action brought by Cohen, another moneylender, against Rothfield in England. Cohen carried on a business as moneylender in the North of England and Scotland, and Rothfield was his manager on the terms of getting one-fourth profits and paying one-fourth losses. Rothfield demanded accounts; Cohen alleged the receipt by Rothfield of secret commissions. Rothfield, through his solicitor, threatened an action in Scotland in respect of the Scottish business if the accounts were not rendered in a week. Cohen within the week issued his English writ for an account as agent and for damages for misconduct as agent. Rothfield then issued his Scottish writ for an account of the Scottish business. Rothfield has got his Scottish action to the stage when it is nearly ready to be set down for trial. Cohen has done nothing in his English action. Cohen then applied in England to restrain Rothfield from proceeding with his Scottish action on the ground that it was vexatious, and SHEARMAN, J., granted him an injunction, and gave leave to appeal. Rothfield now appeals.

When it is proposed to stay an action on the ground that another is pending, and the action to be stayed is not in the court asked to make the order, the same result is obtained by restraining the person who is bringing the second action from proceeding with it. But as the effect is to interfere with proceedings in another jurisdiction, this power should be exercised with great caution, to avoid even the appearance of undue interference with another court. Where an English court is asked to stay an action commenced in a foreign jurisdiction—that is, one outside the British Empire—on the ground that the plaintiff in the foreign action is also plaintiff in an English action, the burden is on the person asking for relief from the English court to satisfy it that the plaintiff in the foreign court cannot obtain any advantage from the foreign procedure that he would not obtain in the English court. It is not primâ facie vexatious for the same plaintiff to commence two actions relating to the same subject-matter, one in England and one abroad. The applicant must prove a substantial case of vexation resulting from the identity of proceedings, remedies, and benefits, or from the existence of some motive other

than a bonâ fide desire to determine disputes. Within the English courts two actions by the same plaintiff relating to the same subject-matter may be primâ facie vexatious, but this primâ facie case does not exist where one action is out of the King's dominions, and the court is not necessarily aware of the incidences of the foreign procedure. This appears to be the result of the judgments in *McHenry* v. *Lewis* (1) and *Hyman* v. *Helm* (2). Where the plaintiff in the foreign action is not plaintiff but defendant in the English action the case against interference is even stronger, for the person to be stayed has not himself initiated two proceedings; he has initiated one, and has been compelled to appear in another over which he has, as defendant, no control. When COTTON, L.J., in 1883 in *Hyman* v. *Helm* (2) asked if there was any case in which a defendant sued here has, before decree, been restrained from commencing an action abroad no case was produced. When in 1909, in *Vardopulo* v. *Vardopulo* (3), a similar question was asked again no case was produced. In 1911, in *Re Connolly Bros.* (4) ([1911] 1 Ch. at p. 745), LORD COZENS HARDY, M.R., who had asked the question in *Vardopulo* v. *Vardopulo* (3) again referred to the matter; and he then pointed out that there was one case in which a defendant had been restrained before decree. That case was *Bushby* v. *Munday* (5), in which the plaintiff, who was suing to set aside a bond alleged to be given for a gaming debt, succeeded in restraining the defendants from suing on the bond in Scotland, by proving that, owing to the superior powers of discovery possessed by the English court, there would be more likelihood of the facts being correctly ascertained in England. While, therefore, there is jurisdiction to restrain a defendant from suing abroad, it is a jurisdiction very rarely exercised, to be resorted to with great care, and on ample evidence provided by the applicant that the action abroad is really vexatious and useless.

Does the same rule of practice apply where the action to be stayed is not abroad, but in another court in the King's dominions, as in Scotland, Ireland, or the colonies? In *McHenry* v. *Lewis* (1), though it was not necessary to decide the question, SIR GEORGE JESSEL, M.R., expressed the view that in the case of the same plaintiff bringing two actions in far parts of the Empire, as there were facilities for enforcing the English judgment in other parts of the Empire, the case was more like concurrent actions in the same jurisdiction, though, as he pointed out, if the remedies were different the case altered. It is obvious, for instance, that an action in South Africa, where the Dutch procedure prevails, Mauritius or Quebec, where French procedure exists, Malta, with its peculiar law, or Scotland with its Roman procedure, may produce quite different results from an English action. It appears to me that unless the applicant satisfies the Court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's dominions, the court should not stop him from proceeding with the only proceedings which he, as plaintiff, can control. This principle has been repeatedly acted upon. Thus, on similar grounds, the court has declined to stay proceedings in Scotland, in *Re Derwent Rolling Mills Co., Ltd.* (6) in which case it was pointed out that by an arrestment in Scotland the plaintiff got a charge on the property arrested taking priority from the date of the judgment, and had no similar advantage in England; and also in *Re Warrand* (7), and has refused to stay an action in England, the only reason given being that proceedings were pending in Ireland between the same parties for the same relief: (*Carter* v. *Hungerford* (8)). In *Jopson* v. *James* (9) the court of Appeal reversed an order of the Vice-Chancellor of the Palatine Court, who had restrained a partnership action in Nova Scotia on the ground of a partnership action pending in England in his court. In *Thornton* v. *Thornton* (10) the court refused to restrain a wife from proceeding in England for restitution of conjugal rights because her husband was already beginning divorce proceedings against her in India; and the explanation of this case given in *Re Norton's Settlement* (11) does not at all detract from its authority. In the last case, as in several of the others, the decision or discretion of the judge below was overruled.

Applying these principles to the present case, Rothfield has brought a perfectly proper action in Scotland to take the accounts of a business carried on in Scotland, and by arrestment has obtained a charge on certain funds. He announced his intention of bringing this action before Cohen commenced an action in England, and has prosecuted it with much greater diligence than Cohen has prosecuted his action in England. Cohen gives no evidence to show that Rothfield will obtain no advantage by the Scottish action, and, so far as the English action relates to Scottish affairs, the evidence can more easily be taken in Scotland than England. In my view the applicant did not in any way support the burden imposed on him by the principles I have stated, and on those principles there was no evidence which justified SHEARMAN, J., in staying the defendant from proceeding with his action in Scotland. His order must be set aside and the appeal allowed with costs here and below.

EVE, J.—This is an appeal from an order of SHEARMAN, J., made on Nov. 20, whereby he restrained the defendant until after the trial of this action or further order from proceeding with an action brought by him against the plaintiff in Scotland on Sept. 14, 1918.

To restrain a man from proceeding with an action which primâ facie he has a right to bring and prosecute is, as was pointed out by FLETCHER MOULTON, L.J., in *Re Connolly Bros., Ltd.* (4), a very serious thing, but it is not disputed that there is jurisdiction to make the order, the basis of the jurisdiction being that it is a jurisdiction in personam, and has nothing to do with any conflict between the tribunals *Bushby* v. *Munday* (5). The question then arises, in what circumstances and upon what principle, does the court act, in exercising this jurisdiction in cases where, as in this case, it is invoked on the ground that another action between the same parties and for substantially the same relief is already instituted. Broadly speaking, I think the answer is that the court will exercise the jurisdiction when the circumstances are such as to satisfy it that continued prosecution of both actions would be oppressive or vexatious. In each case it becomes necessary, therefore, to examine the particular circumstances with a view to ascertaining whether the answer to the question I have stated should be in the affirmative or negative, always bearing this in mind, that it is incumbent on the party who invokes the jurisdiction to satisfy the court of the existence of a state of things justifying its exercise. The litigation with which we have to deal, relates to the mutual obligations of the plaintiff and defendant under two verbal agreements come to in 1911 and 1914 for the carrying on of a moneylending business, first at Newcastle-on-Tyne and afterwards at Newcastle and Glasgow. The agreements were, I gather, made in England and both parties are resident in this country, though the defendant says he has residences also in Glasgow and Edinburgh. Primâ facie the agreements appear to disclose a partnership at will. Disputes having arisen between the parties as to the state of accounts between them, the defendant, in August, 1918, put the matter in the hands of some Scottish solicitors, who, failing to obtain the account they were demanding from the plaintiff, wrote on Sept. 3, that, failing their getting an account within one week, they had peremptory instructions from the defendant to bring an action of accounting against the plaintiff. A few days after the receipt of this letter, and within the week, the plaintiff commenced this action wherein, putting it shortly, he claims a full account against the defendant as manager of the businesses at Newcastle and Glasgow and damages for alleged breaches of duty as such manager. By this it would appear that the plaintiff construes the agreement as one between principal and agent, and not as a contract of co-partnership. To this writ the defendant responded by the institution on Sept. 14 in the Scottish court of proceedings in which he claims an account of the transactions between him and the plaintiff from Sept. 1, 1915, and payment of what, on taking such account, shall be certified to be due. There is nothing in the materials before us to show why the defendant has limited his claim to an account as

from September, 1915 only. The grounds upon which the plaintiff founds his claim for the injunction are stated in his affidavit in the following terms: "Except that I am now away as a soldier, I reside at Sunderland. The books relating to my business (including that formerly carried on at Glasgow) being, as far as production by me is concerned, the whole of the books to be produced on taking any account, are kept at Stockton, where my principal place of business is situate. Further, a large portion of the moneys obtained by the defendant, and not accounted for, were obtained from Newcastle customers of my business, and, to the best of my belief, upon the taking of a full account, it will be found that Newcastle transactions are involved as much, if not more, than Glasgow transactions, and I say that to the best of my belief the Scottish action has not been brought bonâ fide, but in order to put difficulties in the way of my obtaining a full account." To these may be added the obvious contentions that the Scottish proceedings were commenced with knowledge of the English ones; that the relief claimed in each case overlaps; and that a judgment as claimed in the Scottish action would not really determine finally the rights of the parties unless there have been accounts stated between them down to September, 1915, of which there is no evidence.

In my opinion these considerations are quite insufficient to warrant us in restraining the defendant from prosecuting the Scottish action. There is nothing to show, and I am not prepared to assume, that the plaintiff cannot, by appropriate procedure in that action, enlarge its scope so as to cover the whole period over which he claims that the accounts ought to be taken, or that he cannot by counter-claim therein assert his right to recover damages for breach of duty. It is true that the Scottish action was commenced after notice of the English action, but the precedence of the latter has to some extent been discounted by the superior diligence which has been exhibited in pressing on the former, and, in the absence of any evidence to prove that the defendant can obtain no advantage by suing in Scotland, I do not think we are justified in assuming that no such advantage exists. The case made by the plaintiff, in my opinion, falls far short of establishing that the further prosecution of the Scottish action will be oppressive or vexatious. Indeed, a persual of the correspondence leaves on my mind the impression that the plaintiff commenced his own action to postpone the rendering of the account, and I do not think his subsequent procedure is calculated to remove that impression. I therefore think that the order of SHEARMAN, J., ought to be discharged.

Appeal allowed.

Solicitors: *Lazarus & Son*; *Thorogood, Tabor & Hardcastle*, for *Blackett & Gill*, Newcastle-on-Tyne.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

COTMAN *v.* BROUGHAM

[House of Lords (Lord Finlay, L.C., Lord Atkinson, Lord Parker and Lord Wrenbury), March 22, May 6, 1918]

B [Reported [1918] A.C. 514; 87 L.J.Ch. 379; 119 L.T. 162; 34 T.L.R. 410; 62 Sol. Jo. 534]

Company—Memorandum of association—Object clause—Need to specify objects plainly—Limitation by name of company—Registrar's duty to consider before incorporation—Refusal of registration if Companies Acts not complied with —Validity of memorandum—Conclusiveness of certificate of incorporation—
C *Objects clause giving extremely wide powers—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 3 (1) (iii), *s.* 9, *s.* 17, *s.* 118—*Company—Registration—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 17.

Sub-clause (1) of the objects clause (cl. 3) of the memorandum of association of the E. company, authorised the company to develop certain property abroad. The remaining sub-clauses of cl. 3 set out a variety of objects, including the
D promotion of other companies and dealing in their shares, and concluded "the objects set forth in any sub-clause of this clause shall not, except when the context expressly so requires, be in any wise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name of the company. None of such sub-clauses or the object therein specified or the powers thereby conferred shall be deemed subsidiary or auxiliary merely to the
E objects mentioned in the first sub-clause of this clause, but the company shall have full power to exercise all or any of the powers conferred by any part of this clause in any part of the world, and notwithstanding that the business, undertaking, property, or acts proposed to be transacted, acquired, dealt with, or performed do not fall within the objects of sub-cl. 1." The company underwrote and took up shares in another company the business of which was not connected
F with the E. company or with the objects set out in cl. 3 (1). On a summons in the liquidation of the other company it was contended that this transaction was ultra vires the E. company.

Held: as the registrar had accepted the memorandum of the E. company, and granted a certificate of incorporation, the validity of the memorandum could not be challenged, and its memorandum must be construed as it stood,
G and so the transaction was intra vires.

Decision of the Court of Appeal, reported sub nom. *Re Anglo-Cuban Oil, Bitumen and Asphalt Co., Ltd.*, [1917] 1 Ch. 477, affirmed.

Per Lord Wrenbury: Before registering a memorandum of association the registrar ought to consider whether the requirements of the Companies Acts have been complied with, and to refuse registration if he conceives that they
H have not. The memorandum must delimit and identify the objects in such a plain and unambiguous manner that the reader can identify the field of industry within which the corporate activities are to be confined.

Per Lord Atkinson and Lord Parker: For the purpose of determining whether a company's substratum be gone, it may be necessary to distinguish between power and object, and to determine what is the main or paramount
I object of the company, but this is not necessary where a transaction is impeached as ultra vires.

Where the operative part of a memorandum is clear and unambiguous its obvious meaning ought not to be cut down or enlarged by reference to the name of the company.

Notes. The Companies (Consolidation) Act, 1908, has been repealed, but the provisions of the current Act, the Companies Act, 1948, dealing with the statement of the company's objects (s. 2 (1) (c)); the "conditions contained" in the

memorandum (s. 4); the "provisions of its memorandum with respect to the objects" (s. 5 (1), (9), (10)); the form of the memorandum (s. 11); the conclusiveness of the certificate of incorporation (s. 15 (1)); and winding up on the ground that "it is just and equitable" (s. 222 (f)), are sufficiently similar to those of the Act of 1908 not to impair the authority of this case.

Considered: *Egyptian Salt and Soda Co.* v. *Port Said Salt Association, Ltd.*, [1931] A.C. 677; *Re Kitson & Co.*, [1946] 1 All E.R. 435; *Hughes and Vale Pty., Ltd.* v. *State of New South Wales*, [1954] 3 All E.R. 607. Referred to: *Oxford Group* v. *I.R. Comrs.*, [1949] 2 All E.R. 537.

As to the objects of clause of the memorandum of association and the certificate of incorporation, see 6 HALSBURY'S LAWS (3rd Edn.) 108–116, 413–418; and for cases see 9 DIGEST (Repl.) 75–83. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452 et seq.

Cases referred to:

(1) *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 33 T.L.R. 376; 61 Sol. Jo. 478, H.L.; 9 Digest (Repl.) 79, *327*.

(2) *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.*, [1902] 1 Ch. 745; 71 L.J.Ch. 295; 86 L.T. 221; 50 W.R. 509; 18 T.L.R. 327; 9 Mans. 199; 9 Digest (Repl.) 81, *343*.

(3) *Re German Date Coffee Co.* (1882), 20 Ch.D. 169; 51 L.J.Ch. 564; 46 L.T. 327; 30 W.R. 717, C.A.; 9 Digest (Repl.) 81, *342*.

Also referred to in argument:

Re Coolgardie Consolidated Gold Mines, Ltd. (1897), 76 L.T. 269; 13 T.L.R. 301; 41 Sol. Jo. 365, C.A.; 9 Digest (Repl.) 705, *4681*.

Re Crown Bank (1890), 44 Ch.D. 634; 59 L.J.Ch. 739; 62 L.T. 823; 38 W.R. 666; 9 Digest (Repl.) 81, *344*.

Pedlar v. *Road Block Gold Mines of India, Ltd.*, [1905] 2 Ch. 427; 74 L.J.Ch. 753; 93 L.T. 665; 54 W.R. 44; 12 Mans. 422; 9 Digest (Repl.) 706, *4682*.

Appeal by the liquidator of Essequibo Rubber and Tobacco Estates, Ltd. from an order of the Court of Appeal reported sub nom. *Re Anglo-Cuban Oil, Bitumen and Asphalt Co., Ltd.*, [1917] 1 Ch. 477.

A summons was taken out on Oct. 9, 1916, by John Sell Cotman, the liquidator of the Essequibo Rubber and Tobacco Estates, Ltd., asking that, notwithstanding that the time for applying for the variation of the B list of contributories of the Anglo-Cuban Oil, Bitumen and Asphalt Co. by the removal of the name of the Essequibo company from the list in respect of £14,046 15s. 2d. had expired, such time might be enlarged, and that it might be ordered that the B list of contributories and the certificate of the liquidator might be varied by excluding the name of the Essequibo company. The ground of the application was that the transaction, the underwriting of shares in the Anglo-Cuban, etc., Co., which the Essequibo company claimed entitled them to rank as contributories, was ultra vires the Essequibo company. The facts appear in the judgments.

NEVILLE, J., dismissed the summons, and his order was affirmed by the Court of Appeal.

F. Whinney and *Morle* for the liquidator.

Frank Russell, K.C., and *Topham* for the respondent, the official receiver, liquidator of the Anglo-Cuban Co.

The House took time for consideration.

May 6, 1918. The following opinions were read.

LORD FINLAY, L.C.—The Essequibo Rubber and Tobacco Estates, Ltd., is a company which was registered on April 6, 1910. The memorandum of the association is one of a type which unfortunately has become common. The companies (Consolidation) Act, 1908, requires that the memorandum of association should set out (inter alia) "the objects of the company" (s. 3). The memorandum of this

company in cl. 3 set out a vast variety of objects and wound up with the following extraordinary provision:

"(30) The objects set forth in any sub-clause of this clause shall not, except when the context expressly so requires, be in anywise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name of the company. None of such sub-clauses or the objects therein specified or the powers thereby conferred shall be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause of this clause, but the company shall have full power to exercise all or any of the powers conferred by any part of this clause in any part of the world, and notwithstanding that the business, undertaking, property, or acts proposed to be transacted, acquired, dealt with, or performed to do not fall within the objects of the first sub-clause of this clause."

WARRINGTON, L.J., expressed some doubt in his judgment in this case whether a memorandum setting out such a profusion of objects was a compliance with the Act, and it is possible that in some future case the question may arise on application for a mandamus if the registrar should refuse registration, taking the ground that the Act requires that the memorandum should be in such a form that the real objects of the company are made intelligible to the public.

In the present case no such question arises. The registrar accepted the memorandum of association and gave a certificate of incorporation, and that certificate is conclusive. Section 17 of the Act enacts that

"A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act."

All that the courts can do is to construe the memorandum as it stands.

The question is whether it was intra vires of the Essequibo Rubber company to enter into the transaction which has ended in the company's name being put upon the B list of contributories to another company, the Anglo-Cuban Oil, Bitumen and Asphalt Co., Ltd. The Essequibo company underwrote shares in the Anglo-Cuban company and received an allotment of 17,200 such shares. An order was made for a compulsory liquidation of the Anglo-Cuban company, and it was ordered that the Essequibo company, which is already in liquidation, should be placed on the B list of contributories in respect of £14,046 due upon these shares. An application was made to strike out the name of the Essequibo company from the list of contributories on the ground that the whole transaction was ultra vires. NEVILLE, J., refused the application, and he was affirmed by the Court of Appeal. The question depends on the interpretation to be put upon the third clause of the memorandum of association. This clause has thirty heads dealing with a multitude of objects and of powers. It is only necessary to refer to the eighth and twelfth heads of that clause, in addition to the general provision at the end of the clause which I have already quoted:

"(8) To promote, form, issue, and be interested in any company or companies, either in Great Britain, British Guiana, or elsewhere, and take, acquire, hold, transfer, sell, surrender, or otherwise dispose of and deal in shares, stocks, bonds, obligations, debentures, debenture stock, scrip, or securities in or of any such company, and to transfer to any such company any property of this company, and to subsidise or otherwise assist any such company; and in the event of any property sold to such company proving unsatisfactory, to make over to it, gratuitously or otherwise, any other property or rights, either in lieu of the property sold or transferred or otherwise . . . (12) To buy or otherwise acquire in any way and hold, sell, or deal with or in any stocks, shares, securities, or obligations of any Government, authority, corporation, or company which may

be considered capable of being profitably held or dealt in or with by the company." A

I agree with both courts below in thinking that it is impossible to say that the acquisition of these powers was ultra vires of the Essequibo company.

It is well worthy of consideration whether, if it should appear that the law as it stands is not sufficient to cope with such abuses as are exemplified in the memorandum now in consideration, the Companies Act should not be amended so as to B bring the practice into conformity with what must have been the intention of the framers of the Act. But the only question before us now is the construction of the memorandum as it stands, and in my opinion this appeal must be dismissed with costs.

LORD ATKINSON.—I concur in the opinion of LORD PARKER, which I am about C to read for my noble and learned friend.

LORD PARKER (read by LORD ATKINSON).—I agree. It may well be that the memorandum of association in the present case is not framed on the lines contemplated by the Companies (Consolidation) Act, 1908. This point would no doubt have been open to argument on proceedings for a mandamus had the registrar D refused to accept it. Possibly also it might have been raised in proceedings on behalf of the Crown to cancel the company's certificate of incorporation: see *Bowerman* v. *Secular Society, Ltd.* (1) ([1917] A.C. at p. 439). It cannot, however, be raised in these proceedings because the seventeenth section of the Act makes the certificate of incorporation conclusive evidence that (inter alia) the provisions of s. 3 as to stating the objects of the company in its memorandum of association have E been duly complied with. The only point, therefore, open to your Lordship's House is the true construction of such memorandum, and on this point I find myself in such complete agreement with the Lord Chancellor that I have little to add. Clause 3 (8) and (12) of the memorandum are in their terms amply wide enough to cover the transaction in question, and the concluding words of sub-cl. (30) were clearly introduced to preclude the operation of these (among other) sub-clauses F being cut down by considerations such as arose in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.* (2).

Counsel for the liquidator suggested that, in considering whether a particular transaction was or was not ultra vires a company, regard ought to be had to the question whether at the date of the transaction the company could have been wound-up on the ground that its substratum had failed. Upon consideration I can- G not accept this suggestion. The question whether or not a company can be wound-up for failure of substratum is a question of equity between a company and its shareholders. The question whether or not a transaction is ultra vires is a question of law between the company and a third party. The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place, it gives protection to subscribers, who learn from it the purposes to H which their money can be applied. In the second place, it gives protection to persons who deal with the company and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum the less is the subscribers' risk, but the wider such objects the greater is the security of those who transact business with the company. Moreover, experience soon showed that persons who transact business with companies do not like having to depend on I inference when the validity of a proposed transaction is in question. Even a power to borrow money could not always be safely inferred, much less such a power as that of underwriting shares in another company. Thus arose the practice of specifying powers as objects, a practice rendered possible by the fact that there is no statutory limit on the number of objects which may be specified. But even thus, a person proposing to deal with a company could not be absolutely safe, for powers specified as objects might be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object,

and on this construction no one could be quite certain whether the court would not hold any proposed transaction to be ultra vires. At any rate, all the surrounding circumstances would require investigation. Fresh clauses were framed to meet this difficulty, and the result is the modern memorandum of association with its multifarious list of objects and powers specified as objects, and its clauses designed to prevent any specified object being read as ancillary to some other object. For the purpose of determining whether a company's substratum be gone, it may be necessary to distinguish between power and object, and to determine what is the main or paramount object of the company, but I do not think this is necessary where a transaction is impeached as ultra vires. A person who deals with a company is entitled to assume that a company can do everything which it is expressly authorised to do by its memorandum of association, and need not investigate the equities between the company and its shareholders.

The only other point which I need mention is the company's name. In construing a memorandum of association, the name of the company, being part of the memorandum, can, of course, be considered; but where the operative part of the memorandum is clear and unambiguous, I do not think its obvious meaning ought to be cut down or enlarged by reference to the name of the company. It should be remembered that the name is susceptible of alteration, and it would be impossible to hold that such alteration could diminish or enlarge a company's powers. On the other hand the name may be very material if it be necessary to consider what is the company's main or paramount object in order to see whether its substratum is gone. I think the appeal should be dismissed with costs.

LORD WRENBURY.—On April 16, 1910, the Essequibo Rubber and Tobacco Estates, Ltd. were incorporated by registration under the Companies (Consolidation) Act, 1908. To obtain the advantage of that incorporation, the law required that "the memorandum must state . . . the objects of the company": (s. 3, (1) (iii)). There is some guidance furnished by the Act as to the meaning of these words. There are other matters which the Act requires to be stated in the memorandum. Section 7 and s. 45 speak of all collectively as "conditions contained" in the memorandum of association; s. 41 as "conditions of its memorandum." Section 9 speaks of the "provisions of its memorandum" with respect to the objects. Section 9 shows that the Act contemplates that the company will as a consequence of "the provisions of its memorandum" have what the Act calls "its business" and will have a "main purpose." Section 9 (e) speaks of the "objects specified in the memorandum." The meaning of the Act in this respect is not without authority, which, at any rate, is some guidance. One ground for winding up is that the court is of opinion that it is just and equitable that the company should be wound-up: s. 129 (vi). *Re German Date Coffee Co.* (3) is the leading authority for the proposition that when that which is called the substratum of the company is gone, a winding-up order may be made under s. 129 (vi). The substratum is gone when the "main purpose" has become impossible. This class of cases recognises the existence of a "main purpose" in a memorandum which names a host of acts in the clause which has to state the objects.

I cannot doubt that, when the Act says that the memorandum must "state the objects," the meaning that it must specify the objects; that it must delimit and identify the objects in such plain and unambiguous manner that the reader can identify the field of industry within which the corporate activities are to be confined. The purpose, I apprehend, is twofold. The first is that the intending corporator who contemplates the investment of his capital shall know within what field it is to be put at risk. The second is that anyone who shall deal with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects. The objects of the company and the powers of the company to be exercised in effecting the objects are different

things. Powers are not required to be and ought not to be specified in the memorandum. The Act intended that the company, if it be a trading company, should by its memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade. The third schedule of the Act contains model forms of memoranda of association. These ought to be followed. Section 118 enacts that those forms, "or forms as near thereto as circumstances admit," shall be used in all matters to which those forms refer.

There has grown up a pernicious practice of registering memoranda of association which under the clause relating to objects contain paragraph after paragraph not specifying or delimiting the proposed trade or purpose, but confusing power with purpose and indicating every class of act which the corporation is to have power to do. The practice is not one of recent growth. It was in active operation when I was a junior at the Bar. After a vain struggle I had to yield to it, contrary to my own convictions. It has arrived now at a point at which the fact is that the function of the memorandum is taken to be, not to specify, not to disclose, but to bury beneath a mass of words the real object or objects of the company, with the intent that every conceivable form of activity shall be found included somewhere within its terms. The present is the very worst case of the kind that I have seen. Such a memorandum is not, I think, a compliance with the Act.

The Act throws on the registrar a great responsibility when it provides, as it does, that his certificate of incorporation "shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with." Before registering a memorandum of association the registrar ought to consider whether the requirements of the Act have been complied with and to refuse registration if he conceives that they have not, bearing in mind that if he does not take that course he may put the court in the position in which your Lordships find yourselves in the present case—a position in which it must assume that all requirements in respect of matters precedent and incidental to registration have been complied with, and confine yourselves to the construction of the document. I shall take care that the committee which is now sitting to inquire as to amendments desirable in the law relating to joint stock companies looks into this question and considers whether amendment is desirable both to strengthen the requirements as to definition of objects and to control in some proper way the finality of the registrar's certificate.

I turn to consider the transaction in question in this case and to see whether it falls within the company's objects upon a true construction of the memorandum of association, assuming, as I am bound to do, that this is a valid instrument. The transaction was as follows. A company, called the Anglo-Cuban Oil, Bitumen and Asphalt Co., Ltd., was in November, 1910, being promoted by a company called the London and Mexico Exploitation Co., Ltd. The Essequibo company, in November, 1910, sub-underwrote 20,000 shares of 10s. each in the Anglo-Cuban company for a commission of £600 in cash and £5,000 in cash or shares upon one Chansay, who was the promoter undertaking to purchase at par on or before Nov. 30, 1911, any shares which the Essequibo company might have to take up. The Essequibo company had to take up 17,200 shares. On Nov. 29, 1910, they applied for that number, and they were allotted to them. On Sept. 6, 1912, they transferred the shares to the London and Mexican company. On Nov. 12, 1912, an order was made to wind-up the Anglo-Cuban company. The Essequibo company have been put upon the B list of contributories. They, by their liquidator (for they also are in liquidation), applied to vary the B list by excluding their name therefrom. The ground of that application was that the transaction was ultra vires the Essequibo company. The only question open on this appeal is whether upon the construction of the memorandum of association the transaction was ultra vires. The construction of the instrument does not admit of reasonable doubt. Clause 3 (8) and (12) are in terms so wide that an obligation in a contingent event to take up

shares falls within them. The language of cl. 3 (30) is such that I cannot say that such a transaction was ultra vires because it was not ancillary to or connected with or in furtherance of something which I find elsewhere in the company's memorandum to have been "its business." Upon the narrow question upon which alone it is, unfortunately, within the competence of this House to determine, I think the decision below was right. It follows that this appeal must be dismissed with costs.

Solicitors: *Sparks, Whitehouse, Russell & Co.*; *Stanley, Evans & Co.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

MELLES & CO. *v.* HOLME

[KING'S BENCH DIVISION (Salter and Roche, JJ.), April 23, 1918]

[Reported [1918] 2 K.B. 100; 87 L.J.K.B. 942; 119 L.T. 191; 62 Sol. Jo. 704]

Landlord and Tenant—Repair—Liability of landlord—Need for notice to landlord of want of repair—No knowledge of defect save by information from tenant—No right to enter defective part of premises.

A landlord's covenant to repair is only subject to an implied condition that notice of a defect shall be given to him when he does not and could not know of the defect unless the tenant tells him of it, or when the landlord has no right to enter on the part of the premises which is defective.

A landlord let rooms in a house, and covenanted with the tenant to keep the outside walls and roof of the demised premises in good and tenantable condition, to scour the gutters, and to keep the passage of the down flow pipes at all times free. The landlord regularly inspected the roof and gutters, but some rainwater pipes became stopped up a few feet from the top, and as a result water from the rainwater gutters came through the roof and down the walls to the tenant's rooms, and there did damage.

Held: the landlord was in breach of his covenant and was liable in damages to the tenant even though the tenant had given him no notice of want of repair.

Notes. Considered: *Murphy* v. *Hurly*, [1922] All E.R.Rep. 169. Followed: *Bishop* v. *Consolidated London Properties, Ltd.* (1933), 102 L.J.K.B. 25. Considered: *Greg* v. *Planque*, [1935] All E.R. Rep. 237. Referred to: *Citron* v. *Cohen* (1920), 36 T.L.R. 560; *McCarrick* v. *Liverpool Corpn.*, [1946] 2 All E.R. 646.

As to liability for disrepair of a landlord who retains possession of part of the demised premises, see 23 HALSBURY'S LAWS (3rd Edn.) 573; and for cases see 31 DIGEST (Repl.) 342–349.

Cases referred to:

(1) *Makin* v. *Watkinson* (1870), L.R. 6 Exch. 25; 40 L.J.Ex. 33; 23 L.T. 592; 19 W.R. 286; 31 Digest (Repl.) 346, *4768*.

(2) *Tredway* v. *Machin* (1904), 91 L.T. 310; 53 W.R. 136; 20 T.L.R. 726; 48 Sol. Jo. 671, C.A.; 31 Digest (Repl.) 383, *5105*.

Also referred to in argument:

Hart v. *Rogers*, [1916] 1 K.B. 646; 85 L.J.K.B. 273; 114 L.T. 329; 32 T.L.R. 150; 31 Digest (Repl.) 267, *4011*.

Torrens v. *Walker*, [1906] 2 Ch. 166; 75 L.J.Ch. 645; 95 L.T. 409; 54 W.R. 584; 31 Digest (Repl.) 344, *4752*. A

Manchester Bonded Warehouse Co. v. *Carr* (1880), 5 C.P.D. 507; 49 L.J.Q.B. 809; 43 L.T. 476; 45 J.P. 7; 29 W.R. 354; 31 Digest (Repl.) 281, *4156*.

Appeal by tenants from a decision of the Liverpool County Court dismissing their action against their landlords for damages for breach of the landlords' covenant to repair. B

The facts and arguments appear in the judgment of SALTER, J.

McCall, *K.C.*, and *Kyffin* for the tenants.

Hanbury Aggs for the landlords.

SALTER, J.—This is an action for damages for breach of covenant to repair. The facts are that the defendants on June 24, 1915, demised to the plaintiffs certain C rooms in a house of the defendants by a lease dated June 24, 1915. Other portions of the house were let to other persons. In particular, rooms above those demised to the plaintiffs were let to persons who carried on a boot manufacturing business. The lease to the plaintiffs contains a covenant by the lessors that they will keep the outside walls and roof of the demised premises in good and tenantable condition. The roof—including in the expression the gutters and rain-water pipes—appears to D have been kept in perfectly good repair. The landlords employed a person to inspect every three months, and he appears to have done his duty; but by some means one of the rain-water pipes became choked within a few feet of the top. There was evidence to the effect that ashes from the chimneys fell upon the roof, and that, because of this, the landlords took care to see to the gutters; but it also appeared from the evidence that refuse from the rooms where the boot manufacture E was carried on was wont to accumulate on the roof. In the result, the rain lying in the gutters came through the roof and down the walls to the rooms occupied by the plaintiffs. It is material to observe that their lease expressly provided that they should use the rooms only for the exhibition or storage of certain perishable wares.

In an action for damages for breach of covenant a learned county court judge F has found for the defendants. He held that there was no want of care on the part of the landlords, and that, in the absence of notice of want of repair, and assuming that it was a breach of covenant to allow the pipes to become stopped up, the action could not be maintained. In my view that judgment cannot be supported. The matter turns upon the covenant to which I have referred. I do not think it is necessary to consider any implied term. No implied term could be wider—even if G it were as wide—as the express term which is to be found in the lease. It has been contended, however, that the plaintiffs cannot enforce the performance of this covenant—even if it was broken—because they gave no notice of want of repair. The rule that in some cases there must be read into a landlord's covenant to repair an implied condition that notice of a defect shall be given to him depends in the first instance on *Makin* v. *Watkinson* (1), and the principle of the rule is there H enunciated. It is that where the circumstances are that the landlord does not and could not know of the existence of the defect unless the tenant informs him, or where he has no right to enter upon the premises, then in such circumstances it is reasonable and in accordance with common sense to imply that he shall have notice of want of repair: see per COLLINS, M.R., in *Tredway* v. *Machin* (2). There must be a strong reason to justify our reading into a covenant words which are not I there. Here, having regard to the plain intention of the parties, there is no such reason. The roof was in the possession and was under the control of the landlords. It was not in the possession of nor was it under the control of the tenant, and the landlords were in a better position than he was to know of its conditions.

The question remains: On the facts was there a breach? I am of opinion that the covenant must be read as applying to the roof, in so far as it covered these premises, which were in fact a set of rooms. As it was the expressed intention that the obligation of the landlords under the covenant included the scouring of the

gutter and the keeping of the passage of the down-flow pipe at all times free, as they failed to do that they were guilty of a breach of covenant, and the judgment should have been for the tenants for the amount of the damages found by the judge.

ROCHE, J.—I agree.

Appeal allowed.

Solicitors: *Howard & Shelton*; *J. H. Glover*, Liverpool.

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law*.]

Re RIVERS. PULLEN *v.* RIVERS

[CHANCERY DIVISION (Eve, J.), April 30, 1919]

[Reported [1920] 1 Ch. 320; 88 L.J.Ch. 462; 121 L.T. 57; 63 Sol. Jo. 534]

Administration of Estates—Legacy—Refunding as between legatees—Reversionary legacy—Estate distributed—Insufficiency of fund—Order in administration action in reversionary legatee's absence—Liability of residuary legatee to refund.

A testator bequeathed three annuities, followed by bequests of pecuniary legacies to the children of the annuitants on their deaths. The income of the residuary estate was given to the testator's daughter during her life, and after her death the capital was bequeathed to her children. The estate was administered in court and invested in Consols, sums of which were allocated to payments of the annuities. On the death of the life tenant in 1885 the estate was, with the exception of Consols standing to the credit of the accounts of two surviving annuitants, paid out, under an order made on their application but to which the children of the last surviving annuitant were not parties, to the residuary legatees, the life tenant's children. After the death of the last annuitant in 1917 it was discovered that the proceeds of the sale of the Consols standing to the credit of her annuity account would not be sufficient to pay the legacy of £200 to her children.

Held: the children of the last annuitant could not be bound or prejudiced by proceedings to which they were not parties, and so, the orders for payment out having been made in their absence and the annuity fund having been set aside merely to answer the annuity and not their pecuniary legacies, they were entitled to follow the assets in the hands of the residuary legatees and recover from them the difference between the sums they actually received out of the annuity fund and what they would have received had the testator's estate been distributed in due course of administration.

Notes. Referred to: *Ministry of Health* v. *Simpson*, [1950] 2 All E.R. 1137.

As to refunding as between legatees, see 16 HALSBURY'S LAWS (3rd Edn.) 335; as to appropriation by personal representatives, see ibid. 372–376; and for cases see respectively 23 DIGEST (Repl.) 439–441 and 407.

Case referred to:

(1) *Re Robinson, McLaren* v. *Public Trustee*, [1911] 1 Ch. 502; 104 L.T. 331; 55 Sol. Jo. 271; sub nom. *Re Robinson, McLaren* v. *Robinson*, 80 L.J.Ch. 381; 43 Digest 960, *4002*.

Also referred to in argument:

Anon. (1718), 1 P. Wms. 495; 24 E.R. 487; 23 Digest (Repl.) 439, *5087*.

Walcott v. *Hall* (1788), 2 Bro. C.C. 305; 29 E.R. 167; 23 Digest (Repl.) 439, *5092*.

Gillespie v. *Alexander* (1827), 3 Russ. 130; 38 E.R. 525, L.C.; 23 Digest (Repl.) 441, *5112.*

David v. *Frowd* (1833), 1 My. & K. 200; 2 L.J.Ch. 68; 39 E.R. 657; 24 Digest (Repl.) 856, *8513.*

Sawyer v. *Birchmore* (1837), 2 My. & Cr. 611; 1 Keen, 825; 6 L.J.Ch. 277; 40 E.R. 773, L.C.; 24 Digest (Repl.) 856, *8514.*

Prowse v. *Spurgin* (1868), L.R. 5 Eq. 99; 37 L.J.Ch. 251; 17 L.T. 590; 16 W.R. 413; 23 Digest (Repl.) 439, *5096.*

Fenwick v. *Clarke* (1862), 4 De G.F. & J. 240; 31 L.J.Ch. 728; 6 L.T. 593; 10 W.R. 636; 45 E.R. 1176, L.JJ.; 23 Digest (Repl.) 329, *3971.*

Action by the plaintiff Mrs. Mary Ann Tharp Pullen, entitled to part of a deferred legacy of £200, against the executors of one of the three residuary legatees under the will and codicil of John Tharp, who died in 1863.

The testator's will was dated Feb. 9, 1861, and he thereby devised and bequeathed to two trustees his real and personal estate on trust, after a legacy to his daughter, Harriet Rivers, to pay out of the rents and proceeds the sum of £20 sterling a year to his housekeeper, Jane Deborah Fish, for her life and free from all legacy and succession duty and on further trust to pay to the testator's granddaughter Mary A. T. Carter (afterwards Mary A. T. Brown) the sum of £16 a year, afterwards reduced to £8 by a codicil, for her life free from succession and legacy duty, and after her decease to raise and pay to her children or issue the sum of £400, reduced by a codicil to £200, to be equally divided between them if more than one and if only one the whole to such one, and on further trust to pay the rents, issues, and profits of the testator's real and personal estate after such payments as aforesaid to Harriet Rivers for her separate use and after her decease on trust for conversion and to divide the same between her children and issue if more than one and if only one then the whole to such one. The annuity of £8 was given by the testator's codicil to the testator's grandaughter Mary Frances Williams, and the sum of £200 to her children after her decease. The plaintiff claimed that on the death of her mother Mrs. Tharp Brown she became entitled to receive 11-72 parts of the legacy of £200 bequeathed by the testator's will to Mrs. Tharp Brown's children, and that she was entitled to follow the assets forming part of the estate of the testator come to the hands of the late William Rivers, a residuary legatee under the will, or the defendants as his executors, to the extent of the difference between 11-72 parts of £200 and the sum of £12 8s. 9d. which the plaintiff had actually received on account, and payment with interest from Mrs. Tharp Brown's death. The defendants alleged that at the date of the payment under an order of the court dated July 13, 1885, the £266 13s. 4d. Consolidated Three Per Cent. annuities standing to the credit of Mrs. Tharp Brown's annuity account was amply sufficient to provide for her life annuity and for the payment of the legacy of £200 bequeathed after her death to her children or issue. The share of residue was paid with notice of the last mentioned fact and without any trust or subject to any charge for payment of the legacy. The defendants also relied on s. 8 of the Trustee Act, 1888 and admitted sufficient assets of William Rivers in their hands to satisfy the legacy.

C. P. Sanger for the plaintiff.

C. Johnston Edwards for the executors.

EVE, J.—The plaintiff, in this action, seeks to recover from the legal personal representatives of William Rivers, deceased, one of the residuary legatees under the will of the late John Tharp, the amount whereby her share of a reversionary legacy of £200 falls short of the sum she would have received in respect thereof had the estate been distributed in the usual course of administration.

Under the joint effect of the will and codicil of the testator, the plaintiff's mother, Mrs. Mary Ann Tharp Brown, was entitled to a life annuity of £8, and at her death her children were entitled in equal shares to a legacy of £200. The testator died in 1863 and in 1871 a decree was made in a suit in which Jane Deborah Fish,

A another annuitant under his will, was plaintiff, for the administration of his estate and the execution of the trusts of his will. By the order made on further consideration on May 27, 1873, it was ordered that £266 13s. 4d. consolidated 3 per cent. annuities should be carried over to a separate account entitled "The annuity account of Mary Ann Tharp Brown, the wife of Frederick Charles Brown," and that the dividends thereon should be applied in keeping down the said annuity; B other annuities, including that of the plaintiff in the action, were provided for in like manner, and the ultimate residue of the estate was ordered to be carried over to the credit of an account to be entitled "The net residuary account of the testator subject to succession duty and subject to legacy duty," and invested in consolidated 3 per cent. annuities and the dividends of this account were ordered to be paid to Harriet Rivers, the testator's daughter, the tenant for life of the residue during her C life or until further order, and on her death any persons entitled to or interested in the said annuities were to be at liberty to apply concerning the same as they might be advised. Harriet Rivers died on Feb. 7, 1885, and thereupon the residue became divisible subject to provision being made amongst other things for the legacy of £200 to Mrs. Brown's children. On an application made by the three residuary legatees of whom the late William Rivers was one the amount standing D to the credit of the net residuary account was, by an order of July 13, 1885, in substance, ordered to be paid out to them and their mortgagees, and pusuant to that order William Rivers received one third of the sum then distributed. In 1904 Mary Frances Williams, another annuitant, whose annuity of £8 had been secured by carrying over a like amount of Consols to that carried over to the annuity account of Mrs. Tharp Brown, died, and on her death there became payable to her only child E a legacy of £200. By an order of July 1, 1904, the fund so carried over was ordered to be sold and the surplus proceeds, after providing for the annuity down to the death of the annuitant and for the legacy to the child of the annuitant, were ordered to be paid to the residuary legatees and their incumbrancers.

These orders of July, 1885, and July, 1904, were made without notice to Mrs. F Tharp Brown or her children, and must, I think, have been made without the parties thereto appreciating that the £266 13s. 4d. consols appropriated to secure the annuity of Mrs. Tharp Brown had not been appropriated to answer the legacy of £200 bequeathed to her children, or they may possibly have thought that on the falling in of the annuity the fund set aside to answer it would be sufficient to provide for the legacy; but whatever was the reason for so framing the orders as to bring G about a distribution of residue without adequately providing for legacies, the legatees cannot in the circumstances be bound or prejudiced by proceedings to which they were no parties.

Mrs. Brown survived the testator a good many years and died in 1917, when the proceeds of the fund set aside to answer her annuity constituted the only outstanding estate of the testator, and were insufficient to pay costs, duties, and the legacy H to her children. The amount of the plaintiff's share in the distribution fell short by £18 or so of the sum to which she was properly entitled, and this action has been instituted as a test action with a view to establishing her right and the right of other persons interested in the legacy to recover the deficiency from the residuary legatees. If this were an action in which the facts were such as to justify the defendants in relying on the lapse of time as affording by analogy to the Statute of I Limitations a defence, it may well be that the decision in *Re Robinson, McLaren v. Public Trustee* (1), on which counsel for the defendants relied, would have been an answer to the plaintiff's claim, but, as he has candidly admitted, the facts here leave no room for any argument founded on the statute, and his real defence is that the plaintiff is seeking to make the residuary legatee liable for an unforeseen loss whereby a fund, adequate at one time to answer the claim of the legatees, has become inadequate by reason of circumstances which have arisen since it was set aside. He contends that at the date in 1873 when the sum was appropriated to the mother's annuity, and again in 1885 when payments were made to the residuary

legatees, and finally in 1904, when the Williams' annuity determined, there was a sufficient fund in hand to meet this reversionary legacy, and that in these circumstances it would not be right to make the residuary legatees answerable for loss due to the unlooked-for depreciation which has since occurred. The plaintiff does not admit that the fund in question was ever an adequate provision, and, if this were established, it would, of course, dispose of the defendants' argument as just stated, but I think there is another and shorter answer to it in this, that the fund never was set aside to provide for the legacy. It was appropriated to answer the annuity, and for that purpose only, and although it may well be that the residuary legatees believed that it afforded a sufficient retention to provide for the legacy and received payment of moneys on account of residue on that footing, I do not think it is open to them, now that their belief as to the sufficiency of the fund has been falsified, to rely on the existence of this fund—set aside, as I say, to secure the payment of the annuity, and nothing else—as a defence to this action. In my opinion, the defendants admitting assets of the late William Rivers sufficient to satisfy the claim of the plaintiff, she is entitled to recover the difference between the sum she actually received in respect of her share in the legacy of £200, and what she would have received had the testator's estate been distributed in due course of administration, and, if the figures cannot be agreed, an inquiry must be directed. The defendants must pay the costs of the action.

Solicitors: *A. E. Cubison*; *H. G. Kenyon*, for *Albery, Lucas & Beresford*, Midhurst, Sussex.

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

DAVIES *v.* THOMAS OWEN & CO., LTD.

[King's Bench Division (Salter, J.), April 15, 1919]

[Reported [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 17 L.G.R. 407]

Factory—Dangerous machinery—Duty to fence—Secure fencing commercially impracticable—Absolute duty—Breach—Defence—Volenti non fit injuria—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10 (1) (*c*).

The obligation imposed on the occupier of a factory by the Factory and Workshop Act, 1901, s. 10 (1) (c) [now the Factories Act, 1937, s. 14 (1)] is an absolute obligation to fence dangerous machinery securely. The maxim volenti non fit injuria affords no defence where the plaintiff can prove that the injury which he has suffered was the direct consequence of a breach by the defendant of his express statutory duty.

Baddeley v. *Earl Granville* (1) (1887), 19 Q.B.D. 423, and observations in *Thomas* v. *Quartermaine* (2) (1887), 18 Q.B.D. 685, applied.

A workman in a factory was injured by an unfenced dangerous machine which it was impracticable to fence securely.

Held: the occupier of the factory was liable in damages to the workman for breach of statutory duty.

Per **Curiam**: If a machine cannot be securely fenced while remaining commercially practicable or mechanically useful the effect of the sub-section is that it is put out of use.

Notes. Considered: *Sowter* v. *Steel Barrel Co., Ltd.*, [1935] All E.R.Rep. 231; *Wing* v. *Soar*, [1938] 1 K.B. 379, n. Followed: *Dennistoun* v. *Charles E.*

Greenhill, Ltd., [1944] 2 All E.R. 434; *Pugh* v. *Manchester Dry Docks Co.*, [1954] 1 All E.R. 600. Applied: *Frost* v. *John Sumners & Sons, Ltd.*, [1954] 1 All E.R. 901. Approved: *John Sumners & Sons, Ltd.* v. *Frost*, [1955] 1 All E.R. 870. Referred to: *Fowler* v. *Yorkshire Electric Power Co.*, [1939] 1 All E.R. 407; *Lewis* v. *Denyé*, [1940] 3 All E.R. 299; *Whitten* v. *Army and Navy Stores, Ltd.*, [1943] 2 All E.R. 244; *Proctor* v. *Johnson and Phillips, Ltd.*, [1943] 1 All E.R. 565; *Miller* v. *William Boothman & Sons, Ltd.*, [1944] 1 All E.R. 333; *Whitehead* v. *James Stott & Co.*, [1949] 1 All E.R. 245; *Burns* v. *Joseph Terry & Sons, Ltd.*, [1950] 2 All E.R. 987; *Benn* v. *Kamm & Co.*, [1952] 1 All E.R. 833.

As to the statutory duty to fence machinery securely, see 17 HALSBURY'S LAWS (3rd Edn.) 70–79; and for cases see 24 DIGEST (Repl.) 1049–1056. For Factories Act, 1937, see 9 HALSBURY'S STATUTES (2nd Edn.) 996.

Cases referred to:

(1) *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423; 56 L.J.Q.B. 501; 57 L.T. 268; 51 J.P. 822; 36 W.R. 63; 3 T.L.R. 759; 36 Digest (Repl.) 158, *834*.

(2) *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685; 56 L.J.Q.B. 340; 57 L.T. 537; 51 J.P. 516; 35 W.R. 555; 3 T.L.R. 495, C.A.; 36 Digest (Repl.) 7, *11*.

Further Consideration of action tried at Cardiff Assizes.

The plaintiff claimed damages for the negligence of the defendants in not securely fencing the dangerous parts of a pressing machine, whereby the plaintiff was injured. The plaintiff was employed in the defendants' factory as an assistant machineman. While engaged on his work he had his hand caught between the rollers of a calender pressing and finishing machine and crushed. He alleged that the defendants negligently, and in breach of their statutory duty, did not securely fence the dangerous parts of the machine, but allowed them to remain in an unfenced and dangerous condition. He further alleged that the defendants did not provide a proper platform on which to stand while attending the machine. The defendants denied negligence and alleged that the rollers of the calender pressing machine could not have been fenced without destroying the utility of the machine. They also alleged contributory negligence against the plaintiff and said that if the machine or platform were, in fact, dangerous the plaintiff knew and appreciated the danger and voluntarily undertook the risk of working the machine.

At the trial of the action the judge left certain questions to the jury. The following are some of the questions, with the jury's answers thereto: Q. Was the calender a dangerous part of the machinery? A. Yes. Q. Was the calender securely fenced?—A. No. But in the opinion of the jury secure fencing is impracticable. Q. Did the plaintiffs provide a proper and sufficient platform?—A. Yes. Q. Was the accident caused by (a) the calender being unfenced?—A. Yes. Q. (b) the platform being insufficient?—A. No. Q. was the accident caused or contributed to by the negligence of the plaintiff?—A. No. Q. What damages (if any)?—A. £100.

In reply to further questions by the judge, the foreman of the jury added that "in the view of the jury the machine, if fenced, would be of practically no commercial value. The jury think that if this machine was fenced it would be more dangerous than in its present condition."

By s. 10 (1) of the Factory and Workshop Act, 1901:

> "With respect to the fencing of machinery in a factory the following provisions shall have effect: . . . (*c*) all dangerous parts of the machinery and every part of the mill gearing must either be securely fenced or be in such a position, or of such construction, as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced."

Wilfred Lewis for the plaintiff.

Sir Ellis Griffiths, K.C., and *Lincoln Reed*, for the defendants.

SALTER, J., stated the facts, and continued.—I now propose to deal with this case on the footing that the additional statements made by the foreman of the

jury in answer to my further question are to be regarded as part of the findings of the jury. The statements in question amount to a finding that it was commercially and mechanically impracticable to fence this dangerous machinery, and that it would be more dangerous if fenced than in its unfenced condition. A

With regard to the allegation of negligence at common law, it is clear that the plaintiff fails, but with regard to the allegation of a breach of a statutory duty, I am of opinion that the plaintiff succeeds. Section 10 (1) of the Factory and Workshop Act, 1901 imposes an absolute obligation with respect to the fencing of dangerous machinery. It imposes an obligation not merely to fence the machinery, but to fence it securely. The sub-section does not say that dangerous machinery shall be securely fenced if that is commercially practicable or mechanically possible. If a machine cannot be securely fenced while remaining commercially practicable or mechanically useful the effect of the sub-section is that it is put out of use. The words of the sub-section are not that dangerous machinery is "to be in such position or of such construction as to be equally safe . . . as it would be if were fenced," but the words are "securely fenced, or be in such position or of such construction as to be equally safe . . . as it would be if it were securely fenced." The workman is entitled to have secure fencing in fact, and the findings of the jury show that this machine was not securely fenced. The observations of the jury that secure fencing is commercially and mechanically impracticable are irrelevant, and I am of opinion that the plaintiff has proved a breach of a statutory duty on the part of the defendants, and he has also proved that damage has been caused to him in consequence of such breach by the defendants of their statutory duty. B C D

That being so, the only defence remaining open to the defendant is the defence which is embodied in the maxim volenti non fit injuria. That would have afforded a good defence to an action for damages for negligence at common law, but it is clear from *Baddeley* v. *Earl Granville* (1), and from the observations of the court in *Thomas* v. *Quartermaine* (2), that the maxim affords no defence where the plaintiff can prove that the injury which he has suffered has been the direct consequence of a breach by the defendant of an express statutory duty. For these reasons there must be judgment for the plaintiff. E F

Judgment for the plaintiff.

Solicitors: *Smith, Rundell, Dods & Bockett*, for *Harold M. Lloyd*, Cardiff; *Pritchard, Englefield & Co.*, for *W. B. Francis & Cooke*, Cardiff.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*] G

A

JOSEPH EVANS & CO., LTD. *v.* HEATHCOTE AND OTHERS

[Court of Appeal (Pickford, Bankes and Scrutton, L.JJ.), January 21, 22, 23, February 4, 1918]

[Reported [1918] 1 K.B. 418; 87 L.J.K.B. 593; 118 L.T. 556; 34 T.L.R. 247]

B *Account Stated—Action on—Competency—Account based on agreement unenforceable as being in restraint of trade—Account based on agreement not "directly" enforceable under Trade Union Act*, 1871 (*34 & 35 Vict., c.* 31), *s.* 4 (1).

Contract—Illegality—Restraint of trade—Association of manufacturers—Regulation of prices—Restriction against selling to other than five named buyers—

C *Indefinite term of contract.*

By the rules of an association of which the plaintiffs and the defendants were members and which had for its objects the regulation of prices of cased tubes, and the protection of the interests of the members, members whose turnover should fall below a fixed percentage of the trade done by the members were to be compensated by payment out of a fund created by payments in from mem-

D bers whose turnover exceeded their fixed percentage. By an agreement, dated June 24, 1913, and made between five bedstead manufacturers, the plaintiffs, and the association, the plaintiffs agreed not to sell any tubes save as provided by the price lists and rules of the association and only to sell to the five named bedstead manufacturers. The agreement was to continue so long as the association and a society over which the plaintiffs had no control should continue to

E control prices. Between March and November, 1915, the plaintiffs' output of tubes was less than their fixed percentage, and they received from the secretary of the association accounts showing the amount out of the fund to which, under the rules, they would be entitled. On a claim by the plaintiffs to recover that sum under the agreement and the rules,

F **Held:** (i) the rules of the association and the agreement of June 24, 1913, were unenforceable as being unreasonably in restraint of trade, and an action for an account stated based on such an agreement could not succeed; the association, however, was a "trade union" within s. 16 of the Trade Union Act Amendment Act, 1876, and s. 3 of the Trade Union Act, 1871, provided that the purposes of a trade union should not, by reason merely that they were in restraint of trade be unlawful so as to render any agreement void or voidable;

G s. 4 (1) of the Act of 1871 provided that an agreement between members of a trade union concerning the conditions on which they should sell their goods should not be "directly" enforceable by the court, but claiming upon an account stated was not "direct" enforcement of the agreement; and, therefore, the plaintiffs were entitled to succeed.

H **Notes.** The Restrictive Trade Practices Act, 1956 (36 Halsbury's Statutes (2nd Edn.) 931), provides for the registration and judicial investigation of certain restrictive trading agreements, and for the prohibition of such agreements when found contrary to the public interest.

Applied: *McEllistrim* v. *Ballymacelligott Co-op. Agricultural and Dairy Society*, [1919] A.C. 548. Considered: *Thompson* v. *British Medical Association*

I (*N.S.W. Branch*), [1924] A.C. 764. Distinguished: *Palmolive Co.* (*of England*) v. *Freedman*, [1928] Ch. 264. Referred to: *Rawlings* v. *General Trading Co.*, [1921] 1 K.B. 635; *Re Home and Colonial Insurance Co.*, [1929] All E.R.Rep. 231; *Wyatt* v. *Kreglinger and Fernau*, [1933] All E.R.Rep. 349; *Gugenheim* v. *Ladbroke & Co.*, [1947] 1 All E.R. 292; *Alberg* v. *Chandler* (1948), 64 T.L.R. 394; *Tool Metal Manufacturing Co.* v. *Tungsten Electric Co.* (1953), 71 R.P.C. 1.

As to an action on an account stated, see 8 Halsbury's Laws (3rd Edn.) 252 et seq.; and as to agreements contrary to public policy, see ibid., p. 130–136, and 32 Halsbury's Laws (2nd Edn.) 397 et seq. For cases see 12 Digest (Repl.) 642 et

seq., 269 et seq., and 43 DIGEST 19 et seq. As to trade union agreements see 32 HALSBURY'S LAWS (2nd Edn.) 473 et seq., and for cases see 43 DIGEST 96, 97. A

Cases referred to:

(1) *Herbert Morris, Ltd.* v. *Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 Sol. Jo. 305, H.L.; 43 Digest 24, *154*.

(2) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 37 W.R. 756; 5 T.L.R. 658; affirmed [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp. M.L.C. 120, H.L. 12 Digest (Repl.) 263, *2039*. B

(3) *Cocking* v. *Ward* (1845), 1 C.B. 858; 15 L.J.C.P. 245; 135 E.R. 781; 12 Digest (Repl.) 185, *1267*.

(4) *Gozney* v. *Bristol Trade and Provident Society*, [1909] 1 K.B. 901; 78 L.J.K.B. 616; sub nom. *Gosney* v. *Bristol, West of England and South Wales Operatives' Trade and Provident Society*, 100 L.T. 669; 25 T.L.R. 370; 53 Sol. Jo. 341, C.A.; 43 Digest 92, *962*. C

(5) *Swaine* v. *Wilson* (1889), 24 Q.B.D. 252; 59 L.J.Q.B. 76; 62 L.T. 309; 54 J.P. 484; 38 W.R. 261; 6 T.L.R. 121, C.A.; 43 Digest 91, *950*.

(6) *Bishop* v. *Kitchin* (1868), 38 L.J.Q.B. 20; 12 Digest (Repl.) 314, *2424*. D

(7) *North Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A.C. 461; 83 L.J.K.B. 530; 110 L.T. 852; 30 T.L.R. 313; 58 Sol. Jo. 338, H.L.; 12 Digest (Repl.) 338, *2619*.

(8) *Kennedy* v. *Broun* (1863), 13 C.B.N.S. 677; 1 New Rep. 275; 32 L.J.C.P. 137; 7 L.T. 626; 9 Jur. N.S. 119; 11 W.R. 284; 143 E.R. 268; 12 Digest (Repl.) 244, *1852*. E

(9) *Rose* v. *Savory* (1835), 2 Bing. N.C. 145; 1 Hodg. 269; 2 Scott, 199; 4 L.J.C.P. 275; 132 E.R. 57; 12 Digest (Repl.) 655, *5085*.

(10) *Scadding* v. *Eyles* (1846), 9 Q.B. 858; 15 L.J.Q.B. 364; 7 L.T.O.S. 226; 10 Jur. 945; 115 E.R. 1504; 12 Digest (Repl.) 645, *4987*.

(11) *Lampleigh* v. *Brathwait* (1615), Hols. 105; 1 Brownl. 7; Moore, K.B. 866; 80 E.R. 255; 12 Digest (Repl.) 243, *1837*. F

(12) *Williams* v. *Moor* (1843), 11 M. & W. 256; 12 L.J.Ex. 253.

(13) *La Touche* v. *La Touche* (1865), 3 H. & C. 676; 34 L.J.Ex. 85; 11 L.T. 773; 11 Jur. N.S. 271; 13 W.R. 563; 159 E.R. 657; 12 Digest (Repl.) 246, *1878*.

(14) *Flight* v. *Reed* (1863), 1 H. & C. 703; 32 L.J.Ex. 265; 8 L.T. 638; 9 Jur. N.S. 1016; 12 W.R. 53; 158 E.R. 1067; 12 Digest (Repl.) 246, *1882*.

(15) *Wennall* v. *Adney* (1802), 3 Bos. & P. 247; 127 E.R. 137; 12 Digest (Repl.) 245, *1869*. G

(16) *Earl of Falmouth* v. *Thomas* (1832), 1 Cr. & M. 89; 3 Tyr. 26; 2 L.J.Ex. 57; 149 E.R. 326; 12 Digest (Repl.) 142, *893*.

Also referred to in argument:

Wickens v. *Evans* (1829), 3 Y. & J. 318; 43 Digest 13, *71*. H

Collins v. *Locke* (1879), 4 App. Cas. 674; 48 L.J.P.C. 68; 41 L.T. 292; 28 W.R. 189, P.C.; 43 Digest 21, *137*.

A.-G. of Australia v. *Adelaide Steamship Co., Ltd.*, [1913] A.C. 781; 83 L.J.C.P. 84; 109 L.T. 258; 12 Asp. M.L.C. 361; 29 T.L.R. 743, P.C.; 43 Digest 12, *68*.

Osborne v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 27 T.L.R. 289, C.A.; 43 Digest 93, *972*. I

Jones v. *North* (1875), L.R. 19 Eq. 426; 44 L.J.Ch. 388; 32 L.T. 149; 39 J.P. 392; 23 W.R. 468; 43 Digest 14, *75*.

De Mattos v. *Benjamin* (1894), 63 L.J.Q.B. 248; 70 L.T. 560; 42 W.R. 284; 10 T.L.R. 221; 38 Sol. Jo. 238; 10 R. 103, D.C.; 25 Digest 412, *156*.

Russell v. *Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421; 81 L.J.K.B. 619; 106 L.T. 433; 28 T.L.R. 276; 56 Sol. Jo. 342, H.L.; 43 Digest 94, *987*.

A *Hyams* v. *Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 791; 99 L.T. 424; 24 T.L.R. 675; 52 Sol. Jo. 551, C.A.; 12 Digest (Repl.) 220, *1617*.
Jeffreys v. *Evans* (1845), 14 M. & W. 210; 3 Dow. & L. 52; 14 L.J.Ex. 363; 153 E.R. 452; 42 Digest 138, *1335*.

Appeal by the plaintiffs from an order of Low, J.

B The plaintiffs were a limited company carrying on business as manufacturers of "cased tubes" (used mainly in the manufacture of bedsteads) and were members of a society called the Cased Tube Association. The defendants were all the members of the association other than the plaintiffs. The association was regulated by rules, r. 2 of which was:

> "The object of the association shall be the regulation of prices and the taking
C of such action for the protection of the interests of the members as may from time to time be decided upon."

By other rules each member whose output sold during any month was greater than the percentage allowed him under the rules was required to pay into a "pool" the amount of the profits derived from the excess, while a member whose output was
D less than his percentage was entitled to draw from the pool certain amounts, monthly settlements being made. By r. 21:

> "The association terms shall be as stated in the price lists issued from time to time."

Rule 22:

E > "Every member shall charge the basis prices, extras, and discounts as set out in the price list of the association adopted Dec. 23, 1904, and confirmed Jan. 23, 1908, or such other prices as may be fixed upon from time to time by the association in general meeting in the manner herein provided."

By r. 36:

F > "No contracts shall be allowed. No orders may be taken beyond the amount the member can supply in one month from the date order is received, except on the understanding that orders are subject to an alteration of discounts after each month's supply is delivered."

By an agreement dated June 24, 1913, and made between five firms of bedstead manufacturers of the first part, the plaintiffs, the association, and certain guaran-
G tors, the association fixed the percentage of the plaintiffs' output at 6·81 of the whole output of the association, and the plaintiffs agreed

> "not to offer for sale or sell any cased tubes excepting as may be provided from time to time by the price lists and rules and regulations of the association from time to time in force, and, in addition, from the day of the date hereof not to sell or offer for sale nor make delivery of any such tubes to any person, firm or
H company other than the manufacturers, parties hereto of the first part."

The manufacturers undertook not to purchase cased tubes from any other persons other than members of the association. It was further provided that the agreement should be effective and binding upon each of the parties thereto only so long as both the association and a society called the Bedstead Manufacturers' Federa-
I tion should continue to control prices. Between March and November, 1915, the plaintiffs' output of tubes was less than their agreed proportion of the total output, and they received from the secretary of the association monthly accounts showing to how much out of the pool they were entitled, the aggregate of the monthly sums being shown to amount to £958 1s. 7d. They brought the action to recover that amount under the agreement and rules, and they also claimed on an account stated. By their defence the defendants pleaded that the action would not lie on the ground that the rules of the association and the agreement were in restraint of trade and illegal. Low, J., held that the restraints were

unreasonable and contrary to public policy, and that the plaintiffs' money claim could not be upheld, because the restraints went to the root of the contract and to enforce the claim under the agreement would be to assist in carrying out that which was the sole object of the parties—i.e., to restrain and control the trade in a manner wholly unreasonable and tyrannical. For the same reasons the plaintiffs' claim on an account stated also failed. The plaintiffs appealed.

By the Trade Union Act, 1871:

"Section 3. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

"Section 4. Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely (1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed . . . But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

By the Trade Union Act Amendment Act, 1876, s. 16:

"The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the [Act of 1871] had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

Disturnal, K.C., Hogg, K.C., and *Gandy* for the plaintiffs.

Hollis Walker, K.C., and *E. W. Cave* (*P. O. Lawrence, K.C.*, with them) for the defendants.

Cur. adv. vult.

Feb. 4, 1918. The following judgments were read.

PICKFORD, L.J.—The plaintiffs and defendants were members of an association called the Cased Tube Association, which was formed, as stated in its rules, for the regulation of prices and the taking of such action for the protection of the interests of the members as might from time to time be decided upon. Part of the scheme consists of a compensation to those members whose turnover falls below a fixed percentage of the trade by payment out of a pool or fund created by payments into it by the members whose turnover exceeds a fixed percentage. The plaintiffs allege that there is due to them in respect of such compensation a sum of £958 1s. 7d. If the plaintiffs are entitled to recover, the amount is not disputed. The plaintiffs claim this sum as due to them under their contract with the other members, and they also claim it upon an account stated. In the argument before us they also contended that they were entitled to recover the amount as money had and received by the defendants to their use. I do not think we ought to entertain this last claim. It was not pleaded and was not raised at the trial, and would, I think, require evidence in order to show whether it could be maintained which could have been called at the trial. I, therefore, say nothing about it. The defendants' defence is that the transaction was in restraint of trade and void, and, therefore, the plaintiffs cannot recover anything in respect of it. They do not contend that the agreement and rules of the association are unreasonable in the interests of the public, but say that the restrictions imposed by them on the plaintiffs are unreasonable, and, therefore, the agreement and rules are in restraint of trade and void. If they show that they are unreasonable in the interests of the contracting parties this is enough to invalidate them: see per LORD PARKER in *Herbert Morris, Ltd.* v. *Saxelby* (1) ([1916] 1 A.C. at p. 706). The curious result in this

A case is that the defendants are refusing to pay a sum of money to the plaintiffs which they have agreed to pay to them on the ground that the restrictions which they have imposed on the plaintiffs and to which the plaintiffs do not object are unreasonable and oppressive. I think that Low, J., was right in saying that the terms of the rules and the agreement imposed unreasonable restrictions upon the plaintiffs, and were, therefore, invalid as being in restraint of trade. Rules 21 and B 22 place no limit upon the terms that may be imposed upon the members trading and prices, and the rules contain no limitation of the time during which the restrictions are to operate. In the same way the agreement limits the plaintiffs' trading to the five firms mentioned therein, and provides that the arrangement shall continue so long as two bodies continue to exist whose existence is not dependent in any way upon the plaintiffs. In my opinion, therefore, the plaintiffs C cannot recover upon the agreement as it is in unreasonable restraint of trade and the courts will not enforce it.

If, therefore, the plaintiffs can recover at all, it must be upon the ground of an account stated. I think there is evidence of accounts stated in the letters addressed to the plaintiffs by the secretary of the association, of which the letter of May 28, 1915, is a sample:

D

> "Dear Sirs,—I inclose copy of the April, 1915, pool statement. Your index letter is 'K.' From this you will see that your pool adjustment is £119. Deduct: Your payment to the emergency fund, ¾ per cent. on your sales, £62 9s. 4d. Your share of expenses, £3 5s. 11d.—£3 15s. 3d. Received £115 4s. 9d.—Your Faithfully, ERIC L. HEATHCOTE, Secretary."

E Is there material to support an account stated? It is necessary to consider from that point of view the nature of a contract in restraint of trade. Such a contract is not illegal in the sense that it is an offence against the criminal law to enter into it, but the law will not enforce it, and from the nature of the contract no valid claim can arise by virtue of it. I think it is correct to call such a contract void, or, to use the words of LORD HALSBURY in *Mogul Steamship Co.* v. *McGregor, Gow* F *& Co.* (2) ([1892] A.C. at p. 39):

> "As, for example, [contracts made] in restraint of trade; and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all."

It differs, therefore, from such a contract as that in *Cocking* v. *Ward* (3), where the G contract was perfectly valid and good, but could not be directly enforced because of statutory difficulties of proof. I do not think that, where a contract from its nature can give rise to no valid claim, a claim upon it can be used to found an action upon an account stated.

In this case, however, the contract has to be considered in connection with the Trade Union Acts, 1871 and 1876. I think this association was a trade union H within the meaning of those Acts, and that its objects as defined in the rules were in restraint of trade. The agreement between the parties in this case was made, in my opinion, in order to carry out those purposes. Then ss. 3 and 4 of the Trade Union Act, 1871, provide that such a contract shall not be void, but that it shall not be directly enforced. The terms of the legislation are not entirely clear, but I take the effect to be that a contract made by a trade union in restraint of trade is I no longer a void contract upon which no valid claim can arise, but is a valid contract upon which a valid claim can arise, although that claim cannot be directly enforced. I think it must be inferred from ss. 3 and 4 of the Trade Union Act, 1871, that it can be indirectly enforced if there be a means of doing so. The difficulty which I have felt is whether suing in any form for the money due upon a contract is not directly enforcing it, but on the whole I have come to the conclusion that claiming it upon an account stated is not. It seems to me that this follows from the decision in *Cocking* v. *Ward* (3). The contract there could not be directly enforced by reason of the provisions of the Statute of Frauds, but it was held that the amount

could be recovered on a count for accounts stated. I think this conclusion is also supported by *Gozney* v. *Bristol Trade and Provident Society* (4) and *Swaine* v. *Wilson* (5). *Bishop* v. *Kitchin* (6) was cited to us by the plaintiffs as an authority in their favour, and I think if it can be supported to the full extent of the judgment as reported the plaintiffs are entitled to rely upon it. It seems to decide that if there be an agreement imposing an unreasonable restraint of trade upon a person he can, when he has submitted to the restraint, recover upon the contract the amount due to him for such submission, and that where, as in that case and in this, there are periodical payments each such payment may be recovered on the same ground. The case has, so far as I know, never been considered by any court, probably because the person upon whom an unreasonable restraint has been imposed seldom wishes to enforce the agreement imposing it. It is, however, mentioned without comment in text-books as establishing the proposition I have mentioned. The case is very scantily reported, and there may be other reasons for the decision, but for either party to sue upon the contract whether the consideration be executed or not, and not upon a separate cause of action such as an account stated, is, I think, invoking the assistance of the law to enforce that which is by law unenforceable, and is inconsistent with what I think has been decided to be the nature of such contracts as expressed in the words of LORD HALSBURY above quoted. I do not, therefore, rest my decision in any way upon that case. The appeal must, in my opinion, be allowed, and judgment entered for the plaintiffs with costs here and below.

BANKES, L.J.—This is an appeal by the plaintiffs in the action against a decision of the late Low, J. The action was brought to recover the sum of £958 under an agreement dated June 24, 1913, or, alternatively, as upon an account stated. The only point relied upon by way of defence was that the agreement was illegal and contrary to public policy as being in restraint of trade. Low, J., decided the point in the defendants' favour both as to the agreement and as to the account stated.

As long ago as the year 1907 certain cased tube manufacturers at Birmingham formed themselves into an association having for its object the regulation of prices and the taking of such action for the protection of the interests of the members as might from time to time be decided upon. The scheme appears to have been in its broad outlines as follows. Every member had to bind himself to sell only at the same prices. Each member's share of the available trade was fixed at a certain proportion of the whole, and a member in any month either paid into or received from the pool according as his trade turned out to be above or below his fixed proportion for that month. The plaintiffs' claim was in respect of the amounts which they alleged to be due to them from the pool for the months April to November, 1915, both inclusive. The association was governed by certain rules to which it is not necessary to refer in detail. Rule 41 provided that all members of the association should sign a legal agreement binding themselves to the observance of the rules or of any modification thereof. No evidence was given whether this rule was observed in practice or not. The plaintiffs did enter into a written agreement dated June 24, 1913, which is the one upon which this action is based. This agreement goes far beyond anything contemplated by r. 41, and no evidence was given to explain the circumstances in which it came into existence. Judging from the internal evidence afforded by the document itself, it seems to have been called into existence in the joint interests of the Cased Tube Association and another combine or association called the Bedstead Manufacturers' Federation. The peculiar feature of this case is that the defendants do not suggest that either the rules of the association or the terms of the agreement offend against the principles of the common law in being, as from the point of view of the public, in unreasonable restraint of trade, but they say that from the point of view of the plaintiffs themselves they are in unreasonable restraint of trade, and as such illegal and unenforceable.

There is no question that the terms of the agreement are in restraint of trade. As pointed out by LORD PARKER in *Herbert Morris, Ltd.* v. *Saxelby* (1), where that occurs two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. LOW, J., decided that the restraint imposed upon the plaintiffs themselves by the terms of the agreement and by the rules was not reasonable. In the result I agree with the view taken by LOW, J., though I do not agree with all the grounds of his decision. No evidence was given as to the circumstances in which the agreement was entered into, or as to the considerations which induced the parties to bind themselves as they did. Taking the provisions of the agreement merely by themselves it seems to me impossible to say that the restraint which the plaintiffs imposed upon themselves was reasonable, or that the provisions of the agreement are anything but one-sided and unfair. There were four parties to the agreement. Five bedstead manufacturers are the parties of the first part, the plaintiffs are parties of the second part, the Cased Tube Association and its secretary parties of the third part, and Manufacturers' Investments, Ltd., parties of the fourth part. Clause 2 of the agreement is in these terms:

> "In consideration of the company being allowed by the association the percentage hereinbefore referred to, the company agrees not to offer for sale or sell any cased tubes excepting as may be provided from time to time by the price lists and rules and regulations of the association from time to time in force, and, in addition, from the day of the date hereof not to sell or offer for sale nor make delivery of any such tubes to any person, firm, or company other than the manufacturers parties hereto of the first part."

There is no corresponding obligation on the part of the manufacturers to buy from the plaintiffs, but only an obligation to buy from members of the Cased Tube Association. It appears to me upon the face of these provisions that they provided for a state of things which may result in the shutting down altogether of the plaintiffs' manufacture of cased tubes. Whether the plaintiffs anticipated that the result of the manufacturers purchasing from members of the Cased Tube Association other than themselves would be that they would receive in money from the pool the equivalent of the profit they would have made from the sale of tubes themselves I cannot say. I am not entitled to guess. On the face of the agreement it appears to me that the provision contained in cl. 2 is sufficient of itself to compel the court to say that it is not enforceable, even at the instance of the plaintiffs themselves. There are other objections to the agreement which have been urged, particularly the one that there is no limit of time fixed during which the agreement is to remain in force. I am satisfied to rest my judgment on this point on the provisions of cl. 2, so I do not propose to discuss the others.

There remains to be considered the plaintiffs' claim founded upon an account stated. It is, I think, clear that the evidence is sufficient to establish the stating of accounts showing the amounts claimed by the plaintiffs to be due. It was contended for the defendants that it was open to them to rebut the primâ facie liability arising out of the account stated by showing that the debts charged in the accounts were not enforceable on the grounds already discussed. LOW, J., decided against the plaintiffs. At the end of his judgment he disposes of the point in these words:

> "For these reasons I think that the plaintiffs' claim upon an account stated also fails, as the sole basis for the account is the arrangement which I hold to be illegal."

These last words of LOW, J., raise a question which but for the argument of counsel for plaintiffs founded upon the Trade Union Acts might have been of great importance in this case. The question depends upon what the true view is in reference to a contract which offends against the common law rule as being in unreasonable restraint of trade. Such a contract is sometimes spoken of as being an

illegal contract, sometimes as a void contract, sometimes, and as I think more properly, a contract which the law will not enforce: see BOWEN, L.J., in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2) (23 Q.B.D. at p. 619). I think that some day it may have to be decided whether, in a case like the present, where the consideration has been wholly executed by the party setting up the account stated, the other party will be allowed to dispute the original debt on the ground merely that the contract under which the debt was incurred was in unreasonable restraint of the trade of the party suing on the account stated. As reported, it is not easy to understand the ground of the decision in *Bishop* v. *Kitchin* (6). It may be that some such considerations as I have suggested above may have led the court to decide as it did, though no indication of them appears in the report. The point taken by the plaintiffs is based upon the Trade Union Acts, 1871 and 1876. He says, and I think correctly, that the Cased Tube Association is a trade union within the definition contained in s. 16 of the Act of 1876. He then contends that the effect of ss. 3 and 4 of the Act of 1871 is to remove the taint attaching by the common law to the agreement sued on in this action. The point is an ingenious one, but I think that it is sound. The purpose of this trade union must, in my opinion, be judged by what was done in furtherance of its objects, and not by what was stated in its rules. So judged its purpose was in unreasonable restraint of trade. The result under s. 3 of the Act of 1871 is that the agreement sued on is not either void or voidable merely on the ground that it was in restraint of trade. Section 4 of the same Act prohibits any court entertaining any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of certain agreements which are set out in the section. The present proceeding in so far as it is an action based upon accounts stated does not, in my opinion, come within the language of the prohibition. The position of the agreement sued on, therefore, under these Acts is that it is neither void nor voidable, and there is nothing in the Act which prevents the court from accepting the debt created under the agreement as a proper foundation for an account stated. The first kind of agreement described in s. 4 is an agreement between the members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed. The point was not argued whether the agreement sued on came within this description. If it did, the last words in the section appear to indicate that an agreement of this description falls within the provisions of s. 35. However that may be, I think that the provisions of the Trade Union Acts justify a decision in the plaintiffs' favour on so much of the action as relates to the claim on accounts stated. On these grounds I think that the appeal succeeds, and that judgment should be entered for the plaintiffs for the amount claimed with the costs of the action and of this appeal.

SCRUTTON, L.J.—Joseph Evans & Co., Ltd., sued various firms trading as the Cased Tube Association for a share of a pool due to them under an agreement and on an account stated. The defendants replied that the agreement was in restraint of trade, and, therefore, illegal. Low, J., agreed with this contention and dismissed the action. The plaintiffs appeal.

The judgment of the learned judge that no action can be brought on the agreement itself appears to me correct. The Cased Tube Association is composed of members of the cased tube trade, and its rules regulate the conduct of that trade. The plaintiffs are members of the association, and the agreement, to which they and the Cased Tube Association are parties, binds them only to sell their goods in a particular way and to observe the rules of the association. The Cased Tube Association clearly comes within the definition of a trade union in s. 16 of the Trade Union Act Amendment Act, 1876:

> " . . . [a] combination . . . between masters and masters . . . for imposing restrictive conditions on the conduct of [a] trade or business."

If so, the agreement sued on is within the words of s. 4 (1) of the Trade Union Act, 1871:

> "Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods . . ."

In that case, by s. 4 of that Act, nothing in the Act (which has provided in s. 3 that the purposes of a trade union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement) "shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing" such an agreement as above mentioned. The effect of this is that, while an agreement by a trade union which would formerly be void as in restraint of trade, and, therefore, illegal, though not criminally punishable or actionable, is no longer unlawful and void by reason of s. 3, part of the effect of the previous illegality, which is that the courts would not directly enforce the agreement, survives.

The courts would not directly enforce the agreement before this Act, if it contained restraints of trade unreasonable either (i) in the interests of the public, or (ii) in the interests of the parties. As regards the first point, the defendants not unnaturally shrank from saying they had made an agreement against public interest, and did not contend that the restraints were unreasonable in the public interest. As they offered no evidence as to the conditions of the cased tube trade, the court, following the principles laid down by the House of Lords in *North Western Salt Co.* v. *Electrolytic Alkali Co.* (7), was unable to say of its own knowledge that the restraints in the agreement were injurious in the public interest. But the defendants did say the restraints were unreasonable in the interests of the parties—that is, went further than was necessary in the interests of the party for whose protection they were imposed. That party was the defendants themselves, and their position was not very meritorious. Usually the party complaining is the party restrained; but here the party restrained, the plaintiffs, raised no objection to his fetters, and only asked for the agreed price for wearing them, as he had done. The complainant was the party who had received the benefit of the restraints, which he now said was more than he was reasonably entitled to, and, having enjoyed this unreasonable benefit, he used the excess of benefit he had received as a reason why he should not pay for it. I do not hesitate to say that I have struggled against this contention, which seems entirely destitute of merits, but the matter being one of public policy, and not of private demerit, I feel bound to give effect to my opinion that in some respects the agreement and incorporated rules contain unreasonable restraints of trade. It is enough to mention two: (i) The plaintiffs are bound not to sell except to five named firms, who are under no obligation to buy from them, and who may all cease to exist, and this restriction is to continue so long as two trade associations continue to control prices. (ii) There is no power of withdrawal by the plaintiffs from the agreement, a matter which most of the law lords in the *Mogul Steamship Co.'s Case* (2) considered of great importance. I am not so much impressed by a clause which apparently had weight with the judge below, "No contracts shall be allowed." Business men frequently confine the word "contracts" to contracts for forward delivery. Here contracts for a month's supply at a time were allowed, and there is no evidence to enable me to say that in this particular trade such a restriction is unreasonable. For these reasons, while I am always strongly impressed with the view that it is very important from the point of view of public policy to maintain agreements which persons of full capacity have thought fit to make for the conduct of their own business, I think this agreement and the incorporated rules are in restraint of trade and are not made enforceable by action by the provisions of the Trade Union Act, 1871.

The plaintiffs, however, claimed in the alternative on an account stated, for it

appeared that the association sent the plaintiffs monthly statements showing the exact sum they were entitled to receive under their agreement, and it was not alleged that up to the time of the last statement the plaintiffs had not performed all the terms of their agreement, so that any defence on the lines of a breach of a condition precedent could be sustained. It is well established that accounts stated may be sued on as admissions, but are not conclusive, as it is open to examine the debt or consideration in respect of which they are stated. Thus, if there is no consideration, as in an account stated for a barrister's fees: *Kennedy* v. *Broun* (8), or the consideration has failed, or there was an immoral or illegal consideration: *Rose* v. *Savory* (9), or there was a statutory condition precedent to recovery which had not been fulfilled, as the delivery of a solicitor's signed bill: *Scadding* v. *Eyles* (10), the claim on account stated failed. If the consideration was executed, it was not enough to defeat a claim on account stated that an action could not be brought directly for the debt. Thus, in *Cocking* v. *Ward* (3), where B. orally promised to pay A. £100 if A. would surrender a farm to V. and endeavour to induce V. to demise the farm to B., and A. did surrender the farm and induced V. to accept B. as tenant, an action on the agreement for the £100 was held unenforceable by reason of the Statute of Frauds, as the agreement related to an interest in lands, but an action based on an account stated, a subsequent admission of liability by the defendant, succeeded. It was objected that the admission would only serve as an account stated where the debt itself does not appear incapable of recovery. The court rejected this on principle and on authority, but TINDAL, C.J., said (1 C.B. at p. 870):

> "The principle may not perhaps be applicable to cases where it can be shown the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as by those against usury or gaming; but we think it applies to cases where the only objection is that the original debt might not have been recoverable from the deficiency of legal evidence to support it."

As already pointed out, since the Act of 1871 a contract in restraint of trade between members of a trade union is no longer void, but is not directly enforceable. It appears to be what is sometimes called "an agreement of imperfect obligation," and the question is whether executed consideration under such an agreement can be a good consideration for a promise to pay implied from a subsequent account stated. Under the well-known doctrine of *Lampleigh* v. *Brathwait* (11) a past consideration executed on request is a good consideration for a subsequent promise to pay; and this has been held and the promise to pay enforced where the past consideration was executed under a contract which, owing to its conflicting with some rule of law, could not be enforced. The liability to pay a sum admitted to be due under a contract unenforceable by reason of the Statute of Frauds is one instance of this: see *Cocking* v. *Ward* (3). Another instance is the liability before the Infants' Relief Act, 1874, of a person of full age for goods supplied during infancy on an account stated during infancy and ratified after full age, as appears from the judgment of PARKE, B., in *Williams* v. *Moor* (12). The liability of the giver of a promissory note, the consideration for which was that the giver had received money under another promissory note the claim for which was barred by the Statute of Limitations, illustrates the same rule: *La Touche* v. *La Touche* (13). Indeed, though TINDAL, C.J., in *Cocking* v. *Ward* (3) doubted whether the principle would apply in the case of an account stated for money paid in a transaction void under the usury laws, the Court of Exchequer in 1863 in *Flight* v. *Reed* (14) held (MARTIN, B., dissenting) that a bill of exchange given after the repeal of the usury laws, the consideration for it being a previous bill of exchange for money received which could not be sued on as the transaction was void under the usury laws, could be sued on on this principle. POLLOCK, C.B., in giving the judgment of the majority, refers with approval to the learned note to *Wennall* v. *Adney* (15)

(3 Bos. & P. at p. 249), which states the same position. The distinction is between transactions valid but unenforceable owing to some statutory provisions and transactions which the law would either punish as positively illegal or would take no notice at all of as void though not punishable or actionable. A contract, not void but unenforceable under the Trade Union Act, 1871, comes within the first class, and executed consideration under such a contract would under this principle be good to support an account stated. The executed consideration need not be money payment; action or abstention from action at request will do; the past consideration in *Lampleigh* v. *Brathwait* (11) was "riding at his own charges from London to Roiston, when the King was there, and so to and from Newmarket, to obtain pardon for the defendant" for a felony. When, however, the consideration was only executory, and the contract was unenforceable, the principle did not apply: *Earl of Falmouth* v. *Thomas* (16). In that case none of the consideration was pleaded as executed. In the present case the money paid into the pool is divisible each month, and up to the time of the last month's account stated the consideration moving from the plaintiffs—the abstention from trading and observance of the rules, is executed—and the defendants have got the benefit of the pool. A part executed consideration on request appears to me to be in the same position as an executed consideration; the effect of the execution of all that can be executed at the time is not destroyed by the fact that in the future some more remains to be executed.

It remains to consider *Bishop* v. *Kitchin* (6) in 1868. A traveller covenanted not to solicit orders for any person not his employers in the West of England, South Wales, or any district whatever, in consideration of a salary and an annuity. An action was brought for arrears of salary while in the defendants' service, and of annuity when he had left their service. The defendants demurred to the count for the annuity on the ground that the agreement set out was bad as in restraint of trade. The court, COCKBURN, C.J., LUSH, HANNEN, and HAYES, JJ., held that, if it were, as the plaintiff had submitted to the restraint, he could recover the consideration. The case, as far as I can discover, has never been followed or doubted, but is cited in recent text-books without comment. If there were some account stated it would stand on the same footing as *Flight* v. *Reed* (14), the case under the usury laws; but in the absence of such an element I do not understand, with respect to the eminent judges who decided the case, how you can sue on a contract which is, in the language of LORD HALSBURY in the *Mogul Steamship Co. Case* (2),

> "void in restraint of trade, so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all . . ."

unless it is on the ground that the contract in restraint could be severed and the illegal part rejected, which is not the ground in the judgment of the court as shortly reported. It is because the contract in this case is under the Trade Union Act, 1871 (which was not in force when *Bishop* v. *Kitchin* (6) was decided in 1868, and could not have applied in any event to the facts of that case), not void that I feel able to hold that the plaintiffs can recover here on the series of accounts stated contained in the monthly pool accounts.

It was further argued before us that the amount could be recovered as money had and received to the plaintiff's use. This, however, was not pleaded or argued in the court below, and to give a final decision on it would, in my opinion, require more accurate knowledge of facts than we at present possess. I do not, therefore, deal with it. In my opinion the appeal should be allowed, and judgment entered for the plaintiffs for the amount claimed on accounts stated. As the claim on the agreement has, in my opinon, involved no extra costs, I think the judgment should be with costs here and below.

Appeal allowed.

Solicitors: *G. H. Walker & Tree*, for *Moore-Bayley & Co.*, Birmingham; *David Davis & Oerton.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

COLE *v.* DE TRAFFORD

[COURT OF APPEAL (Pickford, Bankes and Scrutton, L.JJ.), May 10, 13, June 17, 1918]

[Reported [1918] 2 K.B. 523; 87 L.J.K.B. 1254; 119 L.T. 476; 62 Sol. Jo. 635]

B

Master and Servant—Duty of master—Exercise of reasonable care not to expose servant to danger by negligence—Safety of premises—Duty to inspect—Domestic premises.

In the absence of special provisions in the contract of employment the law presumes that a servant in entering into the contract undertakes as between himself and his employer to run the ordinary risks which are incidental to the C employment. But the personal negligence of the employer is not one of those risks, and the employer is under an obligation not by such negligence to expose the servant to danger. What amounts to personal negligence on the part of the employer must depend on the circumstances of each case; it is impossible to lay down any general rule which will apply to every case. The employer does not absolutely warrant the servant's safety, and if he has used reasonable care to D secure that safety, he is not liable. With regard to the safety of the premises on which the servant works, the measure of inspection of them depends on their nature and condition. It cannot be said as a matter of law that an employer is under a duty to his servant to have any periodical or other examination of ordinary domestic premises which are apparently in good condition for the special purpose of discovering whether any defects exist which may be a E possible source of danger to the servants employed on the premises. If a custom or practice to have such an examination exists in any district or any particular circumstances, it must be proved by evidence, and the line must be drawn between suggestions of possible precautions and evidence of actual negligence. Where a servant sues his employer for injury caused by a defect in the premises he must show that the employer did not take reasonable care to F remedy the defect, either because he knew of it and did nothing, or because he ought to have known of it and so was negligently ignorant.

Negligence—Res ipsa loquitur—Damage caused by accident by its nature more consistent than not with defendant's negligence.

Per PICKFORD, L.J.: I take the expression res ipsa loquitur to mean that an accident may by its nature be more consistent with its being caused by G negligence for which the defendant is responsible than by other causes.

Notes. In reading the judgments (infra) it should be borne in mind that in 1948 the defence of common employment, before that date open to an employer in an action such as the present, was abolished by the Law Reform (Personal Injuries) Act of that year.

Considered: *Fanton* v. *Denville*, [1932] All E.R. 360. Referred to: *Baker* v. H *James*, [1921] All E.R. Rep. 590; *Easson* v. *London and North Eastern Rail. Co.*, [1944] 2 All E.R. 425; *Deyong* v. *Shenburn*, [1946] 1 All E.R. 226.

As to the duty of a master towards his servants, see 25 HALSBURY'S LAWS (3rd Edn.) 505 et seq.; and as to the doctrine of res ipsa loquitur, see ibid., vol. 23, pp. 77–80. For cases see 34 DIGEST 115 et seq., 194 et seq., and 36 DIGEST (Repl.) I 143–149.

Cases referred to:

(1) *Byrne* v. *Boadle* (1863), 2 H. & C. 722; 3 New Rep. 162; 33 L.J.Ex. 13; 9 L.T. 450; 10 Jur. N.S. 1107; 12 W.R. 279; 159 E.R. 299; 36 Digest (Repl.) 73, *387*.

(2) *Kearney* v. *London, Brighton and South Coast Rail. Co.* (1871), L.R. 6 Q.B. 759; 40 L.J.Q.B. 285; 24 L.T. 913 20 W.R. 24, Ex. Ch.; 36 Digest (Repl.) 146, *774*.

(3) *Pritchard* v. *Peto*, [1917] 2 K.B. 173; 86 L.J.K.B. 1292; 117 L.T. 145; 15 L.G.R. 860; 36 Digest (Repl.) 51, *281.*

(4) *Webb* v. *Rennie* (1865), 4 F. & F. 608; 34 Digest 200, *1635.*

(5) *Murphy* v. *Phillips* (1876), 35 L.T. 477; 24 W.R. 647; 34 Digest 197, *1619.*

(6) *Holmes* v. *Clarke* (1862), 31 L.J.Ex. 356; 9 L.T. 178; 10 N.R. 405; sub nom. *Clarke* v. *Holmes*, 7 H. & N. 937; 8 Jur. N.S. 992; 158 E.R. 751, Ex.Ch.; 34 Digest 194, *1588.*

(7) *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338; 68 L.J.Q.B. 918; 81 L.T. 62; 47 W.R. 680; 15 T.L.R. 468, C.A.; 34 Digest 195, *1590.*

(8) *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 4 Jur. N.S. 767; sub nom. *Bartonshill Coal Co.* v. *Clark*, 6 W.R. 664, H.L.; 34 Digest 126, *971.*

(9) *Crafter* v. *Metropolitan Rail. Co.* (1866), L.R. 1 C.P. 300; Har. & Ruth. 164; 35 L.J.C.P. 132; 14 W.R. 334; 12 Jur. N.S. 272; 8 Digest (Repl.) 95, *630.*

(10) *Wilson* v. *Merry* (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675, H.L.; 34 Digest 211, *1747.*

(11) *Priestley* v. *Fowler* (1837), 3 M. & W. 1; Murp. & H. 305; 7 L.J.Ex. 42; 1 Jur. 987; 150 E.R. 1030; 34 Digest 202, *1647.*

(12) *Hutchinson* v. *York, Newcastle and Berwick Rail. Co.* (1850), 5 Exch. 343; 6 Ry. & Can Cas. 580; 19 L.J.Ex. 296; 15 L.T.O.S. 230; 14 Jur. 837; 155 E.R. 150; 34 Digest 207, *1697.*

(13) *Farwell* v. *Boston and Worcester Railroad Corpn.* (1842), 45 Mass. 49; reprinted 3 Macq. 316.

(14) *Paterson* v. *Wallace & Co.* (1854), 1 Macq. 748; 23 L.T.O.S. 249, H.L.; 36 Digest (Repl.) 219, *1152.*

(15) *Brydon* v. *Stewart* (1855), 2 Macq. 30, H.L.; 34 Digest 194, *1583.*

(16) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 34 Digest 202, *1657.*

(17) *Young* v. *Hoffman Manufacturing Co., Ltd.*, [1907] 2 K.B. 646; 76 L.J.K.B. 993; 97 L.T. 230; 23 T.L.R. 671, C.A.; 34 Digest 210, *1731.*

(18) *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry* v. *Ashton*, 24 W.R. 581; 34 Digest 163, *1274.*

(19) *Brown* v. *Accrington Cotton Spinning and Manufacturing Co., Ltd.* (1865), 3 H. & C. 511; 34 L.J.Ex. 208; 13 L.T. 94; 29 J.P. 744; 159 E.R. 631; 34 Digest 206, *1684.*

(20) *Wigmore* v. *Jay* (1850), 5 Exch. 354; 6 Ry. & Can. Cas. 589; 19 L.J.Ex. 300; 15 L.T.O.S. 206; 14 J.P. 387; 14 Jur. 837; 155 E.R. 155; 34 Digest 208, *1698.*

(21) *Feltham* v. *England* (1866), L.R. 2 Q.B. 33; 7 B. & S. 676; 36 L.J.Q.B. 14; 31 J.P. 212; 15 W.R. 151; 34 Digest 213, *1759.*

(22) *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex. Ch.; 34 Digest 191, *1565.*

(23) *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; 56 L.J.Q.B. 229; 55 L.T. 709; 51 J.P. 404; 35 W.R. 141; 3 T.L.R. 233, H.L.; 36 Digest (Repl.) 130, *667.*

Also referred to in argument:

Southcote v. *Stanley* (1856), 1 H. & N. 247; 25 L.J.Ex. 339; 27 L.T.O.S. 173; 156 E.R. 1195; 34 Digest 208, *1702.*

Watling v. *Oastler* (1871), L.R. 6 Exch. 73; 40 L.J.Ex. 43; 23 L.T. 815; 19 W.R. 388; 34 Digest 204, *1675.*

Scott v. *London Dock Co.* (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 11 Jur. N.S. 204; 13 W.R. 410; 159 E.R. 665, Ex. Ch.; 36 Digest (Repl.) 145, *772.*

Briggs v. *Oliver* (1866), 4 H. & C. 403; 35 L.J.Ex. 163; 14 L.T. 412; 30 J.P. 391; 14 W.R. 658; 36 Digest (Repl.) 146, *773*. A

Chaproniere v. *Mason* (1905), 21 T.L.R. 633, C.A.; 36 Digest (Repl.) 146, *778*.

Leaver v. *Pontypridd U.D.C.* (1911), 76 J.P. 31; 56 Sol. Jo. 32, H.L.; 36 Digest (Repl.) 90, *484*.

Seymour v. *Maddox* (1851), 16 Q.B. 326; 20 L.J.Q.B. 327; 16 L.T.O.S. 387; 15 Jur. 723; 117 E.R. 904; 34 Digest 199, *1628*. B

Burr v. *Theatre Royal Drury Lane, Ltd.*, [1907] 1 K.B. 544; 76 L.J.K.B. 459; 96 L.T. 447; 23 T.L.R. 299; 51 Sol. Jo. 265, C.A.; 34 Digest 210, *1728*.

Griffiths v. *London and St. Katharine Docks Co.* (1884), 13 Q.B.D. 259; 53 L.J.Q.B. 504; 51 L.T. 533; 49 J.P. 100; 33 W.R. 35, C.A.; 34 Digest 204, *1665*.

Appeal by the plaintiff from an order of the Divisional Court (A. T. Lawrence and Shearman, JJ.) on appeal from Bloomsbury County Court. C

C. T. Williams and *Lewis Davies* for the plaintiff.

du Parcq for the defendant.

Cur. adv. vult.

June 17, 1918. The following judgments were read. D

PICKFORD, L.J.—This case has an unfortunate history. The plaintiff was injured while in the service of the defendant, and, so far as appears from the facts before us, would have had an undoubted claim for compensation under the Workmen's Compensation Act. He or his advisers preferred to bring an action at common law, in which it was necessary for him to prove negligence on the part of the defendant. The case was tried in a county court, and a verdict returned for the plaintiff with £100 damages. The county court judge ordered a new trial on the ground that the damages were so excessive that the verdict could not stand. Against this decision the plaintiff appealed and failed ([1917] 1 K.B. 911). The case then came on for a new trial before the same county court judge, and at the end of the plaintiff's case the defendant's counsel submitted that there was no evidence of negligence on the part of the defendant. The county court judge wisely determined to take the opinion of the jury and reserve the point whether there was any evidence proper to be left to them. The defendant's counsel decided to rest his case as to liability on his legal submission, and called no evidence except that of one doctor as to the nature of the plaintiff's injuries. The jury returned a verdict for the plaintiff for £70. The county court judge considered the amount rather too much, but that matter became immaterial, because on consideration he decided that there was no evidence of negligence, and entered judgment for the defendant. The plaintiff appealed to the Divisional Court, where the judges differed in opinion, A. T. Lawrence, J., agreeing with the county court judge that there was no evidence to go to the jury, while Shearman, J., was of an opposite opinion. This appeal was then brought, and it is evident from this statement of the facts that, whatever the final result of embarking on the difficult question of the obligations of a master towards his servant may be, the net amount which in any event could reach the plaintiff's hands would be very small. E F G H

The facts were as follows. The plaintiff had been a chauffeur in the defendant's service for about a fortnight, when one morning as he was opening the garage door from the inside a heavy piece of glass fell from the top of the door on his arm and cut it badly. The glass had been let into a space cut in the top of the door for the purpose of giving light to the garage, and was so fixed as not to open. There was evidence that it was of an unusual thickness and of the kind of glass used for pavement lights, and in consequence did not allow space for a sufficient beading, but that, if the beading which had secured it had been intact, it would have been reasonably safe and would have lasted for a considerable time. In fact, two pieces of the beading had come away, and someone had driven a nail into I

A the door for the purpose of holding the glass in its place. The condition of the putty round the glass showed that it must have been in this condition for a period described as "for some time," "months," and "a considerable time," and was and had been for that time dangerous. The plaintiff had constantly opened and shut the door during the fortnight he had been in the defendant's service, and had from time to time washed the glass by turning a hose pipe on to it. This involved B danger, as it would loosen the glass, and showed that the plaintiff had, as he said, not noticed anything wrong with the glass, which was 8 ft. 5 in. from the ground and could only be examined by the use of a ladder or something of that kind by which to reach it. There was no evidence whether the defendant was owner or tenant of the garage, how long she had been in occupation, who had put in the glass, when the beading had fallen out (except that which has been stated), who C had driven the nail into the door or when it had been so driven, or when the last examination, painting, or repair had been done to the garage. There was also no evidence that the defendant had any knowledge of the state of the glass and door or of the garage in general.

The question we have to decide is whether on those facts there was evidence of negligence on the part of the defendant to go to the jury. This must depend D primarily on the obligation of a master towards his servant, and no difference can arise from the fact that the employer in this case was a woman. A servant has been held to accept many risks of his employment, but he does not accept them all so as to leave the master without any obligation towards him. I think the master's obligation may be expressed in this way. It is an obligation not by his own personal negligence to expose the servant to danger, and what is personal E negligence of the master must depend upon the facts of the particular case. I do not think the obligation can usefully be defined with greater particularity; if it be, that definition will in its turn require explanation, and in the result it will come to the question whether in the circumstances of the case the master had personally failed to exercise reasonable care and skill, i.e., had been negligent. I quite agree with the form of statement of the duty by the learned judges in the F Divisional Court, i.e., to take reasonable care to maintain the premises free from any concealed danger of which she was aware or ought to have been aware; but in order to apply it to any particular case the expression "ought to have been aware" must be explained, and after explanation it seems to me to mean would have known but for the failure to exercise reasonable care and skill, i.e., but for negli- G gence. If, as I think is the case, the only possible suggestion of negligence here is that the defendant failed to secure a sufficient examination or inspection of the premises, that obligation varies according to the subject-matter to be inspected. The measure of inspection required for chains or machinery liable to get out of order by use is different from that required in the case of premises, and in the case of premises the necessary amount of inspection varies according to whether they are of H solid or flimsy construction, and whether they are old and dilapidated, or new and in good condition. As there was no evidence of any knowledge by the defendant of the defect, or any report to her of the loss of the beading or the fixing of the nail, or any evidence that if she had gone to look round the garage she would have discovered the defect any more than the plaintiff himself discovered it, the only question left is whether there was evidence that she negligently failed to secure a I proper inspection of the premises.

It was argued before us that this was a case to which the maxim res ipsa loquitur applies. I take that well-known expression to mean that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and that in such a case the mere fact of the accident is primâ facie evidence of such negligence. This principle may be applicable to a case of master and servant, but clearly it is more difficult of application, because in such a case the nature of the accident must be more consistent with the master's personal negligence than with any other cause.

including among such other causes the negligence of a fellow servant. In the well-known case always cited for this principle of *Byrne* v. *Boadle* (1) the fall of the barrel was more consistent with negligence on the part of the defendant or his servants than with any other cause, but if it had been necessary to show that the barrel fell by the personal negligence of the defendant I do not think the mere fact of the accident would have been evidence of such negligence. In the same way in *Kearney* v. *London, Brighton and South Coast Rail. Co.* (2) the fall of the brick from the bridge was of itself no evidence of personal negligence on the part of the directors, though it might well be evidence of negligence on the part of servants for whom they were responsible to a stranger.

In the present case the nature of the accident itself is not any more consistent than inconsistent with the defendant's personal negligence. But we are not left to draw a conclusion from the accident alone, and have evidence up to a certain point as to how it happened. It happened from a condition of things which had existed for some months not known to the defendant, not discoverable by ordinary observation, as is shown by the plaintiff's own evidence and conduct, and discovered at some unknown time by some unknown person who may or may not have been in the defendant's employment. Evidence was given that "someone should periodically have looked to see if the glass was properly secured," but no evidence was given as to the usual or proper periods at which such premises should be examined, when these premises had last been examined, or whether the condition of the door was such that it must have existed for more than the time which in ordinary and reasonable practice would elapse between one examination and another. It was argued that, as the surveyor gave evidence that the premises should be periodically examined, and as the courts have in several cases stated that examination should be made "from time to time"—e.g., *Kearney* v. *London, Brighton and South Coast Rail. Co.* (2) (L.R. 6 Q.B. at p. 762) the jury were at liberty without any evidence to form their own conclusion whether the defendant had exercised reasonable care and skill in the examination of these premises. I think this contention is wrong. There may be matters so universally known that a jury may act on their own knowledge, but on a matter so varying as the proper measure and periods of inspection of particular premises—a matter on which probably few, if any, of a county court jury have an experience—I think they cannot. I think this is a case to which the words of BAILHACHE, J., in *Pritchard* v. *Peto* (3) are particularly applicable ([1917] 2 K.B. at p. 176):

> "The plaintiff, if he desired to establish the fact that her (the defendant's) ignorance was due to neglect of some reasonable precaution, should have given some evidence to show what precautions are usual and proper for occupiers of houses with projecting cornices to take, and that she failed to take them."

I find that in cases in which the employer has been held liable for non-inspection such evidence has been given: see *Webb* v. *Rennie* (4) and *Murphy* v. *Phillips* (5). There was, in my opinion, on the evidence given in this case, nothing more consistent with the existence of personal negligence by the defendant than with its absence, and, therefore, I agree with the decision of the county court judge and of A. T. LAWRENCE, J. The appeal must be dismissed with costs.

BANKES, L.J.—The question raised by this appeal is whether the county court judge was right in entering judgment for the defendant upon the ground that the plaintiff had given no evidence in support of his case proper to be submitted to the jury. The Divisional Court were divided in opinion, A. T. LAWRENCE, J., holding that the ruling of the county court judge was right, SHEARMAN, J., taking the opposite view. It was obvious from the evidence as to the height of the pane from the ground and the position of the nail that the insecure condition of the pane was not apparent to anyone standing on the ground and looking at the door. The condition of things could only have been discovered by someone making a special examination of the door, or having occasion to mount a ladder for the

purpose of painting the door, or some similar purpose, and so discovering the defect. The plaintiff himself had been in the habit of cleaning the glass with a hose, which was obviously the worst possible thing to do under the circumstances and indicated very clearly that he had never noticed anything wrong with the glass. There was no evidence whether the glass was the glass originally put in when the door was made. I should gather from the evidence given by the surveyor called for the plaintiff that it was. There was no evidence as to when the beading came away or when the nail was inserted. The only witness called to speak to the state of the door was this surveyor, and what he said was this: "Door not constructed to allow sufficient beading," by which I understand him to mean that, having regard to the thickness of the glass used, the door was not constructed so as to allow room for a sufficient beading. He added: "There was originally three-eighths beading, but the side and top were missing when I was there. Someone had put in a French nail at the top corner to steady loose corner of glass. It must have been loose for some time, months, from the appearance of the putty. Pushing the door open might cause the glass to fall. It was in a dangerous condition and had been so for a considerable time."

The question which has been discussed in the courts below and in this court is as to the duty which the defendant owed to the plaintiff in the circumstances disclosed by the evidence. One point is quite clear, namely, that the only duty which the defendant owed to the plaintiff was the duty which the law imposed upon the defendant by reason of the fact that the plaintiff was her servant. Whether the action is founded in contract or in tort, it is well established that in the absence of any special provisions the law presumes that the servant in entering into the contract of service undertakes as between himself and his master to run the ordinary risks which are incidental to the employment. This rule of law places a far-reaching limitation upon the duty which a master owes to his servant. The present is a case in which the contract between the parties contained no special provisions. Unless, therefore, the plaintiff gave some evidence to show either that the risk to which he was exposed was not an ordinary risk incidental to his employment, or that his case fell within some of the recognised limitations upon or exceptions to the rule, the county court judge was right in refusing to allow the case to go to the jury.

So far as the nature of the risk is concerned, I find nothing in the evidence to distinguish the risk to which the plaintiff was exposed from the ordinary risk to which every domestic servant is exposed from accident arising from such causes as the falling of a picture or of a curtain pole, or the breaking of the leg of a chair or a table, due to some defect. All such accidents appear to me to fall within the class of accidents resulting from ordinary risks incidental to the particular employment. Although the risk may in this sense be an ordinary one, yet the case may fall within one of the recognised limitations upon the rule. One only of these limitations need be considered—namely, where the risk is due to the personal negligence of the employer. In such a case the law does not recognise the personal negligence of the employer as an ordinary risk, or one which as between himself and the servant the latter undertakes: see per CROMPTON, J., in the report of *Holmes* v. *Clarke* (6) (31 L.J.Ex. at p. 360) in the LAW JOURNAL. What will amount to personal negligence on the part of the employer must depend upon the circumstances of each case. It is impossible to lay down any general rule which will apply to every case. Some cases are clear, as for instance where the defect which occasioned the injury to the servant was known to the employer, and was known by him to be dangerous, and yet he neither warned his servant nor took any steps to have the defect remedied: see *Williams* v. *Birmingham Battery and Metal Co.* (7). In cases where a master employs a servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks: per LORD CRANWORTH in *Bartonshill Coal Co.* v. *Reid*

(8) (3 Macq. at p. 288); and see *Holmes* v. *Clarke* (6) and *Murphy* v. *Phillips* (5). The rule would, no doubt, apply where a master employed a servant to work in premises which he knew to be dilapidated and consequently dangerous. But, in my opinion, it cannot be said as a matter of law that a master is under any duty to his servants to have any periodical or other examination of ordinary domestic premises, which are apparently in good condition, for the special purpose of discovering whether any defects exist which may be a possible source of danger to the servants employed upon the premises. If a custom or practice to have such an examination exists in any district or under any particular circumstances it must be proved by evidence, and the line must be drawn between suggestions of possible precautions and evidence of actual negligence such as ought reasonably and properly to be left to the jury: *Crafter* v. *Metropolitan Rail. Co.* (9) (L.R. 1 C.P. at p. 304).

In the present case there was, in my opinion, no such evidence. The surveyor called for the plaintiff stated that "someone should periodically have looked to see if the glass was properly secured." I read this statement as an expression of opinion by a person who knew the kind of glass which had been used, and the way in which it had been originally secured, and not as an expression of opinion as to a general duty in regard to the periodical examination of the premises. Even assuming that this is not so, and that the statement amounts to something more than a suggestion of a possible precaution, I do not think that the mere statement of the duty is sufficient without some evidence of the breach of it. The fact that the glass fell is no evidence itself of any breach of the duty. No evidence was given as to the circumstances under which the defendant was in occupation of the garage, or how long she had been in occupation. Even assuming a periodical examination (whatever that loose expression may mean) of the premises was a usual or necessary precaution to take, there was no evidence that the particular period of time had elapsed between the date when the defendant's occupation of the premises commenced and the date when the accident happened. In my opinion, the view taken by the county court judge was correct, and this appeal fails.

SCRUTTON, L.J., stated the facts and continued: It is now firmly established by decisions of the House of Lords—*Bartonshill Coal Co.* v. *Reid* (8) and *Wilson* v. *Merry* (10) (affirming the view taken by the English courts in *Priestley* v. *Fowler* (11) and *Hutchinson* v. *York, Newcastle and Berwick Rail. Co.* (12), and approving the reasoning of SHAW, C.J., in the American case, *Farwell* v. *Boston and Worcester Railroad Corpn.* (13))—that it is an implied term in the contract between master and servant that the master is not liable for any damage to the servant by the negligence of his fellow servants however highly placed in superintendence. But it is also now well established that the master is liable for his own negligence; that, though he is not liable for the negligence of fellow servants, he is bound to use reasonable care to select those fellow servants, and is liable if he fails to do so and the negligence of the incompetent fellow servant causes damage; and that he is bound to use reasonable care to provide safe premises and appliances for his servant to work in and with, and to use reasonable care to keep them safe: see the two decisions of the House of Lords in *Paterson* v. *Wallace & Co.* (14) and *Brydon* v. *Stewart* (15), the statement of LORD HERSCHELL in *Smith* v. *Baker* (16) ([1891] A.C. at p. 362), and the judgment of KENNEDY, L.J., in *Young* v. *Hoffmann Manufacturing Co., Ltd.* (17) ([1907] 2 K.B. at p. 656). The master does not absolutely warrant safety, and if he has used reasonable care to appoint a competent person to inspect he is not liable to his servant for the negligence of such an inspector. But if he knows of defects and does not remedy them or warn the servant he is liable; and if he ought to know of defects by inspection "from time to time," to use a phrase used by several authorities, KELLY, C.B., in *Murphy* v. *Phillips* (5) (35 T.L.R. at p. 478), BLACKBURN, J., in *Tarry* v. *Ashton* (18) (1 Q.B. at p. 319), and KELLY, C.B., in *Kearney* v. *London, Brighton and South Coast*

Rail. Co. (2) (L.R. 6 Q.B. at p. 762), he is liable if, by failure himself to inspect or to take reasonable care to appoint a competent person to inspect, he does not discover a defect which would have been discovered by reasonable inspection. This does not mean continuous inspection; inspection at reasonable intervals and in a reasonable way is sufficient; and in the cases in which such a liability has been enforced evidence has been given of the kind of precautions to be taken. Thus in *Webb* v. *Rennie* (4), in 1865, where a servant was injured by the fall of a scaffold pole, which had rotted underground, COCKBURN, C.J., charged the jury as follows (4 F. & F. at p. 612):

> "The law upon the subject up to a certain point was clear—viz., that where a particular service necessarily involves a certain amount of danger, the servant who engages in the employment must submit to the risks attendant upon it in the course of its ordinary conduct and management; but that, on the other hand, the servant has a right to expect that he shall only be exposed to the ordinary risks of the employment, and that the machinery or apparatus about which he is to be employed, and out of which danger arises, shall be attended to with reasonable care, to ensure its being in a fit state to be worked without undue or extraordinary danger to those employed in or about it; and although in general an employer was not liable unless he knew of the danger, yet it was his business to know if, by reasonable care and precaution, he could ascertain whether the apparatus or machinery was in a fit state or not. It was not enough, therefore, that the master did not know of the danger if, by reasonable care, he might have known, and if, reasonably, he ought to have known, and to have taken the proper means of knowing. It followed that, although he would not be liable merely on account of the negligence of his servants, yet it was his duty either himself to take the proper means of knowing of the danger, or to employ some competent person to do so . . . all that could be reasonably expected of him would be that he should employ some competent person from time to time to examine it. The master must either ascertain the state of the machinery or apparatus himself, or employ some competent person to do so; and if he did employ such a person and a workman was injured in consequence of that person's neglect of his duty in that respect, the master would not be liable to one of his servants for such negligence of a fellow servant in the particular matter."

In that case evidence was given on each side as to the time for which poles buried in the ground might remain sound, so that they need not be inspected. In *Murphy* v. *Phillips* (5), in 1876, where a servant was injured by the breaking of a defective chain, evidence was given as to well-known methods of testing chains, none of which had been used, and it was held that it was the duty of the master to have the chains used in his business properly and duly examined and tested from time to time. In *Brown* v. *Accrington Cotton Spinning and Manufacturing Co., Ltd.* (19), a person erecting premises was held not liable to a workman on the premises by reason of a defect in the construction of the buildings, unless he personally interfered or appointed a negligent superintendent with knowledge of his incompetency.

In the present case a servant sues his employer for damage caused by a defect in the premises. He must show that the employer did not take reasonable care to remedy the defect, either because she knew of it and did nothing, or because she ought to have known of it and so was negligently ignorant. Here it is not suggested that the employer knew of the defect. Was there evidence that she ought to have known of it? For this purpose, if he has delegated the duty of inspection to a person selected with reasonable care, he will not be liable for that person's failure to discover the defect, or to inform the master if he has discovered the defect: per COCKBURN, C.J., in *Webb* v. *Rennie* (4). This ruling of the Lord

Chief Justice appears to be in accordance with the authorities. Thus, in *Wigmore* v. *Jay* (20) a master who had appointed a competent person to construct a scaffolding, and then employed a workman to work on the scaffolding, was held not liable for an accident caused to the workman by the foreman having negligently used an unsound pole in the scaffolding. So in *Wilson* v. *Merry* (10) the employer was held not liable, where a foreman had negligently constructed a platform in a mine making the mine unsafe through defective ventilation, to a workman subsequently employed and injured by an explosion caused by such defective ventilation. In *Feltham* v. *England* (21) a similar ruling was given in the case of a defective brickwork. The master's obligation, if he knows or ought to have known of danger, is limited by the rule by which he is not liable for the negligence of fellow workmen of the injured man. Knowledge is not imputed to him because a fellow workman knew and negligently did not remedy or ought to have found out danger and negligently did not discover it. The negligence must be personal negligence of the employer. In this respect it appears to me that the liability of a master to his servant is narrower than the liability of invitor to invitee as stated in *Indermaur* v. *Dames* (22), the effect of which decision the Divisional Court adopt as the measure of liability in this case. The master against whom it is alleged, not that he knew, but that he ought to have known, will succeed unless it is shown that he had not made or caused to be made an inspection, when by the practice of reasonably careful householders he ought by himself or his servants to have inspected; and even then if he took reasonable care to appoint a person to inspect, who nevertheless by negligence did not discover, or remedy, or report, he will not be liable to his injured servant for injuries caused by this negligence of the fellow servant.

It is said here that res ipsa loquitur. The accident does talk, but all it appears to me to say is that there was a defect in the premises of some standing, which would have been discovered by reasonable inspection when that inspection was made; and that someone unknown did discover it, and applied an improper and imperfect remedy. I do not think it is an illegitimate inference to find that the person who discovered it was a servant of the person who was then in occupation of the premises. This the accident seems to me to inform us. It does not inform us how long the defendant has been in possession of the premises, or whether the person who put the nail in it was a servant of the defendant or not. It does not inform us whether the defendant has been in possession so long that according to the practice of reasonably careful people she would have examined, or caused to be examined, this window (which is not a window made to open) for latent defects. For I do not know of any obligation on a new occupier entering premises apparently free from defect to examine the whole premises for latent defects, either immediately on entry, or on the entry of each fresh servant. And I do not think a county court jury, who are not as a rule people who keep motor cars, are entitled to find without evidence what is the ordinary practice as to examination of a garage. It appears to me that, while the accident tells me something, it leaves untold a state of things which, according to the true facts, may make or may not make the defendant liable. And to prove a state of facts consistent with liability or non-liability does not support the plaintiff's case—*Wakelin* v. *London and South Western Rail. Co.* (23), where the jury had seen the level crossing on which the man was found and the curve approaching it, but their verdict was set aside. I have come to the conclusion that the county court judge was right in entering judgment for the defendant on the evidence as given at the second trial, but with some regret. For I think one or two judicious interrogatories, or a little more evidence at the trial, might have turned the scale the other way. The plaintiff has, however, his compensation under the Workmen's Compensation Act, and I am sorry he was not content with this instead of being induced to enter on legal proceedings which were more likely to benefit his legal

advisers than himself, and which have resulted disastrously to him. One may regret that the decision in *Priestley* v. *Fowler* (11) was ever given, but it is not, in my view, possible for the Court of Appeal now to disturb it.

Appeal dismissed.

Solicitors: *Berry Tompkins & Co.*; *Eardley Holt, Lightly & Slater.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re STABLE. DALRYMPLE *v.* CAMPBELL

[PROBATE, DIVORCE AND ADMIRALTY DIVISIOV (Horridge, J.), October 25, November 8, 1918]

[Reported [1919] P. 7; 88 L.J.P. 32; 120 L.T. 160]

Will—Soldier's Will—Oral declaration—Proof of intention to make will unnecessary—Knowledge of power to dispose immaterial—Wills Act, 1837 (*7 Will., 4 & 1 Vict., c.* 26), *s.* 11.

In order to establish the validity of a soldier's will it is not necessary to prove that the testator knew either that he was making a will, or that he had the power to make a will by word of mouth, or, if an infant, that he had the power to dispose of his property.

The deceased, while under orders to leave for France, said to the plaintiff, in the presence of an independent witness: "If I stop a bullet everything of mine will be yours."

Held: the words used by the deceased were deliberately intended to give expression to his wishes as to what should be done with his property in the event of his death and constituted a valid will.

Notes. Followed: *Godman* v. *Godman*, [1919] P. 229. Applied: *Selwood* v. *Selwood*, [1920] All E.R.Rep. 413. Considered: *Re Wingham*, [1948] 1 All E.R. 208; *Re Spicer, Spicer* v. *Richardson*, [1949] 2 All E.R. 659. Referred to: *In the Estate of Beech, Beech* v. *Public Trustee*, [1923] P. 46.

As to informal and nuncupative wills, see 16 HALSBURY'S LAWS (3rd Edn.) 178, 179; and for cases, see 39 DIGEST 336. For Wills Act, 1837, s. 11, see 26 HALSBURY'S STATUTES (2nd Edn.) 1335.

Probate Action in which the plaintiff, Miss B. M. Dalrymple, propounded a declaration by the deceased infant, Second Lieutenant R. C. Stable, as a nuncupative will. The defendant was the maternal grandmother and next of kin of the deceased. On July 6, 1917, the defendant, who was then under orders to leave for France, said to the plaintiff, in the presence of a Miss Tawney, "If I stop a bullet everything of mine will be yours." He was killed in action on Oct. 9, 1917. The remaining facts appear in the judgment.

Sir Ernest Pollock, K.C., and *Bayford* for the plaintiff.

Sir Ellis Hume-Williams, K.C., and *Stuart Bevan* for the defendant.

Cur. adv. vult.

Nov. 8, 1918. **HORRIDGE, J.**—It has now been proved before me that Mr. Stable received his orders to leave for France on June 30, 1917, and it was not disputed that from the time of receiving such notice he would be a soldier on actual military service for the purpose of s. 11 of the Wills Act, 1837. The plaintiff alleges that on two occasions Mr. Stable made statements which are, in effect, a soldier's will. On June 22, 1917, he said to her in a garden: "If anything happens to me and

I stop a bullet, everything of mine will be yours," and on July 6, 1917, she states that at the house of Miss Tawney, who in this respect confirms her, he said: "If I stop a bullet everything of mine will be yours." This conversation of July 6 was referred to between the plaintiff and Mr. Stable after they had left Miss Tawney's house. She then said to him: "I wish you would not speak of such things to outside people." He replied: "Well, you see, if anything happens to me and there is a row and grannie gets fussed, Miss Tawney will be able to back you up."

In my view it is not necessary, in order to establish the validity of a soldier's will, to prove that he knew that he was making a will, or had the power to make a will, by word of mouth. The statement made by Mr. Stable must be meant in the sense that he intended deliberately to give expression to his wishes as to what should be done with his property in the event of his death. The conversation which took place after he had left Miss Tawney's shows that the expressions which he had previously used in Miss Tawney's presence were not made at random, but deliberately. I regard the letter of Aug. 9, not as a will in itself, but as strong corroborative evidence that Mr. Stable had previously expressed his wishes on July 6. I think the following passage refers to the expression of those wishes:

> "My Treasure,—As regards me, you know all will be yours when we are married, in stages, only, as I'm not going to give it you in a lump, but as surprises now and again. So, supposing—I hate saying so, as I know far too well I shall get killed—but in an extreme case, darling, it will be yours a little sooner perhaps."

On behalf of the defendant it was contended that as Mr. Stable knew from the conversations which he had with his solicitor that he would not be entitled to receive his property until he was twenty-one, he never intended to dispose of it. This argument does not appeal to me, as he had a vested interest in the property, which he could dispose of if he wished. I think that the expression "If I stop a bullet everything of mine will be yours," which was used by him on July 6, constitutes a good will, and I pronounce for probate of the will in these words, as I accept the plaintiff's and Miss Tawney's evidence that this was the expression he used.

Solicitors: *Bircham & Co.*; *Biddle, Thorne & Co.*

[*Reported by* G. C. Tyndale, Esq., *Barrister-at-Law.*]

Re HOLLINS. HOLLINS *v.* HOLLINS

[Court of Appeal (Swinfen Eady and Bankes, L.JJ., and Eve, J.), March 14, 15, 1918]

[Reported [1918] 1 Ch. 503; 87 L.J.Ch. 326; 118 L.T. 672; 34 T.L.R. 310; 62 Sol. Jo. 403]

Trustee—Investment—Ascertainment of capital sum required to produce annuity —Ascertainment by court—Ascertainment on basis of investment in Consols.

Where the court is asked by trustees to ascertain the capital sum required to produce a certain yearly income the established rule of the court is to ascertain the sum on the basis of an investment in Consols, and not on the basis of investment in any other government security such as War Loan, Consols being the security which is the most permanent and the least likely to be redeemed.

Rule in *Prendergast* v. *Prendergast* (1) (1850), 3 H.L.Cas. 195, followed.

By her will the testratrix bequeathed to trustees appointed by the will "such a capital sum as will by the annual income thereof at the time of appropriation or investment produce, after deduction of income tax, a yearly income of £1,000" in trust for D. on her attaining the age of twenty-five. The testatrix also bequeathed a number of legacies to other legatees. The will authorised the trustees to invest in any securities authorised by law, or in a wide range of other securities set out in the will. The estate was insufficient to satisfy all the legacies and the trustees, not wishing to exercise their discretion to invest, took out an originating summons asking the court to determine how the capital sum of D.'s legacy was to be ascertained, i.e., whether on the basis of investment in Consols, four per cent. War Loan or in any other investment. Investment in Consols would have caused greater deficiency in the estate than investment in War Loan.

Held: under the settled rule of the court D. was entitled to have the capital sum of her legacy ascertained on the basis of investment in Consols.

Notes. Considered: *Re Nicholson's Will Trusts*, *Ortmans* v. *Burke*, [1936] 3 All E.R. 832. Followed: *Re Thomas*, *Public Trustee* v. *Falconer*, [1945] 2 All E.R. 586. Referred to: *Re Viscount Rothermere*, *Mellors and Basden & Co.* v. *Coutts & Co.*, [1944] 2 All E.R. 593; *Re Jones*, *Midland Bank Executor and Trustee Co.* v. *League of Welldoers*, [1950] 2 All E.R. 239.

Cases referred to:

(1) *Prendergast* v. *Lushington* (1846), 5 Hare 171, L.C.; affirmed sub nom. *Prendergast* v. *Prendergast* (1850), 3 H.L.Cas. 195; 14 Jur. 989; 10 E.R. 75, H.L.; 43 Digest 930, *3677*.

(2) *Hicks* v. *Ross* [1891] 3 Ch. 499; 60 L.J.Ch. 853; 65 L.T. 200; 40 W.R. 172; 39 Digest 193, *828*.

Also referred to in argument:

Hill v. *Rattey* (1862), 2 John & H. 634; 70 E.R. 1212; sub nom. *Hill* v. *Potts*, 31 L.J.Ch. 380; 5 L.T. 787; 8 Jur. N.S. 555; 10 W.R. 439; 39 Digest 139, *329*.

Appeal from an order of Astbury, J.

By her will, dated Oct. 7, 1914, the testatrix, Dorothea Louisa Hollins, after appointing the plaintiffs her executors and trustees, bequeathed to them free of duty "such a capital sum as will by the annual income thereof at the time of appropriation or investment produce, after deduction of income tax, a yearly income of £1,000 in trust for my niece Dorothea Louisa Hollins . . . on her attaining the age of twenty-five." There were gifts over if Dorothea should not attain a vested interest. Dorothea was born on Aug. 29, 1905, and would have attained the age of 25 in 1930. The testatrix also gave a number of pecuniary

legacies to other legatees. The will authorised the trustees to invest any monies liable to investment under the will in any securities authorised by law for the investment of trust funds, or in a wide range of other securities set out in the will. The estate of the testatrix was insufficient to pay all the legacies in full. Accordingly, the trustees took out an originating summons to determine whether on the true construction of the will they ought forthwith to invest in Consols or four per cent. War Loan or any other and in what manner such a capital sum as would by its annual income produce, after deduction of income tax at the rate in force at the date of such investment or at any other and what rate, the yearly sum of £1,000 given to the legatee Dorothea Hollins. If the investment were made in Consols there would have been a greater deficiency than if it were made in War Loan and each legacy would, therefore, have had to abate more extensively.

For the legatee, Dorothea Hollins, it was contended that where trustees applied to the court for direction as to investment the court had not the same discretion as when funds were under its own control and were bound to order the sum to be invested in Consols. The summons was adjourned into court and heard by ASTBURY, J., who directed that the capital sum be invested in four per cent. War Loan. The legatee, Dorothea Hollins, appealed.

Jenkins, K.C., and *G. R. Northcote*, for the legatee Dorothea Hollins.
Frank Russell, K.C., and *Owen Thompson* for the residuary legatees.
G. M. T. Hildyard for a pecuniary legatee.
Fairfax Luxmoore for other daughters of William Hollins.
H. H. Slesser for other parties interested.
W. R. Sheldon for the trustees of the will.

SWINFEN EADY, L.J., stated the facts and continued: We are told that having regard to the attitude adopted by some of the legatees, the trustees were not desirous of exercising any discretion vested in them by the will. That was the position upon the date when the originating summons was issued, and that was the position that they have taken up in court. They leave it to the court to say what under the circumstances ought to be done with regard to determining the amount of the capital of the legacy.

The learned judge in the court below has determined, according to the language of the order that has been made upon the originating summons dated May 4, 1917,

> "that upon the true construction of the said will and in the events which have happened the plaintiffs ought forthwith to invest in four per cent. War Loan 1929-1942 income tax compounded such a capital sum as will by its annual income produce at the time of such investment a yearly sum of £1,000."

The form of the order was, perhaps, conduced by the form in which the originating summons was drawn which refers to the investment. But the point to be determined is not the mode in which the legacy was to be invested. The point to be determined is how is the amount of the capital given by this legacy to be determined. The learned judge in the court below in his judgment, after directing this investment at 4 per cent., put it in this way. He said:

> "It is contended that what the court does, and is authorised to do, with regard to moneys actually paid into court cannot be done with regard to a direction of investment by trustees in such a case as the present. The matter is one of extreme importance as to whether the court ought in a case like the present to exercise a different method of procedure or a different degree of care as to investment to that which it adopts and follows with regard to the investment of sums committed to its care."

That is to say, with regard to sums under the control of the court.

In my opinion, that is altogether an erroneous way of regarding the question which has to be determined here. It has nothing to do with the different modes of investing cash under the control of the court. The point for decision is how much

money is the capital sum which is given as a contingent legacy to Dorothea? She has a capital sum, and it is such a capital sum as will by the annual income thereof at the time of the appropriation yield the yearly income of £1,000. How is that sum to be ascertained? In my opinion, the rule of the court is settled, and has long been settled, and, if not before, it was certainly settled by *Prendergast* v. *Lushington* (1) affirmed on appeal, sub nom. *Prendergast* v. *Prendergast* (1), which in its facts is indistinguishable from the present case. In that case there was a gift in these words: "I give and bequeath to my trustees hereafter named so much of my personal estate and effects as at the time of my decease shall produce the clear annual income of £1,500." It is to be observed that there was no gift of an annuity. The trustees were given a capital sum, and it was to be ascertained in the manner directed by the will. It was to be so much of the estate and effects as at the time of the testator's decease should produce the clear annual income of £1,500. That was the description of the gift. Then the fund so arrived at was to be invested, the annual income paid to the widow for life, and upon her death the fund was to fall back into residue and was to be divisible between the testator's children. So the widow only took an interest for life; she did not take an annuity. The will in terms provided that after the investment, if the income had either increased or decreased, as the case might be, the widow was to have the income of the fund, such as it was, and then on her death the fund was to go back into residue. The great point of the case really was, and the first point really was, whether the capital bequest was only to be satisfied by selecting an appropriate portion of the investments of which the testator was possessed at the time of his death (they are fully set out in the report), and it was said that the court had no power to convert or to direct the conversion of those investments with a view of ascertaining the capital sum to be provided, or to refer to any other mode of investment as a measure of ascertaining the capital sum. It was insisted that the sum must be provided out of the investment subsisting at the testator's death and that there was only a power to appropriate. There was some foundation for that argument in the language of the will. But it did not prevail, and, that argument having been got rid of, WIGRAM, V.-C., dealt with the case in this manner. He said:

> "However the case might have been if the trustees had acted on their own responsibility, the court would only execute the trusts of the will by directing the sale and investment in Consols of a sufficient part of the trust property to provide for the annuity to the widow."

So that the amount of the capital sum to be set aside was to be ascertained by reference to the amount of money necessary to buy Consols to produce the given income.

The Vice-Chancellor having decided that the case went on appeal before LORD COTTENHAM, L.C., when he affirmed the decision of the Vice-Chancellor, and then, under the circumstances mentioned in the report, there was a further re-hearing before the Lord Chancellor. It was again argued and he again affirmed his previous decision and that of the Vice-Chancellor. After that the case was taken to the House of Lords, and, as reported in 3 H.L.Cas. 195, there is a little slip in the headnote, because it refers to the gift as an annuity, which it was not strictly. LORD BROUGHAM said this (3 H.L.Cas. at p. 218):

> "The question arising in this case is of importance, from accidental circumstances, to the parties; and it is also important to the law as administered in courts of equity,"

and then he entertained no doubt. He said (ibid.):

> "First of all, let me state the principle which the concurrent authorities of the case and the known course of proceedings in our courts of equity have established. If a person leaves the disposition of his property after his decease to

trustees, and, they declining or neglecting to act, the aid of the court is required, the court will not as a matter of course, exercise the discretion with which the trustees were invested, but will follow its own established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding."

Then he considered the authorities and he said (ibid. at p. 222):

"I take it, then, to be quite clear that the discretion was vested in the trustees. It is equally certain that they declined to exercise that discretion . . . Now, how is the court to act? . . . Here the court can exercise no discretion as to the investment of the property in one stock rather than in another. The rule of the court is to invest in the three per cents. I agree with LORD COTTENHAM in holding that the testator, at all events, contemplated this as possible; indeed, the rule of the court so established must be regarded as known to all, and all must be understood to be aware that if trustees whom they appoint shall decline to act, the court, acting, will follow its known rule. In this case the testator gave the trustees a discretion which they declined to exercise, and it has devolved on the court, which has no choice, as to the mode and manner of executing it, as regards the premises."

Applying that statement to the present case, whatever discretion there was vested in the trustees by the will the trustees declined to exercise it, and therefore there is no question before us as to whether the trustees, in exercise of any discretion vested in them, could or could not have appropriated this four per cent. War Stock. No such question arises before us. That being so, what is the established rule of the court now in arriving at the capital sum? I am of opinion that the established rule is this: The court selects as the basis for ascertaining the amount of capital money bequeathed by the will that government security which is the most permanent and the least likely to be redeemed, and that is Consols. What the learned judge in the court below has done in the present case is this. He has measured the amount given to the legatee by reference to a stock which is at present about par and which is redeemable at par, or liable to be redeemable at par, at a date before this legatee can attain a vested interest under the will. Being born in the year 1905, and the legacy vesting on her attaining twenty-five, it would not vest before the year 1930, and this four per cent War Loan is liable to be redeemed in the year 1929. In my opinion that is not the proper measure or proper rule to apply.

In these circumstances I am of opinion that the learned judge in the court below, in measuring the extent of the legacy by the amount required to buy four per cent. War Loan Stock to produce the yearly income in question, has departed from the settled and known rule of the court, and that that rule exists to-day as when *Prendergast* v. *Lushington* (1) was decided in 1850. I think it first of all came before the courts in 1840, and then was heard in various stages until it was ultimately disposed of in 1850. The legatee here is entitled to have the capital sum ascertained by reference to the sum of money required to purchase Consols to produce, after deduction of income tax at the rate current at the time of appropriation, a yearly income of £1,000. For these reasons I am of opinion that the appeal must be allowed and the order below discharged; and the order made by this court should be put into the proper form and not in the way in which the order was drawn up in the court below. The costs must be paid in the same way as in the court below, except that the residuary legatees cannot be allowed any costs.

BANKES, L.J.—I agree, and what has influenced my judgment more than anything else is the fact that the investment which has been selected by the learned judge in the court below is one which may be redeemed in 1929 and must be redeemed in 1942.

A **EVE, J.**—With all respect to the learned judge in the court below, I cannot help feeling that the true nature of the first question in the originating summons which he was called upon to decide was obscured by the introduction of extraneous and irrelevant considerations. I cannot appreciate how the answer to the question of construction arising on this will depends in any way on the practice of the court with reference to the investment of money under its control. It is, in my view, a B misapprehension to treat this as a case wherein the court is called upon to determine any mode of investment or to exercise any jurisdiction involving, or calculated to bring about, a different mode of procedure, or a different degree of care, as to investment than that which it adopts and follows with regard to the investment of funds committed to its care.

The short point is how the quantum of the contingent legacy for the benefit of the C first-named defendant should be ascertained, a point which involves one, or at most two, plain questions: First, has the court, now that the trustees have defintely refused to exercise a discretion conferred upon them by the will, the same discretion; and, if not, is there any rule on which the court ought to act in determining the quantum of the legacy? It has been contended, and I am content to accept the argument as well founded, that the trustees had an absolute and unfettered dis- D cretion, and could have satisfied the legacy by the appropriation of any part of the estate yielding an income at the date of appropriation of £1,000 plus income tax at the rate then current. It is suggested that the court has the same absolute and unfettered discretion. I gather that ASTBURY, J., thought not. He apparently would limit the discretion of the court to securities from which the moneys under the control of the court can be invested. Well, be it so. The moment it is admitted E that the discretion vested in the court is different from that vested in the trustees, what becomes of the argument that the only operation of the refusal of the trustees to exercise the discretion is to transfer that discretion to the court? It has not, in my opinion, any such operation, and, if not, the only question which remains is: Can the court assume to frame for itself a discretion which is not to be found in F the will, and for which there is no authority? In other words, is there or is there not any such rule as to the principles upon which the court ought to act in ascertaining the quantum of such a legacy as we have here to deal with? I think there is. *Prendergast* v. *Lushington* (1) seems to me to be conclusive on the point. Further, although I fully appreciate that this is not an annuity, a gift of a capital sum sufficient to produce an annual income of a fixed amount is, in my opinion, so G far equivalent to a legacy of a perpetual annuity of that fixed amount as to make the rule applicable to the redemption of a perpetual annuity a matter to which a material consideration can properly be given in determining how the quantum of the capital sum ought to be ascertained.

Subject to certain well-known exceptions, the legatee of a perpetual annuity can require to have the capital value paid to him in lieu of receiving the annuity de H anno in anno. And it is well-settled practice that the price to be paid for such an annuity is such a sum as, at the price of the day, will produce two and a half per cent. government stock sufficient to produce the annuity, excluding any charge for brokerage: see *Hicks* v. *Ross* (2). It is true that in that case the annuity was adequately secured and that in the present case we are dealing with an estate said to be insufficient to provide all the annuities and legacies bequeathed by the will. The I only effect of this could be to reduce the sum given to the legatee. It cannot and ought not to alter the principles on which her aliquot share of the deficient estate is to be ascertained.

I think, therefore, that the judgment appealed from was wrong, and that, in lieu of the first declaration in the order under appeal, a declaration which as it stands does not even give effect to what ASTBURY, J., decided, we ought to declare the amount of the legacy bequeathed in trust for the defendant Dorothea Louisa Hollins contingently on attaining the age of twenty-five years ought to be arrived at by

ascertaining what sum invested in two and a half per cent. Consols would at the date of the investment produce, after deduction of income tax, an annual income of £1,000.

Appeal allowed.

Solicitors: *Boodle, Hatfield & Co.; Field, Roscoe & Co.*, for *Enfield & Son*, Nottingham; *Kenneth Brown, Baker, Baker & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

T. & J. HARRISON *v.* KNOWLES AND FOSTER

[COURT OF APPEAL (Pickford, Warrington and Scrutton, L.JJ.), February 5, 6, 1918]

[Reported [1918] 1 K.B. 608; 87 L.J.K.B. 680; 118 L.T. 566; 23 Com. Cas. 282; 14 Asp.M.L.C. 249]

Misrepresentation—Innocent misrepresentation—Damages—Rescission of contract—Sale of goods—Ships—Inaccurate particulars as to dead-weight capacity—Particulars not part of subsequent contract.

The defendants gave particulars of two steamships to the plaintiffs which contained statements as to the dead-weight capacity of the ships. The plaintiffs agreed to buy the ships, and a memorandum of the contract, which contained no reference to the particulars, was signed. The plaintiffs subsequently discovered that the statements in the particulars as to the dead-weight capacity were wrong, and they claimed damages on the ground that those statements were a condition of the contract, or, in the alternative, a warranty.

Held: the particulars formed no part of the contract, and the defendants were not liable.

Per SCRUTTON, L.J.: A statement may form part of a contract which the party making it promises to be true, or it may be an innocent representation of fact which he does not promise to be true, but which, if it was untrue in a material particular and formed part of the inducement to enter into the contract, may give rise to a claim to rescind, but not to a claim for damages.

Notes. Referred to: *Leaf* v. *International Galleries*, [1950] 1 All E.R. 693; *Long* v. *Lloyd*, [1958] 2 All E.R. 402.

As to the distinction between a representation and a contractual condition or warranty, see 26 HALSBURY'S LAWS (3rd Edn.) 821; and for cases see 35 DIGEST 53. As to conditions and warranties, see 34 HALSBURY'S LAWS (3rd Edn.) 40 et seq.; and for cases see 39 DIGEST 414 et seq.

Cases referred to:

(1) *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 20 Mans. 54, H.L.; 39 Digest 420, *526.*

(2) *Wallis, Son & Wells* v. *Pratt and Haynes*, [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 27 T.L.R. 431; 55 Sol. Jo. 496, H.L.; 39 Digest 477, *996.*

Appeal by the plaintiffs from a decision of BAILHACHE, J., in an action tried by him without a jury.

The defendants, wishing to sell two steamships to the plaintiffs, gave them particulars in writing of the ships, which stated, inter alia, that the dead-weight capacity of each ship was 460 tons. The particulars further contained the words

"not accountable for errors in description." The plaintiffs, relying upon the particulars, agreed to buy the ships, and a memorandum of the contract was signed by the parties on Dec. 9, 1915. The contract made no direct references to the particulars. The dead-weight capacity of each ship was subsequently found to be only 360 tons. The plaintiffs, having accepted the steamers, claimed damages on the ground that the statement as to the capacity of the ships was a condition of the contract, or, in the alternative, a warranty. BAILHACHE, J., held that the statement in the particulars as to the dead-weight capacity of the ships formed part of the contract, but as the statement was a warranty and not a condition, the defendants were protected by the words "not accountable for errors," and were not liable. The plaintiffs appealed.

R. A. Wright, K.C., and *Claughton Scott* for the plaintiffs.

F. A. Greer, K.C., and *Alexander Neilson* for the defendants were not called upon.

PICKFORD, L.J., stated the facts and continued: I take a different view from that reached by BAILHACHE, J., as to whether the particulars were intended to be made part of the contract. I do not think that they were. The document of Dec. 9, 1915, was, I think, intended to be a memorandum of the terms of the contract, and, if so, the particulars were not part of the contract. They merely contained a representation made innocently as to the dead-weight capacity of the ships, which may have induced the plaintiffs to enter into the contract, but which afforded no ground for a claim for damages for breach of contract. As regards the decision of BAILHACHE, J., that the statement in the particulars as to dead-weight capacity was not a condition but a warranty, and that the discrepancy between 460 and 360 tons did not make the ships different commercially from those described, I will say no more than that it is a decision by a learned judge from whom I should be loth to differ; but before I came to a conclusion on that point I should wish to hear the defendants' counsel in support of the decision.

WARRINGTON, L.J.—I agree. The statement in the particulars as to the dead-weight capacity of the ships was a statement preliminary to the contract, and forms no part of it. It was not disputed that the particulars were in one sense the foundation of the contract, and if the statement were untrue in a material particular, though made innocently, it might be a ground for rescinding the contract. But there is a distinction between a statement of fact which gives rise to a right to rescission and a statement of fact which gives rise to a claim for damages. I have nothing to add to what PICKFORD, L.J., has said as to the decision of BAILHACHE, J.

SCRUTTON, L.J.—I agree with the result reached by BAILHACHE, J., but I arrive at that result by a different road. A statement may form part of a contract which the party making it promises to be true, or it may be an innocent representation of fact which he does not promise to be true, but which if it was untrue in a material particular, and formed part of the inducement to enter into the contract, may give rise to a claim to rescind, but not to a claim for damages. It is a question of intention whether a representation amounts to a warranty: *Heilbut, Symons & Co.* v. *Buckleton* (1); see also *Wallis, Son and Wells* v. *Pratt and Haynes* (2). In my opinion the particulars formed no part of the contract between the parties. If they had, I should have desired to hear the defendants' counsel in support of the decision as to the discrepancy between 460 and 360 tons dead-weight capacity.

Appeal dismissed.

Solicitors: *William A. Crump & Son*; *Botterell & Roche.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

BROWN *v.* BRITISH ABRASIVE WHEEL CO., LTD. AND OTHERS

[CHANCERY DIVISION (Astbury, J.), January 24, February 21, 1919]

[Reported [1919] 1 Ch. 290; 88 L.J.Ch. 143; 120 L.T. 529; 35 T.L.R. 268; 63 Sol. Jo. 373]

B

Company—Articles—Alteration—Exercise of power to alter only when alteration for benefit of company as a whole—Compulsory transfer of shares at option of majority—Jurisdiction of court to restrain proposed alteration—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 13.

The power of a company to alter its articles must be exercised not only in the manner required by law, but bonâ fide for the benefit of the company as a whole. If a proposed alteration is fair and just and in the interests of the company and the shareholders generally the court cannot interfere, but if it is contrary to natural justice, oppressive, and unfair, the court should prevent it being carried out.

C

Two directors, who between them held just over forty-nine fiftieths of the shares of a company and whose offer to buy the remaining shares at par had been refused by the other shareholders, sought to procure an alteration in the articles of the company to provide that a shareholder should be bound, on the request in writing of the holders of nine-tenths of the issued shares of the company, to sell or transfer his shares to their nominee at a valuation or at par, whichever should be the greater.

D

Held: in the circumstances of the case the proposed alteration was not for the benefit of the company as a whole, but only for the benefit of the majority shareholders, and so an injunction would be granted to prevent it.

E

Allen v. *Gold Reefs of West Africa, Ltd.* (1), [1900] 1 Ch. 656, followed.

Notes. This case must be read subject to the construction put on the words "bona fide for the benefit of the company as a whole" by the Court of Appeal in *Greenhalgh* v. *Arderne Cinemas, Ltd.*, [1950] 2 All E.R. 1120, at p. 1126. The power to alter articles formerly contained in s. 13 of the Companies (Consolidation) Act, 1908, is now contained in the Companies Act, 1948, s. 10.

F

Considered: *Dafen Tinplate Co.* v. *Llanelly Steel Co.*, [1920] 2 Ch. 124 Distinguished: *Sidebottom* v. *Kershaw, Leese & Co.*, [1920] 1 Ch. 154. Referred to: *Shuttleworth* v. *Cox Bros. & Co. (Maidenhead), Ltd.*, [1926] All E.R. Rep. 498.

G

As to the extent to which the articles of a company may be altered, see 6 HALSBURY'S LAWS (3rd Edn.) 272; as to improper use of their voting powers by company members, see ibid. 338–340; as to when the court will interfere with the exercise of a company's powers, see ibid. 418–420; and as to provision by the articles for the compulsory sale or transfer of shares, see ibid. 254; and for cases see 9 DIGEST (Repl.) 591–596, and 417–419. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

H

Cases referred to:

(1) *Allen* v. *Gold Reefs of West Africa, Ltd.*, [1901] 1 Ch. 656; 69 L.J.Ch. 266; 82 L.T. 210; 48 W.R. 452; 16 T.L.R. 213; 44 Sol. Jo. 261; 7 Mans. 417, C.A.; 9 Digest (Repl.) 592, *3920*.

(2) *Borland's Trustee* v. *Steel Bros. & Co., Ltd.*, [1901] 1 Ch. 279; 70 L.J.Ch. 51; 47 W.R. 120; 17 T.L.R. 45; 9 Digest (Repl.) 231, *1501*.

I

Also referred to in argument:

Dawkins v. *Antrobus* (1881), 17 Ch.D. 615; 44 L.T. 557; 29 W.R. 511, C.A.; 8 Digest (Repl.) 652, *21*.

Baird v. *Wells* (1890), 44 Ch.D. 661; 59 L.J.Ch. 673; 63 L.T. 312; 39 W.R. 61; 6 T.L.R. 229, C.A.; 8 Digest (Repl.) 658, *46*.

Menier v. *Hooper's Telegraph Works* (1874), 9 Ch. App. 350; 43 L.J.Ch. 330; 30 L.T. 209; 22 W.R. 396, L.JJ.; 9 Digest (Repl.) 659, *4367*.

Motion treated as the trial of the action, by the plaintiff, on behalf of himself and all other members of the company except the three defendants, who were directors, to restrain the company and the three defendants from convening or holding any meetings to pass or confirm, and from passing or confirming, any resolutions purporting to alter the articles of association by adding the following proposed article:

"A member who holds shares in the company shall be bound upon the request in writing of the holder or holders of nine-tenths of the issued shares to sell and transfer his shares, ex div., to the nominee of such holder or holders, in consideration of the payment of the fair value of his shares ascertained in accordance with the provisions of cl. 13 of these articles, or the par value thereof, whichever shall be the greater."

The capital of the company consisted of 50,000 £1 shares, of which 49,119 were held by two of the defendants. The plaintiff was the holder of fifty shares.

Micklem, *K.C.*, and *Dighton Pollock* for the plaintiff.
Upjohn, *K.C.*, and *H. Johnston* for the company. *Cur. adv. vult.*

Feb. 21, 1919. **ASTBURY, J.**, read the following judgment: This is an action by the plaintiff against the defendant asking for an injunction to restrain the defendant company and the three individual defendants, who are directors of the company, from convening or holding any meetings to pass or confirm and from passing or confirming any resolutions purporting to alter the articles of association by adding the following proposed article: [HIS LORDSHIP read the article]. Under the present articles the directors have power to refuse to register transfers; there are certain restrictions as to the persons to whom shares may be transferred, and an article provides that no shares shall be transferred to any person not a member so long as any member is willing to buy the shares. The company was originally a private company, but it is now a public one, and the capital has been increased to 60,000 shares of £1 each. The plaintiff is the holder of fifty shares, and objects to the proposed article, which he says is illegal. The directors assert that it is for the benefit of the company as a whole that the articles should contain the new condition proposed, while the plaintiff dissents, although he does not impute any want of good faith to the present directors. The directors have filed affidavits which show how the proposal has come about. The company had not been successful, and in 1918 was at the end of its resources. The holders of the controlling interest had a high opinion of certain secret processes of the company, and consequently in March, 1918, offered to buy up all the shares in the company at par. Most of the shareholders accepted the offer, but a small minority did not. It is said that the company will require fresh capital to open up new markets, having regard to the coming peace, and that it should be in a position to obtain this without the delay and expense of winding-up and reconstruction. It is also said that the company cannot go on unless this further capital is provided, that the minority shareholders are not prepared to risk any more money, that the majority shareholders will not provide it unless the proposed alteration is made, and therefore that it is for the benefit of the company that the alteration should be made.

The question which I have to decide is whether this is an alteration which the majority should be allowed to press on an unwilling minority. It is said that this is an oppressive attempt to buy out the minority forcibly for the benefit of the holders of this large block of shares. The question is whether this proposition is contrary to natural justice. If the proposition is fair and just, in the interests of the company and the shareholders generally, the court cannot interfere, but if, on the other hand, it is oppressive and unfair the court should prevent it being carried out. There are two shareholders who hold forty-nine fiftieths of the capital, and the proposed alteration would place it in their decision as to whether they are to become the owners of all the shares they want. They attempted to buy up all the outstanding shares at par, and failed, and in my opinion this is a proposition to enable them to do forcibly what they were unable to do by agree-

ment. In other words, they are saying: "If you will not agree to sell your shares we shall take powers to compel you to do so." It is contended for the defendants that, having regard to s. 13 of the Companies (Consolidation) Act, 1908, I have no alternative but to dismiss this action. Wide as the language of the section is, it must be read with some qualification, and LORD WRENBURY in his book (BUCKLEY ON COMPANIES (9th Edn.) pp. 23–25) refers to certain cases some of which are outside the range of validity contemplated by this section. In *Allen* v. *Gold Reefs of West Africa, Ltd.* (1) the Court of Appeal, by a majority, sanctioned, as against an existing holder of fully paid-up shares, an alteration in the articles which gave the company a lien on the shares under the circumstances referred to in the case. LORD LINDLEY, speaking of s. 50 of the Companies Act, 1862, said ([1900] 1 Ch. at p. 617):

> "The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s. 50 [s. 13 of the 1908 Act] is, the power conferred by it must, like all other powers be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bonâ fide for the benefit of the company as a whole, and it must not be exceeded."

The question here is whether the power of the company to make this proposed alteration, asked for by the holders of forty-nine fiftieths of the shares, is limited only by the statute and the provisions of the company's memorandum of association, or whether it is subject to those general principles of law and equity which are applicable to all powers conferred on majorities enabling them to bind minorities, and whether the alteration itself is for the benefit of the company as a whole. I find it difficult to follow how it can be just and equitable that a majority who failed to purchase the shares of others by agreement should be entitled to so exercise their votes as to take power to do so compulsorily, and I am of opinion that the proposed alteration is not for the benefit of anyone except the majority. Counsel for the company has referred to *Borland's Trustee* v. *Steel Bros. & Co., Ltd.* (2), in which a somewhat similar article was opposed on the ground referred to in the case, not these grounds, but was held by FARWELL, J., to be free from these objections. The articles were altered, in order to get over a dispute with the managers of the company, who were dissatisfied with the remuneration they received, so that the directors might be entitled to give notice to private shareholders to transfer their shares at the price provided in the articles. The report of the case does not show if there was in the original articles a counterpart of the one in question, but the judge held that the liquidator was a party to the passing of the article, and that there was no case of oppression by the holders of the majority of the shares. Counsel for the company says that under s. 13 of the Companies (Consolidation) Act, 1908, a company may by special resolution, subject to the provisions of the Act and the conditions contained in its memorandum, alter or add to its articles, and,

> "any alteration so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution."

He says that there would have been no objection to this proposed article as an original article. I agree. But when he says that the test is, would the proposed alteration have been valid if it had appeared in the original articles, I think he is wrong. I am of opinion that this is an article which the majority are not entitled to force on the minority, and there must be an injunction with costs.

Solicitors: *Andrew, Wood, Purves & Sutton*, for *R. A. Rotherham & Co.*, Coventry; *Surr & Co.*, for *Docker, Hosgood & Co.*, Birmingham.

[*Reported by* J. B. B. MCMAHON, ESQ., *Barrister-at-Law.*]

Re POOL SHIPPING CO., LTD.

[CHANCERY DIVISION (Peterson, J.), November 7, 1919]

[Reported [1920] 1 Ch. 251; 89 L.J.Ch. 111; 122 L.T. 338; 36 T.L.R. 53; 64 Sol. Jo. 115]

Company—Shares—Transfer—Renunciation by shareholders in favour of another shareholder of right to new shares—Power of directors to refuse registration.

Article 32 of the articles of association of a company enabled the "managers" of the company, who were in the position of directors, in their absolute discretion, and without assigning any reason therefor, to refuse to register any transfer of shares of which they might not approve. In 1919, pursuant to special resolutions duly passed for the purpose, the managers sent a circular letter to each shareholder offering him new shares in the company in the proportion of one share for every four held by him. To the letter were appended letters of renunciation or acceptance to be signed by the shareholder and his nominee respectively in case the shareholder wished to renounce his rights to such allotment. Shareholders entitled to 311 new shares signed letters renouncing their rights to those shares in favour of C., who signed the letters of acceptance and presented them to the managers for the allotment to him of these shares in addition to sixteen shares already held by him. The managers refused to register C., relying on their power under art. 32.

Held: the renunciation of rights to shares was not a "transfer" of shares within the meaning of the articles of association, and so the managers were not entitled to refuse to register C. as the holder of the 311 shares in question.

Notes. Article 32 of the articles of association considered in this case is analogous to art. 24 of table A, Pt. 1, contained in Sch. 1 to the Companies Act, 1948.

As to transfer of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 248–262; and for cases see 9 DIGEST (Repl.) 358–421. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Motion by Samuel Coulson and others, all of whom were shareholders in the Pool Shipping Co., Ltd., for rectification of the register of members by the insertion of the applicant Coulson's name as the holder of 311 new shares in the company in addition to sixteen shares already held by him.

The company was incorporated in 1903 with a capital of £250,000, which was subsequently raised to £500,000, divided into 500,000 shares of £1 each. According to the articles of association of the company, the management was to be in the hands of Sir R. Ropner & Co., Ltd., who were shipowners at West Hartlepool. That company was in control of a large majority of the shares of the Pool Shipping Co. In May, 1919, meetings of shareholders in the Pool Shipping Co., Ltd. were held and special resolutions passed to increase the company's capital from £500,000 to £625,000 by capitalising £125,000 which stood to the credit of the reserve fund, and to distribute among the persons registered as shareholders 125,000 shares of £1 each at the rate of one share for every four shares already issued; and the managers were authorised to carry this into effect. On June 3, 1919, the managers issued a notice to the shareholders in the form of a circular letter informing each shareholder of the number of new shares to the allotment of which he was entitled, and adding that, if he wished to renounce his rights thereto in favour of some other person, he must sign a draft letter of renunciation which was appended, and also obtain the signature of his nominee to a letter of acceptance which appeared on the same page. The draft letter of renunciation was as follows:

To the Pool Shipping Co., Ltd.—Being entitled to an allotment of new shares of £1 each fully paid, in the above company, I (we) renounce my (our) right to such allotment and request you to allot the shares to ,

The applicants duly received letters in this form, which they signed, renouncing their rights in favour of Coulson. The letters of acceptance were then signed by Coulson, who presented the documents to the company and demanded the allotment of 311 shares in all. The managers, however, refused to treat him as the person to whom the shares should be issued, relying on their power under art. 32 of the company's articles of association to refuse to register any transfer of shares of which they might not approve "in their absolute discretion and without assigning any reason therefor." The applicants thereupon brought this motion for the rectification of the register in the terms stated above.

The articles of association, so far as material, were as follows:

"5. The shares shall be under the control of the managers, who may allot or otherwise dispose thereof to such persons on such terms and conditions and at such times as the managers think fit.

[Arts. 30–38 dealt with the 'Transfer and Transmission of Shares.']

30. The instrument of transfer of any share shall be signed both by the transferor and the transferee, and the transferor shall be deemed to remain holder of such share until the name of the transferee is entered on the register in respect thereof.

32. The managers in their absolute discretion, and without assigning any reason therefor, may refuse to register any transfer of shares of which they do not approve.

46. The company in general meeting may, before the issue of any new shares, determine that the same, or any of them, shall be offered in the first instance to all the then members in proportion to the amount of capital held by them, or make any other provision as to the issue and allotment of the new shares; but in default of any such determination or so far as the same shall not extend, the new shares may be dealt with as if they formed part of the shares of the original capital.

47. Except so far as otherwise provided by the conditions of issue or by these presents, any capital raised by the creation of new shares shall be considered part of the original capital, and shall be subject to the provisions herein contained with reference to the payment of calls and instalments, transfer and transmission, forfeiture, lien, surrender, and otherwise.

86. A general meeting of the company may direct the capitalisation of the whole or any part of the reserve fund or funds of the company or of any sums standing to the credit of the profit and loss account of the company by distribution amongst the holders of the shares of the company (other than preference shares or other shares issued upon special conditions) of paid-up shares . . . and the managers shall give effect to such resolution and apply such portion of the reserve fund or funds or profits of the company as may be directed to be capitalised for the purpose of making payment in full at par for the shares . . . but no distribution shall be made unless recommended by the managers . . ."

Tomlin, *K.C.*, and *Hildyard* for the applicants.

Hughes, *K.C.*, and *H. E. Wright* for the respondents.

PETERSON, J., stated the facts and continued: The question arises whether the renunciation of an option is a transfer. Plainly it is not, for the articles relating to transfer deal with a "registered holder" and provide for a method by which a registered holder can transfer his shares. Here there is no transfer of shares, but the substitution of a nominee in place of the person to whom the shares are offered. It follows that the transaction does not come within art. 32. The managers were wrong in refusing to allot the shares in question to the nominee in the present case, and the register must be rectified accordingly.

Solicitors: *Bell, Brodrick & Gray*, for *Harrison & Son*, West Hartlepool; *Crossman, Block, Matthews & Crossman*, for *Turnbull & Tilly*, West Hartlepool.

[*Reported by* PORTER FAUSSET, ESQ., *Barrister-at-Law*.]

PIERCY *v.* S. MILLS & CO.

[CHANCERY DIVISION (Peterson, J.), July 21, 22, 23, 1919]

[Reported [1920] 1 Ch. 77; 88 L.J.Ch. 509; 122 L.T. 20; 35 T.L.R. 703; 64 Sol. Jo. 35]

Company—Shares—Issue—Powers of directors—Issue to maintain control of company—Or to defeat the wishes of existing majority of shareholders.

Directors of a company are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company or merely for the purpose of defeating the wishes of the existing majority of shareholders.

If they do so, such issue is invalid and the court will declare it void.

Fraser v. *Whalley* (1) (1864), 2 Hem. & M. 10 and *Punt* v. *Symons & Co., Ltd.* (2), [1903] 2 Ch. 506, applied.

Notes. As to purposes for which directors may not use their powers, see 6 HALSBURY'S LAWS (3rd Edn.) 295, 296; as to when the court will interfere with the exercise of a company's powers, see ibid. 418–420; and for cases see 9 DIGEST (Repl.) 302. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Fraser* v. *Whalley*, *Gartside* v. *Whalley* (1864), 2 Hem. & M. 10; 11 L.T. 175; 71 E.R. 361; 10 Digest (Repl.) 1220, *8548*.

(2) *Punt* v. *Symons & Co., Ltd.*, [1903] 2 Ch. 506; 72 L.J.Ch. 768; 89 L.T. 525; 52 W.R. 41; 47 Sol. Jo. 619; 10 Mans. 415; 9 Digest (Repl.) 302, *1900*.

(3) *Foss* v. *Harbottle* (1843, 2 Hare, 461; 67 E.R. 189; 9 Digest (Repl.) 662, *4382*.

Also referred to in argument:

Cannon v. *Trask* (1875), L.R. 20 Eq. 669; 44 L.J.Ch. 772; 9 Digest (Repl.) 622, *4153*.

Re Stranton Iron and Steel Co. (1873), L.R. 16 Eq. 559; 43 L.J.Ch. 215; 9 Digest (Repl.) 396, *2542*.

Witness Action.

The following were the facts as set out in his Lordship's judgment:—This was a company which, when the events which gave rise to this action took place, had a capital of some 4252 issued shares of £1 each, some ordinary and some preference. The two directors were Mr. Shercliff and Mr. King. The plaintiff was appointed a temporary manager at a remuneration. Some difficulties arose between him and the directors Mr. King and Mr. Shercliff who did not consider him suitable for the position. The matter was complicated by the fact that the plaintiff had acquired a majority of the shares; out of the 4252 issued shares he had become the holder of, or was entitled to, 2146 and desired to become one of the directors. It may be, and for this purpose I will assume, that the directors were right in considering that he was not altogether a fit person to be a director of this company, but, having the largest interest in the company, it was not unnatural that he should desire to be on the board of directors. On Sept. 17, therefore, he intimated to the directors that he wished to be a director. The two existing directors considered the question, and came to the conclusion that it was undesirable that he should be appointed a director. On Sept. 30, the plaintiff, having no doubt been irritated by the refusal of the existing directors to exercise the powers of electing him to be a member of the board, sent this notice to the directors:

"I, the undersigned member of the company, give you notice that it is my intention at the next general meeting of the company at which it shall be competent to nominate directors, to nominate the following for election."

Then he nominated his two brothers and himself. The result of this move would have been that at the next general meeting, having the majority of the shares, he would have elected a majority of the board of directors. On Oct. 1 he sent a notice to the directors requiring them to call a meeting of the company for the purpose of considering resolutions which he proposed to put forward. The plaintiff gave an account of the manner in which he and his brother went to the Public Library and consulted law books, with the result that ultimately they produced this series of proposed resolutions. The first solution was: "That the existing directors be removed"; and the second was: "That the company be wound-up voluntarily." It is manifest that he could not, if he had realised the effect of them, have put the two resolutions as anything but alternatives. In any case it is quite clear that he had not a majority to carry either of these resolutions. Then there are a number of resolutions which in the main are not inconsistent with the proposal of the plaintiff in the notice of Sept. 30 to elect further directors. I think it fairly clear that what the plaintiff was aiming at was, first, to get on to the Board himself, and, when the directors refused to appoint him, to have the number of directors raised to the maximum number permitted under the articles, the vacancies being filled up with his nominees. On Oct. 17 the directors dismissed the plaintiff from the position of manager. On Oct. 18 Mr. Shercliff wrote to Mr. King: "Many thanks for your letter of the 17th inst. The issue of sufficient shares to obtain full control seems to be the best way out of the mix-up." On the Oct. 23 the two directors met, and, amongst other things, they resolved that preference shares be hereby allotted to the following persons—namely, to Mr. Neal, 100 shares—he is not a party to the action, and therefore the question of the allotment of shares to him is not under consideration in the present proceedings—Mr. King, 100 shares; and to Mr. Shercliff 150 shares. I have heard Mr. King and Mr. Shercliff on the subject of the issue of these shares, and they were, especially Mr. Shercliff, perfectly frank on the subject. It is manifest from the letter of Oct. 18 and from the evidence of the two witnesses, that the shares were allotted simply and solely for the purpose of retaining control in the hands of the existing directors. It was about this time that Mr. Skellett and Mr. Wainwright, who were connected with Mr. Shercliff in the business that he carried on, were appointed co-directors by Mr. King and Mr. Shercliff, and their director's qualification was provided by transfers of shares from Mr. Shercliff. By the manœuvre of the allotment of the shares, which took place on Oct. 23, the directors and their friends had obtained a small majority over the plaintiff and his friends, and the result was that the resolutions which were proposed by the plaintiff were defeated. The plaintiff, however, had been in negotiation for the acquisition of other shares in the company, and, having obtained a further block of shares, small in number, but sufficient to give him a new majority, he then proceeded to requisition the directors to call another meeting, and on Nov. 13 he deposited a transfer of the shares which he had acquired with the company for registration. The directors apparently considered that this move required immediate attention, and on Nov. 14 Mr. Shercliff and Mr. King met and proceeded to allot to their two new co-directors, Mr. Wainwright and Mr. Skellett, further shares, with the result that they and their friends had a majority over the plaintiff once more. In this case also it is manifest from the evidence that these shares were allotted solely for the purpose of keeping control and maintaining the majority over the plaintiff, and it is also quite clear that all the four directors fully realised that that was the sole object. As soon as this fresh allotment came to the knowledge of the plaintiff he very wisely withdrew his requisition; and he brought this action for the purpose of determining the question whether acts of this character on the part of the directors were or were not legitimate. The question is whether the directors were justified in acting as they did, or whether their conduct was a breach of the fiduciary powers which they possessed under the articles.

Tomlin, *K.C.*, and *H. E. Wright* for the plaintiff.
Hughes, *K.C.*, and *Ashton Cross* for the directors.
E. T. T. Duka for the company.

PETERSON, J.—This is an action in which the plaintiff claims a declaration that the allotments of 150 preference shares in the defendant company to Mr. Shercliff, one of the defendants, 100 preference shares in the company to the defendant Mr. King, 150 preference shares to the defendant Mr. Skellett, and 200 preference shares to the defendant Mr. Wainwright, were made in breach of the fiduciary powers of the directors of the defendant company and were void, and that the allotments ought to be cancelled. [HIS LORDSHIP stated the facts.] What the directors did in fact was to override the wishes of the holders of the majority of the shares of the company for the time being by the issue of fresh shares, issued solely for the purpose of overriding the wishes of the majority.

There are two cases to which my attention has been called. One is *Fraser* v. *Whalley* (1), in which there are some observations which are in point, though the case had points of difference from the present case. The learned judge in that case came to the conclusion that the directors were not justified in using their powers for a purpose which had once been authorised, but which had come to an end. In the course of the argument the Vice-Chancellor remarked (2 Hem. & M. at p. 27):

> "No doubt both sides think their views the best for the company. But have you a right to force your views upon the majority of the shareholders by the exercise of a power of this kind?"

In his judgment the Vice-Chancellor said (ibid. at pp. 28, 29):

> "I cannot look upon these directors otherwise than as trustees for a public company, and I must judge of the propriety of their conduct in this matter on the ordinary principle applicable to cases of trustee and cestui que trust. But the point is reduced to this—the directors are informed that at the next general meeting they are likely to be removed; and therefore, on the very verge of a general meeting, they, without giving notice to anyone, with this indecent haste and scramble which is shown by the times at which the meetings were held, resolve that shares are, on the faith of this obsolete power intrusted to them for a different purpose, to be issued for the very purpose of controlling the ensuing general meeting. I have no doubt that the court will interfere to prevent so gross a breach of trust. I say nothing on the question whether the policy advocated by the directors, or that which I am told is to be pursued by Savin, is more for the interest of the company. That is a matter wholly for the shareholders."

The learned Vice-Chancellor then, having fully agreed with the principle laid down in *Foss* v. *Harbottle* (3), continued:

> "If the directors can clandestinely, and at the last moment, use a stale resolution for the express purpose of preventing the free action of the shareholders, this court will take care that, when the company cannot interfere, the court will do so."

It was said that the real point of that case was that the directors were using what the Vice-Chancellor calls a stale resolution, but I think the real substance of his judgment is that the directors were not entitled to issue shares for the express purpose of preventing the free action of the shareholders.

In *Punt* v. *Symonds & Co., Ltd.* (2) the question was again somewhat similar to that in the present case, BYRNE, J., in a reserved judgment, after dealing with the first point, which is immaterial for the present purpose, says this ([1903] 2 Ch. at p. 515):

> "I now come to the last and most important point. It is argued on the evidence that but for the use by the directors of the shares under their powers as directors, and, therefore, in their fiduciary character under the general

power to issue shares, it would have been impossible to pass the resolution proposed; and that the shares were not issued bonâ fide, but with the sole object and intention of creating voting power to carry out the proposed alteration in the articles." A

He then says that

"these shares were not issued bonâ fide for the general advantage of the company, but were issued with the immediate object of controlling the holders of the greater number of shares in the company and of obtaining the necessary statutory majority for passing a special resolution." B

Later on in the judgment he said (ibid. at pp. 515, 516):

"A power of the kind exercised by the directors in this case is one which must be exercised for the benefit of the company: primarily, it is given to them for the purpose of enabling them to raise capital when required for the purposes of the company." C

And further on he said:

"When I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that is a fair and bonâ fide exercise of the power." D

The basis of the decisions in these two cases I have referred to is that directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. That is exactly what has happened in the present case. With the merits of the dispute as between the directors and the plaintiff I have no concern whatever. The plaintiff and his friends held a majority of the shares of the company, and they were entitled, so long as that majority remained, to have their views prevail in accordance with the regulations of the company; and it was not, in my opinion, open to the directors, for the purpose of converting a minority in voting power into a voting majority, and solely for the purpose of defeating the wishes of the existing majority, to issue the shares which are in dispute in the present action. E F

In my opinion, therefore, the issue of the shares in question to the four defendants was a breach on the part of the directors of their fiduciary powers; in the case of the last two allotments, those to Mr. Skellett and Mr. Wainwright, they were made to them with their full knowledge that the allotments were being made for the illegitimate purpose which I have described. I am, therefore, of opinion that those four allotments were invalid and ought to be declared void. G

Solicitors: *Pepper, Tangye & Watson*, for *Pepper, Tangye & Winterton*, Birmingham; *Timbrell & Deighton*, for *C. Upfill Jagger*, Birmingham.

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*] H

A

Re MORGAN. MORGAN *v.* MORGAN

[Chancery Division (Eve, J.), July 24, 29, 1919]

[Reported [1920] 1 Ch. 196; 89 L.J.Ch. 97; 121 L.T. 573; 63 Sol. Jo. 759]

B *Statutes for the distribution of the personal estate of intestates—Statute of Distribution* (22 & 23 *Car.* 2, *c.* 10), *s.* 3—1 *Jac.* 2, *c.* 17, *s.* 7—*Intestates' Estates Act*, 1890 (53 & 54 *Vict.*, *c.* 29), *s.* 2.

Trusts declared in an instrument inter vivos [made before 1926], or in a will [coming into operation before 1926], by reference to "the statutes of distribution" or to "the statutes for the distribution of the personal estate of intes-
C tates" are, unless a contrary intention is shown, to be construed as referring to the statutes of distribution of Charles II (1670) (22 & 23 Car. 2, c. 10), and of James II (1 Jac. 2, 17), but not to the Intestates' Estates Act, 1890.

Notes. By the Administration of Estates Act, 1925, s. 50 (1) references to any statutes of distribution in instruments inter vivos made or wills coming into operation after 1925 are to be construed as references to the rules of distribution
D enacted by the 1925 Act; and by the Intestates' Estates Act, 1952, such references in instruments inter vivos made or wills coming into operation after 1952 are to be construed as references to those rules as amended by the 1952 Act. By s. 50 (2) of the 1925 Act, such references in instruments inter vivos made or wills coming into operation before 1926 are to be construed as referring to the statutes relating to distribution on intestacy in force immediately before 1926. The words in square
E brackets have therefore been added to the headnote to make it a statement of the law as it now is.

As to references to Statutes of Distribution, see 16 Halsbury's Laws (3rd Edn.) 414; and for cases see 24 Digest (Repl.) 936 et seq. For the Statute of Distribution and the Administration of Estates Act, 1925, see 9 Halsbury's Statutes (2nd
F Edn.) 658 and 718 respectively; and for the Intestates' Estates Act, 1952, see ibid., vol. 32, p. 115.

Cases referred to in argument:

Re Twigg's Estate, Twigg v. *Black*, [1892] 1 Ch. 579; 61 L.J.Ch. 444; 66 L.T. 604; 40 W.R. 297; 36 Sol. Jo. 231; 24 Digest (Repl.) 941, *9524*.

Re Cuffe, Fooks v. *Cuffe*, [1908] 2 Ch. 500; 77 L.J.Ch. 776; 99 L.T. 267; 24
G T.L.R. 781; 58 Sol. Jo. 661; 24 Digest (Repl.) 941, *9525*.

Re Nightingale, Bowden v. *Griffiths*, [1909] 1 Ch. 385; 78 L.J.Ch. 196; 100 L.T. 292; 24 Digest (Repl.) 938, *9502*.

Adjourned Summons.

The testator, George Morgan, by his will dated July 25, 1912, appointed the
H plaintiffs, Harry Walker Morgan and Benjamin Herbert Rapson, executors and trustees and bequeathed to each of them a legacy. By cl. 4 the testator bequeathed to his wife, the first defendant, Eva Virginie Rose Morgan, £200 and also all his furniture and other articles. By cl. 7 the testator devised and bequeathed "all the rest and residue of my estate and effects whether real or personal" unto his trustees upon trust to sell and convert and to pay debts and legacies and
I hold "the net proceeds" upon the trusts following: (cl. 8) as to one-third of such net proceeds not exceeding the sum of £5,000 upon trust to invest the same and to pay the income unto his wife during her new life for her separate use without power of anticipation; (cl. 9), as to one other third of such net proceeds not exceeding a like sum of £5,000 upon trust to invest and to pay the income thereof unto the testator's mother, Susannah Morgan, during her life for her separate use without power of anticipation; (cl. 10) on the respective deaths of his wife and his mother the testator declared that the respective thirds of such net proceeds or, as the case might be, sums of £5,000 each, or the investments

representing the same, should be held by his trustees upon the trusts thereinafter declared of and concerning the remaining one-third of such net proceeds, and (cl. 11) as to the remaining one-third or other the balance of such net proceeds his trustees should hold the same upon trust for all or any of his children or child who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters attain that age or marry as tenants in common, the income or capital of the share of any minor child's expectant share to be paid or applied by his trustees at their discretion for the child's maintenance or advancement, the surplus income (if any) to go in augmentation of the capital of such shares; (cl. 12) if the testator should not leave any child who should attain twenty-one or marry then his trustees should hold "my said residuary estate and effects" upon trust to pay the income thereof to his mother (in addition to the income on the sum of £5,000 bequeathed to his trustees in cl. 9) during her life. Clause 13 was as follows:

> "And from and after such failure of children and my mother's death, my trustees shall hold the net proceeds of my residuary estate or the investments for the time being representing the same in trust for the persons or person who would at the time of the failure or determination of all the prior trusts hereinbefore declared have been entitled to my personal estate under the statutes for the distribution of the personal estate of intestates if I had died at the time of such failure or determination intestate such persons if more than one to take the shares which they would have taken under the same statute. . . ."

The testator died on April 29, 1918, and his will was duly proved. The testator left no issue him surviving. The testator's mother, Susannah Morgan, died on May 12, 1919. The defendants, Susannah Morgan and Florence Katie Morgan, were sisters of the testator. The seven last defendants were children of a deceased sister of the testator. The testator left no lineal ancestor except his mother him surviving, and except the defendants there was no brother or sister or child of any deceased brother or sister of the testator living at the date of his mother's death.

By the originating summons the two trustees of the testator's will asked: What, in the events which have happened, is the share or interest (if any) of the defendant widow of the testator in (a) the residue of the testator's estate after providing the sum of £5,000 in which she took a life interest under cl. 8 of the will, and (b) the corpus of the sum of £5,000 subject to her life interest therein; whether or not the widow was entitled to an additional £500 under the Intestates' Estates Act, 1890. The learned judge having held that on the true construction of the testator's will and in the events which had happened the class of persons entitled to the residuary estate was to be ascertained at the date of the death of the testator's mother, the further question was then argued whether the widow was entitled to an additional £500 under the Intestates' Estates Act, 1890.

J. H. Stamp for the plaintiff trustees.
Edward Clayton, K.C., and *W. A. Hunt* for the widow.
J. M. Stone for the children of a deceased sister.
Sydney Goodman for other defendants.

EVE, J.—It is not disputed that under s. 3 of the Statute of Charles II (22 & 23 Car. 2, c. 10) the widow is entitled to one moiety of the estate; the question is whether she is also entitled under the Intestates' Act, 1890, to the additional sum of £500.

It is contended that she is not so entitled for two reasons—the one, that this last-mentioned Act is not one of "the statutes for the distribution of the personal estate of intestates" referred to in cl. 13 of her husband's will, and the other that it has no application to this case because the husband did not die intestate.

By the Short Titles Act, 1896, the Act of Charles II may be cited as "the Statute of Distribution." There is, however, no statutory guide to the meaning to be

affixed to the collective title "the Statutes of Distribution," but for over two centuries the only two statutes to which the description "the Statutes of Distribution" could properly be affixed were the Act of Charles II and the continuing and amending Act of James II (1 Jac. 2, c. 17). In these circumstances I think that long before 1890 the expression had acquired an exclusive application which ought only to be extended to a fresh statute if the intention so to extend it is manifested in such fresh statute either by express enactment or by necessary implication from its legislative effect. No doubt the Intestates' Estates Act, 1890, does make a change in the distribution of the property of intestates, but it is to be observed that it does not apply to all intestates, but only to those who die leaving a widow but no issue, and further that the better provision thereby made for the surviving widow of such an intestate is payable out of his real and personal property rateably in proportion to their respective values. In my opinion it is not an Act proper to be included in the expression "Statutes of Distribution," and still less in the phrase used by the testator "statutes for the distribution of the personal estates of intestates."

Further, I am of opinion that the Act has no application to this case. The late George Morgan, whose will I am construing, did not die intestate. On the contrary he died wholly testate, and although the persons who will participate in his residuary estate are to be ascertained and their interests determined by reference to the statute applicable to an intestacy, they do not in any sense take by virtue of those statutes, but solely under the will.

For these reasons I think that the claim of the widow to the extra £500 fails.

Solicitors: *Brash Wheeler, Chambers & Co.*; *Clarke & Co.*; *Tatton, Gaskell & Tatton*; *Marchant, Newington & Tipper.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

Re LEVY & CO., LTD.

[Chancery Division (Astbury, J.), February 25, 1919]

[Reported [1919] 1 Ch. 416; 88 L.J.Ch. 233; 120 L.T. 531; 35 T.L.R. 334; [1918–19] B. & C.R. 154; 63 Sol. Jo. 373]

Company—Winding-up—Lease—Leasehold premises retained by liquidator—Payment of full rent—Performance of repairing covenants—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 171, 186, 196, 206, 211.

When a liquidator retains possession of premises leased to a company which is being wound-up either voluntarily or compulsorily he can only do so on the terms of the lease. He is bound out of the assets got in to pay the full rent to the lessor, and also the full sum required to comply with any repairing covenants in the lease.

Re Oak Pits Colliery Co. (1) (1882), 21 Ch.D. 322, *Re Lundy Granite Co.* (2) (1871), 6 Ch. App. 462, *Re Silkstone and Dodsworth Coal and Iron Co.* (3) (1881), 17 Ch.D. 158, *Re Brown, Bayley and Dixon* (4) (1881), 18 Ch.D. 649, *Re National Arms and Ammunition Co.* (5) (1885), 28 Ch.D. 474, and *Hand* v. *Blow* (6), [1901] 2 Ch. 721, applied.

Notes. The Companies (Consolidation) Act, 1908, has been repealed, but the provisions of s. 186, s. 206, s. 211, s. 171, and s. 196 thereof referred to by Astbury,

J., in this case are substantially similar to the corresponding provisions of the Companies Act, 1948, s. 302, s. 317, s. 228, s. 267 and s. 309. A

As to liability for rent, etc., of a company being wound up, see 6 HALSBURY'S LAWS (3rd Edn.) 755; and for cases see 10 DIGEST (Repl.) 1054. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to: B

(1) *Re Oak Pits Colliery Co.* (1882), 21 Ch.D. 322; 51 L.J.Ch. 768; 30 W.R. 759; sub nom. *Re Oak Pits Colliery Co., Ltd., Eyton's Claim*, 47 L.T. 7, C.A.; 10 Digest (Repl.) 1023, *7050*.

(2) *Re Lundy Granite Co., Ex parte Heavan* (1871), 6 Ch. App. 462; 40 L.J.Ch. 588; 24 L.T. 922; 35 J.P. 692; 19 W.R. 609, L.JJ., 10 Digest (Repl.) 1023, *7047*.

(3) *Re Silkstone and Dodsworth Coal and Iron Co.* (1881), 17 Ch.D. 158; sub nom. *Re Silkstone and Dodsworth Coal, Ex parte Perkins*, 50 L.J.Ch. 444; 44 L.T. 405; 29 W.R. 484; 10 Digest (Repl.) 1924, *7053*. C

(4) *Re Brown, Bayley and Dixon, Ex parte Roberts and Wright* (1881), 18 Ch.D. 649; 50 L.J.Ch. 738; 45 L.T. 347; 30 W.R. 5; 10 Digest (Repl.) 1025, *7063*.

(5) *Re National Arms and Ammunition Co.* (1885), 28 Ch.D. 474; 54 L.J.Ch. 673; 33 W.R. 585; 1 T.L.R. 240; 49 J.P. Jo. 90; sub nom. *Re National Arms and Ammunition Co., Ltd., Ex parte Birmingham Corpn.*, 52 L.T. 237, C.A.; 10 Digest (Repl.) 1125, *7836*. D

(6) *Hand* v. *Blow*, [1901] 2 Ch. 721; 70 L.J.Ch. 687; 85 L.T. 156; 50 W.R. 5; 17 T.L.R. 635; 45 Sol. Jo. 639; 9 Mans. 156, C.A.; 10 Digest (Repl.) 825, *5393*.

E

Summons by the liquidator in the voluntary winding-up of the company to determine whether the respondent, the landlord of certain premises which had been assigned to the company, was entitled to be paid the full amount of his claim for dilapidation under the covenants by the lessees, or whether he was merely entitled to prove for dividends in respect of his claim.

The facts are stated in the judgment. F

F. K. Archer for the liquidator.

Bryan Farrer for the landlord.

ASTBURY, J.—This is a summons in the winding-up of the company to determine whether the respondents, the landlords, are entitled to be paid the full amount of their claim for dilapidations under the covenants by the lessees contained in a lease, which was assigned to the company for the residue of the term, or whether they are only entitled to prove for dividends in respect of their claim. From the agreed statement of facts it appears that the lease subsequently assigned to the company was dated June 15, 1896, and was of certain premises in the City for a term of twenty-one years at the rent therein reserved. It was assigned to the company in April, 1901, the premises being altered under licence from the landlords and sublet at substantial profit rentals. On May 26, 1910, the company went into liquidation, and the applicant on the summons is the liquidator. At the date of the liquidation there were eight years of the term to run. The liquidator elected to remain in possession of the premises in order to obtain the large profit rentals for the benefit of the company's creditors and of the liquidation generally. Shortly prior to the liquidation the premises were inspected on behalf of the landlord, who served notice on the company as to repairs. The lease contains the ordinary repairing covenants and a covenant to yield up the premises in substantial repair at the end of the term, with a proviso for re-entry on breach of covenant. In order to comply with this last covenant about £420 is required. It has been suggested that some portion of the present dilapidations accrued and was caused prior to the date of the winding-up. That is not important, having regard to the covenant to yield up in repair at the end of the term, because the amount required to comply with the covenant is really the amount in dispute on this summons. When the liquida- G H I

A tion commenced there were three courses open to the liquidator. He might give up the property or sell it for the residue of the term, and thus provide the landlords with a new tenant competent to perform the covenants of the lease, or retain it, as he actually did, for the benefit of the creditors generally. By retaining it the liquidator obtained a sum of £6,000 over and above the rent which he paid to the landlord.

B It is not contested that the liquidator, having elected to retain possession of the property, became liable to pay, and did pay, the rent in full from the beginning of the liquidation, and the only question is what is the true position with regard to the claim for dilapidations. I am told there is no direct decision on the point. I am astonished at that, because it must have frequently happened that liquidators have retained possession of leasehold premises for the purposes of the liquidation C under circumstances similar to the present. The relevant sections of the Companies Act, 1908 are s. 186, which provides that in a voluntary winding-up the assets of the company shall be applied in satisfaction of its liabilities pari passu; s. 206, which deals with debts admissible to proof against the company; s. 211, which provides that where a company is being wound-up by or subject to the supervision of the court a distress put in force against the estate or effects of the D company after the commencement of the winding-up shall be void; s. 171, which provides that the court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment, out of the assets, of the costs, charges, and expenses incurred in the winding-up in such order of priority as it thinks just; and s. 196, under which all costs, charges, and expenses properly incurred in the voluntary winding-up of a company, including the remuneration E of the liquidator, shall be payable out of the assets of the company in priority to all other claims. With regard to rent, the law is laid down in *Re Oak Pits Colliery Co.* (1) by LINDLEY, L.J. Dealing with rents accruing after the commencement of the winding-up, he said (21 Ch.D. at p. 330):

> "When the liquidator retains the property for the purpose of advantageously F disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding-up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose."

In *Re Lundy Granite Co., Ex parte Heavan* (2) JAMES, L.J., said (6 Ch. App. at p. 466):

G "If the company for its own purposes, and with a view to the realisation of the property to better advantage, remains in possession of the estate, which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the court to see that the landlord obtains the full value of the property. He must have the same rights as any other creditor, and if the company choose to keep the estate for their own purposes, they ought to pay H the full value to the landlord, as they ought to pay any other person for anything else, and the court ought to take care that he receives it."

In *Re Silkstone and Dodsworth Coal and Iron Co.* (3) FRY, J., said (6 Ch. App. at p. 466):

> "That is in my view an election by the liquidator to continue in possession of I the property, and if he continued in possession of the property he could only do so upon the terms of the lease, and it is only equitable, if he keeps the lease as an asset of the company and for the purposes of the liquidation, that he should satisfy those conditions upon which the asset remains his; in other words, he should pay the rent in full."

The same judge in *Re Brown, Bayley and Dixon, Ex parte Roberts and Wright* (4) said (18 Ch.D. at p. 652):

> "In respect of any rights arising after the winding-up by reason of the company or the liquidators remaining in possession of the demised or of the mortgaged

premises, they ought, in my judgment, to be treated as independent persons, and if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument, just as any other person must observe those terms."

A similar principle has been put in force as to rates. In *Re National Arms and Ammunition Co.* (5), BAGGALLAY, L.J., said (28 Ch.D. at p. 478):

"The effect of the decision in *Re Lundy Granite Co., Ex parte Heavan* (2) is that if a company in course of being wound-up remains by its liquidator in possession of leasehold property, for its own purposes and with a view to the realisation of the property to better advantage, the court will aid the landlord in obtaining the payment in full of the rent accrued due after the commencement of the liquidation. The principle on which the case was decided applies equally to other outgoings connected with the property, the possession of which is retained for the purpose of more advantageously winding-up the affairs of the company."

In the same case FRY, L.J., stated the principle thus (ibid. at p. 481):

"When a company is wound-up, the creditors who are such at the commencement of the winding-up stand on an equal footing as between themselves. But if after that period the company or the liquidator on its behalf, in order to acquire gain or avoid loss, enter into contracts or occupy land, they must do so on the same terms as any other subjects of Her Majesty, and neither the persons with whom the contracts are entered into, nor the persons to whom sums in respect of the land are payable, whether landlords or rating authorities, are bound to accept a dividend on their claims."

And in *Hand* v. *Blow* (6), ROMER, L.J., said ([1901] 2 Ch. at p. 736):

"If you have a company or person whose estate is being dealt with or administered by the court, and a liquidator or receiver appointed by the court has occupied or used premises that are part of the estate, then, as to rent and other outgoings payable to the landlord or other parties in respect of the premises for that occupation or user and for which the company or person whose estate is being dealt with or administered is liable, the court will see that such rent and other outgoings are paid out of the assets got in by the liquidator or receiver."

That being the rule which the court enforces in a compulsory winding-up, the same principle applies in a voluntary liquidation. The liquidator knew or must be taken to have known the contents of this lease when he elected to retain possession of this beneficial term. It would be just as inequitable to allow the liquidator to obtain this £6,000 of profit rental and disregard the covenants of the lease as it would be to allow him to disregard the obligation to pay rent. It is suggested that the landlord should from time to time have sought to re-enter in respect of the breaches of covenant to repair, or made terms, if the liquidator notwithstanding this, desired to retain possession. With regard to the covenant to yield up the premises in repair at the end of the term, the landlord was obliged to wait until the end of the term to see if the covenant had been complied with. It seems to me obvious on the principle of the various authorities I have referred to that the liquidator having elected to retain possession of these premises in order to obtain the large profit rental ought only to be allowed to do so on the terms and covenants of the lease. Consequently the amount of the landlord's claim for dilapidations ought to be paid in full and he ought not to be put merely to a proof in the liquidation.

Solicitors: *Clark, Rawlins & Co.*; *Kekewich, Smith & Kaye.*

[*Reported by* J. B. B. MACMAHON, ESQ., *Barrister-at-Law.*]

A

Re HOLLEBONE. HOLLEBONE *v.* HOLLEBONE

[CHANCERY DIVISION (Eve, J.), April 30, May 9, 1919]

[Reported [1919] 2 Ch. 93; 88 L.J.Ch. 386; 121 L.T. 116; 63 Sol. Jo. 553]

B *Administration of Estates—Residuary estate—Outstanding personal estate—Apportionment—Instalments of sale price of testator's business—Uncertain amounts dependent on earnings, payable half-yearly, with interest if late.*

A firm of stockbrokers sold their business for a price payable by ten half-yearly instalments, each equal to 53 per cent. (less income tax) of the C commissions earned by the purchasers half-yearly in respect of "the business of the vendors, their present clients and any further clients introduced by the vendors or their clients." If any instalment was not paid when due, the purchasers agreed to pay interest thereon at five per cent. from the due date until the date of actual payment. Two months after the sale one partner died. By his will he left his residuary estate, which included the monies due to him D under the sale, to trustees on trust for sale, with power to postpone, and to pay the income to his widow and divide the capital after her death. The will contained a direction that reversionary interests were not to be sold until they fell into possession. On the question how the share of the instalments of the purchase price of the business to which the testator's estate became entitled should be applied as between the life tenant of income and those E entitled in remainder to the residuary estate of the testator,

Held: the instalments of purchase money were not a reversion, but were outstanding personal estate of the testator of wholly uncertain amount which produced no income until received; accordingly, each instalment of purchase money already received and thereafter to be received, with or without interest, ought as from the date of the testator's death to be apportioned between corpus F and income by ascertaining the sum which, put out at interest at four per cent. per annum on the date of the testator's death and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, amount on the day when the instalment was or should be received to the amount actually received, including interest, if any, and the sum so ascertained must be treated as G capital, and the difference between it and the sum actually received as income.

Rule in *Wilkinson* v. *Duncan* (1) (1857), 23 Beav. 469, *Beavan* v. *Beavan* (2) (1869), 24 Ch.D. 649, note (1), and *Re Earl of Chesterfield's Trusts* (3) (1883), 24 Ch.D. 643, applied.

Crawley v. *Crawley* (4) (1835), 7 Sim. 427, distinguished.

H **Notes.** The rule in this case has no application to real estate: *Re Woodhouse*, [1941] 2 All E.R. 265.

As to the administration of residuary estate settled under a will, see 16 HALSBURY'S LAWS (3rd Edn.) 379–384; as to express trusts for life and in remainder, see 33 HALSBURY'S LAWS (2nd Edn.) 116–128; and for cases see 20 DIGEST 335–402.

I Cases referred to:

(1) *Wilkinson* v. *Duncan* (1857), 23 Beav. 469; 26 L.J.Ch. 495; 29 L.T.O.S. 35; 3 Jur. N.S. 530; 5 W.R. 398; 53 E.R. 184; 20 Digest 368, *1063*.

(2) *Beavan* v. *Beavan* (1869), 24 Ch.D. 649, n.; 52 L.J.Ch. 961, n.; 49 L.T. 263, n.; 32 W.R. 363, n.; 20 Digest 368, *1064*.

(3) *Re Earl of Chesterfield's Trusts* (1883), 24 Ch.D. 643; 52 L.J.Ch. 958; 49 L.T. 261; 32 W.R. 361; 20 Digest 368, *1065*.

(4) *Crawley* v. *Crawley* (1835), 7 Sim. 427; 4 L.J.Ch. 265; 58 E.R. 901; 40 Digest (Repl.) 711, *2059*.

Also referred to in argument: A

Ibbotson v. *Elam* (1865), L.R. 1 Eq. 188; 35 Beav. 594; 12 Jur. N.S. 114; 14 W.R. 241; 55 E.R. 1027; 36 Digest (Repl.) 563, *1221.*

Adjourned Summons.

By articles of partnership dated April 8, 1903, expressed to be made between Charles Vine Hollebone of the first part, Henry Hollebone of the second part, Benjamin Bloomfield Trench of the third part, and Charles James Palmer of the fourth part the parties thereto covenanted to enter into the business of stock and sharebrokers. By art. 1 the term of the partnership was to be seven years from July 1, 1902; by art. 4 the capital of the partnership was to consist of such sums as the partners should from time to time agree, each partner to be entitled to interest at 5 per cent. on his capital such interest to be payable yearly out of profits before any division thereof. By art. 7 the partners were to be entitled to the profits of the business in the following shares—viz.: Charles J. Palmer to 15 per cent. thereof and the remaining 85 per cent. to be divided in equal proportions between Charles V. Hollebone, Henry Hollebone, and Benjamin B. Trench. By art. 18, on June 30 in every year a general account in writing was to be taken of all moneys, debts, and effects belonging or due to the partnership, but not of goodwill, and of all liabilities and a copy delivered to each of the partners. By art. 23, in the case of the death or retirement of any partner his executors should thenceforth have no interest in common with the surviving or continuing partner or partners in the property of the partnership. Articles 24 and 25 provided the means of ascertaining and paying the share and interest of a deceased or retiring partner in the business including goodwill. Article 27 provided for the winding-up of the business on the determination of the partnership by effluxion of time and for the discharge of liability, repayment of the partners' capital and distribution of surplus assets according to the shares in which they were entitled to the net profits but without allowing any sum for goodwill. By a memorandum under the hands of the four partners of May 5, 1911, in which it was recited that the partnership deed expired on June 30, 1909, and had not been renewed, all conditions in the articles were to continue in full force subject to modification as to shares of profits. Charles V. Hollebone died on July 22, 1913. By an agreement of Oct. 3, 1913 between the three surviving partners the net profits of the firm after deduction of interest on partners' capital were to be divided as to 34⅓ (sic) per cent. each between such surviving partners. This agreement was to remain in force de die in diem and to be terminable at will. By an agreement, dated July 17, 1917, made between Henry Hollebone, Benjamin B. Trench and Charles J. Palmer (thereinafter called "the vendors") of the one part and Walter Scrimegeour, John Alexander Scrimegeour, Vernon Austen Malcolmson, Harry Blunt, Alexander Carron Scrimegeour, Hugh Carron Scrimegeour, and Edward John William Jewdwine (thereinafter called "the purchasers") of the other part, the vendors agreed to sell and the purchasers to purchase the vendors' business and the goodwill thereof together with the exclusive right to use the name "Hollebone Brothers and Trench." It was further provided that the said business and goodwill should be transferred to the purchasers as on Aug. 1, 1917 (thereinafter called the date of transfer); that the purchase price for the said business and goodwill should be paid by ten half-yearly instalments each of which instalments should be a sum equal to 53 per cent. (less income tax at the rate or rates current for each half-year) of the total net commissions which the purchasers should earn during the half-year ending on Jan. 31 and July 31 in each year commencing with the half-year ending on Jan. 31, 1918, in respect of the business of the vendors' then present clients and any further clients introduced by the vendors or their clients. Each such instalment should be payable one calendar month after the end of the half-year to which it related. Should any such payment not be made at or before its due date interest at 5 per cent. per annum should

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be paid thereon from that date until actual payment thereof; and that the purchasers should only be accountable to the vendors on each of the said dates of payment for a sum equal to 53 per cent. (less income tax as aforesaid) of such portion of the said commissions earned during the corresponding half-year as might actually have been received at the date of payment, but that in case of any commissions earned during any of the said half-years not so received the proportion thereof payable to the vendors should be paid over to them as and when received.

Henry Hollebone duly made his last will, bearing date Dec. 11, 1911, and thereof appointed his wife, the first defendant Emily Hollebone, her son, the plaintiff (Leslie Harry Hollebone), and his son Trevor Shum Hollebone to be executors and trustees thereof, and after certain specific bequests the testator directed payment of his debts and funeral and testamentary expenses, and gave and bequeathed all his real and personal estate not thereby or by any codicil thereto specifically bequeathed to his trustees thereinbefore named upon trust for sale and conversion as therein mentioned, with power to postpone such sale or conversion for such period as his trustees might think proper, and to invest as therein mentioned, and he directed that his trustees should stand possessed of the residue of his moneys and investments representing the same thereinafter referred to as his "residuary estate" upon the trusts thereinafter declared concerning the same, and he directed that his trustees should stand possessed of his residuary estate upon trust to pay the income arising therefrom to his wife Emily Hollebone during her life and upon her decease in trust to divide the same into equal parts or shares, and to stand possessed of such equal parts or shares upon the trusts thereinafter declared concerning the same, and he directed his trustees to pay one of such equal parts or shares to the plaintiff absolutely, and another to his daughter, the second defendant Evelyn Mary Docwra, then Evelyn Mary Hollebone, absolutely, and another to his son Trevor Shum Hollebone absolutely, and he directed his trustees to stand possessed of another of such equal parts or shares upon trust to invest the same and to pay the income arising therefrom to his son, the third defendant, Clifford Frederick Hollebone, during his life as therein mentioned, and on and after the decease of Clifford F. Hollebone upon trust to divide the said share equally amongst the children of the said Clifford F. Hollebone living at his death and who should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry under it, and in the event of there being no such child living at the date of the death of the said Clifford F. Hollebone, then the said share should fall into the testator's residuary estate and be divided accordingly, and he directed his trustees to stand possessed of another of such parts or shares upon trust for his daughter Lilian Amy Florence, the wife of Herbert Claud Mieville, for life and after her decease for her children as therein mentioned, and he directed his trustees to stand possessed of the remaining part or share upon trust for his son Harold Trench Hollebone for life and after his death as therein mentioned. Henry Hollebone died on Sept. 12, 1917, and his will was duly proved by his widow, the first defendant and the plaintiff. In pursuance of the agreement for sale of July 17, 1917, the purchasers paid to the credit of Hollebone Brothers and Trench the sum of £1,675 6s. 11d., as representing the proportion of the net commissions (less income tax) payable for the period from Aug. 1, 1917, to June 30, 1918, and there had been paid to the testator Henry Hollebone's executors the sum of £575 4s., as representing the proportion of the £1,675 6s. 11d. to which the testator's estate was entitled under the agreement of Oct. 3, 1913.

This originating summons issued on behalf of Leslie H. Hollebone, to which an infant child of the defendant Clifford F. Hollebone was one of the defendants, raised the question whether the share of the instalments of purchase money payable under the agreement dated July 17, 1917, being the purchase price of the business carried on by the testator and his partners ought, as between the

persons interested in the testator's residuary estate, to be treated and applied as capital or income thereof. A

J. M. Stone for the plaintiff trustee.

J. G. Wood for the testator's widow entitled to income.

J. W. Manning for those interested in capital of the testator's residuary estate.

Cur. adv. vult. B

May 9, 1919. **EVE, J.,** read the following judgment: On July 17, 1917, the testator and his partners sold the goodwill of their business as stockbrokers for a consideration to be paid by ten half-yearly instalments, each of which was to be a sum equal to 53 per cent. (less income tax at the rate current for each half-year) of the total net commissions which the purchasers should earn during the half- C year ending on Jan. 31 and July 31 in each year, commencing with the half-year ending on Jan. 31, 1918, in respect of the business of the vendors' then present clients and any future clients to be thereafter introduced by the vendors or their clients. Each instalment was to be paid within one calendar month after the end of the half-year, and, if not so paid, was to carry interest at the rate of 5 per cent. from the due date. The testator died on Sept. 12, 1917, having made his will, D dated Dec. 11, 1911, whereby he devised and bequeathed his residuary real and personal estate to three trustees—of whom his widow was one—upon trust for conversion, with power to postpone for such a period as his trustees might think proper, and with a direction that any reversionary interest should not be sold until it falls into possession unless his trustees should see reason for sale. The widow is tenant for life of the residue, and the other respondents are the persons beneficially interested therein in remainder expectant on her decease. Since the testator's E death certain sums have been received representing his share of instalments of the purchase price of the business, and this summons has been issued for the purpose of having it determined how the amounts already received in respect of the period subsequent to the testator's death and the instalments hereafter to be received ought to be treated as between the widow and those interested in the corpus of F the residuary estate. On behalf of the latter it has been argued that the instalments are capital, and that the only right of the tenant for life is to have the income derived from the investment of each instalment as received; the widow, on the other hand, contends that each instalment ought to be apportioned as between capital and income, and that she is entitled to be paid the proportion attributed to income, and to receive thereafter the interest earned by the investment of the G proportion representing capital. Those entitled in remainder rely to some extent on the direction in the will that reversionary interests are not to be sold until they fall into possession, and on the provision in the sale agreement that unpaid instalments are to bear interest if not paid at the stipulated date. I do not think these considerations really affect the question; the testator's interest cannot, in my opinion, be accurately described as a reversion; each instalment is a debt of H an uncertain amount, payable at a future date; nor can the fact that, as between vendor and purchaser the latter is bound to pay interest by way of addition to the purchase money if he fail to complete on the due date, affect the rights inter se of the parties interested in the purchase price.

It comes, therefore, to this, that part of the outstanding personal estate of the testator is represented by the right to receive these instalments of purchase money I of wholly uncertain amounts and in the meantime producing no income. The widow is not bound to join in exercising the power to postpone the conversion of the asset, but it is obvious that the amount which could be realised by its immediate conversion is of a very uncertain and speculative character. In these circumstances it is for the benefit of all parties interested in the corpus of the estate that conversion should be postponed and that the agreement for sale should be worked out, but this result ought not to be allowed to prejudice the tenant for life, and in my opinion the case falls within the principle settled in *Wilkinson* v. *Duncan* (1),

applied in *Beavan* v. *Beavan* (2) and followed in *Re Earl of Chesterfield's Trusts* (3). The facts of the present case are not unlike those in *Beavan* v. *Beavan* (2). There the testator's estate, which was subject to an immediate trust for conversion, was represented in part by arrears of an annuity which had accumulated from the death of the testator in 1852 to Aug. 8, 1865, to the amount of £8,656 10s. 7d., when they were paid off, and by instalments of the annuity to be received subsequent to Aug. 8, 1865. LORD ROMILLY decided that the £8,656 10s. 7d. received on Aug. 8, 1865, ought to be apportioned as on that day between corpus and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, amount on Aug. 8, 1865, to £8,656 10s. 7d. and that the sum so ascertained ought to be treated as corpus and the difference as income, payable to the tenant for life, and further that each instalment of the annuity with or without interest received after Aug. 8, 1865, or to be thereafter received ought to be apportioned between corpus and income as on the day on which such instalment was or should be received on the same principle as that on which the £8,656 10s. 7d. was directed to be apportioned.

In my opinion, in this case each instalment of purchase money already received and hereafter to be received with or without interest ought, as from the date of the testator's death, to be apportioned between corpus and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on Sept. 12, 1917, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, amount on the day when the instalment was or shall be received to the amount actually received including interest, if any, and the sum so ascertained must be treated as capital and the difference between it and the sum actually received as income.

It by no means follows from this that in every case where the outstanding estate is represented in part by a right to receive purchase or other moneys by deferred instalments, or includes a terminable annuity, the tenant for life is entitled to insist on apportionment. *Crawley* v. *Crawley* (4) is an instance in which the tenant for life was held entitled only to the income derived from the investments of the payments made on account of the annuity, but the facts there were quite different from those of this case, and I do not think, in deciding as I have done, that I have arrived at any conclusion inconsistent with the judgment of SHADWELL, V.-C.

Solicitor: *Wellington Taylor.*

[*Reported by* W. P. PAINE, ESQ., *Barrister-at-Law.*]

A

LANCASTER *v.* BLACKWELL COLLIERY CO., LTD.

[House of Lords (Lord Birkenhead, L.C., Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Buckmaster), November 13, 1919]

[Reported 89 L.J.K.B. 609; 122 L.T. 162; 64 Sol. Jo. 113; 12 B.W.C.C. 400] B

Workmen's Compensation—Accident "arising out of and in the course of employment"—Burden of proof—Conflicting inferences of equal degrees of probability—Possibility of comparing and balancing probabilities—Inference in favour of applicant.

In considering whether injury resulted from an accident arising out of and in the course of employment for the purposes of a claim under the Workmen's Compensation Acts, if the proved facts gave rise to conflicting inferences of equal degrees of probability so that the choice between them was a mere matter of conjecture, the applicant for compensation was **held** to have failed to prove his case. But where there was ground for comparing and balancing the probabilities and a reasonable man might hold that the more probable conclusion was that for which the applicant contended, the arbitrator was justified in drawing an inference in favour of the applicant. C D

Notes. The Workmen's Compensation Acts were repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, and s. 1 (1) of the Act of 1946 provides that insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment. E

Considered: *Davis* v. *London, Midland and Scottish Rail. Co.* (1930), 23 B.W.C.C. 368; *Hannon* v. *Mowlem & Co.* (1937), 30 B.W.C.C. 139; *Wheat* v. *Florence Coal and Iron Co.* (1938), 31 B.W.C.C. 405; *Alexander* v. *J. Dickinson & Sons, Ltd.*, [1939] 3 All E.R. 204. Applied: *Dowen* v. *Aldridge U.D.C.* (1939), 32 B.W.C.C. 65. Referred to: *Hurst* v. *Walter's Palm Toffee Co.* (1929), 22 B.W.C.C. 215; *Hutchings* v. *Devon County Council* (1931), 24 B.W.C.C. 320; *Davies* v. *Sir W. G. Armstrong-Whitworth Aircraft, Ltd.* (1933), 149 L.T. 206; *McLarty* v. *Prince Line, Ltd.* (1933), 26 B.W.C.C. 134; *Collins* v. *British Timkin, Ltd.* (1934), 27 B.W.C.C. 74; *Leary* v. *Deptford Steamship Owners* (1935), 28 B.W.C.C. 235; *Whittle* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1936] 2 All E.R. 467; *Hickman* v. *Peacey*, [1945] 2 All E.R. 215; *Horabin* v. *British Overseas Airways Corpn.*, [1952] 2 All E.R. 1016. F G

As to the burden of proving that the accident arose out of and in the course of employment, see 34 Halsbury's Laws (2nd Edn.) 853–856, paras. 1179, 1180; and for cases see 34 Digest 323 et seq. For the National Insurance (Industrial Injuries) Act, 1946, see 16 Halsbury's Statutes (2nd Edn.) 797.

Cases referred to in argument:

Mills v. *Dinnington Main Coal Co., Ltd.* (1916), 86 L.J.K.B. 231; 116 L.T. 181; 61 Sol. Jo. 202; 10 B.W.C.C. 153, C.A.; 34 Digest 330, *2686*. H

Barnabas v. *Bersham Colliery Co.* (1910), 103 L.T. 513; 55 Sol. Jo. 63; 4 B.W.C.C. 119, H.L.; 34 Digest 325, *2656*.

Appeal by the applicant, the widow of the deceased workman, from an order of the Court of Appeal allowing an appeal by the employers from an award in favour of the applicant by a county court judge sitting as arbitrator under the Workmen's Compensation Acts. The county court judge had found that the deceased was injured by accident arising out of and in the course of his employment which resulted in death. The Court of Appeal held that there was no evidence to support this finding. The facts of the case and the evidence before the county court judge are referred to in the opinion of Lord Birkenhead, L.C. I

Compston, K.C., and *Shakespeare* for the appellant.

Rigby Swift, K.C., *J. B. Matthews, K.C.*, and *E. W. Cave* for the employers.

LORD BIRKENHEAD, L.C.—This is an appeal from a judgment of the Court of Appeal, setting aside an award in favour of the appellant by the county court judge of Derbyshire. The appellant is the widow of Lancaster, who is now dead, a workman in the employ of the respondents, who died on Dec. 14, 1917, from internal strangulated hernia. The deceased, a strong healthy man who seldom suffered from illness, was employed by the respondents at their collieries as a banksman, and his work involved the pulling of loaded tubs on to the rails at the pit top. Evidence was offered to the arbitrator and accepted by him that the work was heavy work. On Friday, Dec. 7, the deceased left his home for his work at 5.15 in the morning and arrived at the colliery in his usual health. He commenced his work, but after working a short time he complained of great pain, leaning against the shed and ascribing at the moment his pain to indigestion. He did not resume his work but shortly afterwards left the colliery for his home. He arrived there at about nine in the morning in a stooping position with his hands pressed against his body and told his wife that "he thought he was done for." Soon after his return home he commenced vomiting, and, after seeing a doctor, he went to bed, and remained in bed; the pain and the vomiting continued during the whole of this period until Dec. 14, 1919, when he went into hospital at Nottingham. On the same night an operation was performed and it was discovered that he was suffering from internal strangulated hernia caused by the bowel having intruded into a hole, which I assume to have been congenital, in the mesentery of the colon. Death followed upon the operation.

Before I ask your Lordships' attention to the evidence, it is necessary to point out that the learned arbitrator has found as a fact that there was injury by accident arising out of and in the course of employment. The Court of Appeal has set aside the award of the arbitrator on the ground that there was no evidence by which such finding could be supported. I am of opinion that the Court of Appeal was wrong, and, in order to justify the view which I have found, it is necessary, however shortly, to ask the attention of your Lordships to the evidence.

The medical evidence given on behalf of the appellant was that of Dr. Hogarth. He said: "The intrusion of the small intestine must have been sudden and happening from a few hours to three days before he came in." The lords justices in the Court of Appeal have all of them founded themselves upon this statement made by Dr. Hogarth, and they have based upon it the conclusion that, in so much as the intrusion, which in their view was the fatal intrusion, must have occurred, taking the maximum period, three days before the examination, therefore, it could in no event be referable to what had taken place seven days before. The same witness, and almost in the same answer, contemplated a contingency which seems entirely to have escaped the attention of the learned lords justices, because he observes in this second statement which I have in mind: "If it," that is to say, the small intestine, "went in and came out again it might cause pain and sickness." I postpone my comment upon that evidence until I have directed your Lordships' attention to one or two further statements that were made by the witnesses. In re-examination Dr. Hogarth said, "If the coming on was contemporaneous with hard strain in work I should have attributed it to that." That is the re-examination of the applicant's doctor. The doctor who was called on behalf of the respondents in answer to a question put to him in cross-examination gave an answer which corresponds completely with the answer to which I have just directed your Lordships' attention made by Dr. Hogarth. Dr. Southern said in answer to cross-examination, "If the pain came on during heavy strain I should ascribe it to that." So, there was before the learned arbitrator not only a statement made by one of the medical witnesses, but there were statements made by both medical witnesses, to the effect that if the coming on of the pain " was contemporaneous with hard strain in work" they would have ascribed the pain to that hard strain; and so far from there being no evidence upon which the learned arbitrator might properly act, he had before him, at any rate upon those points,

complete agreement as to the evidence as between the doctors who were called. On this evidence the learned arbitrator, as I have said, has found that there was injury by accident arising out of and in the course of employment. I find it therefore desirable to recall, however shortly, the history of that which happened. On the 7th the man goes to his work. At the very moment that he is carrying out heavy work he feels unaccustomed pain; he comments upon it to the man who is working with him, attributing it in the first place to indigestion. He goes home. By the time he reaches home the pain is so aggravated that that which he had in the first place ascribed to indigestion he now feels is in its nature mortal, and he tells his wife that he is, in his judgment, affected by a fatal injury. A physical result of that injury is constant vomiting. There is medical evidence, to which I have already directed your Lordships' attention, that if the pain came on during a heavy strain it ought to be ascribed to and explained by that straining. Then the operation is performed and the man dies.

The principles which have to be applied to facts like these are by now well settled; they have been declared on numerous occasions by your Lordships and they may be very easily summarised. If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the arbitrator is justified in drawing an inference in his favour. That view of the law has been stated in this House repeatedly, and it is not open to challenge to-day. On the view which I have formed of the facts in this case, I think the Court of Appeal were wrong in holding here that the facts proved gave rise to conflicting inferences of equal degrees of probability. I think, on the contrary, that there was ground here for comparing and balancing the probabilities, and I think that the learned arbitrator was fully entitled on the facts proved before him to form the view that the more probable conclusion was that for which the applicant contends. He was entitled, for instance, to accept the view of both doctors that the coincidence in point of time between a severe physical strain, and the commencement of the pain suggests a more intimate connection. He was entitled to decide (as he did decide) that the medical view that the fatal intrusion could not at most be more than three days standing was so much qualified by cautious reservations as to be of little value. Having found this view he was most certainly entitled to ask himself the question (and to answer it as he did): what, in fact, did happen while he was working which so swiftly produced a physical collapse so complete? Counsel for the employers admitted—we should have paid little attention had he denied it—that the first so-called accident led to a temporary intrusion of the intestine, but he contended that, according to the medical evidence, this could not have been the final and fatal intrusion. It is an answer to this argument that the "accident" caused the vomiting, and the vomiting was admittedly a sufficient explanation of the final intrusion. In this connection the evidence of the applicant's doctor that the intestine might intrude within the mesenthol, withdraw, and reintrude, is of great importance, and fully justified the finding of the arbitrator. I am, for the reasons I have given, of opinion that the somewhat surprising conclusion reached by the Court of Appeal cannot be sustained, and I move your Lordships that the appeal be allowed with costs.

VISCOUNT HALDANE.—I agree in the conclusions which have been arrived at by your Lordship on the Woolsack, and I have very few words to add. The workman, the accident to whom is in question, was hurt, or exhibited symptoms of being hurt, upon Dec. 7, 1917, and he died on the 14th. It is quite possible that strain in the heavy work he was doing might have occasioned a protrusion of

A the intestine through the hole, which there undoubtedly appears to have been in the mesentery, a hole which, I will assume for the purpose of what I am going to say, was congenital. Then, if so, there is continuity in the sequence of symptoms between the 7th and the 14th. His widow's evidence is important. He never changed his condition from being that of a man suddenly affected on the 7th, and remained ill until he went into hospital and died at once, the operation which was
B effected having taken place too late to save him.

There is here what would justify the inference of a train of causation but for one circumstance, and that is, that a medical witness puts the extreme limit within which the protrusion of the intestine must have taken place in order to produce the pathological condition which was found after death at three days. But, from the observations made by the learned county court judge, it is obvious that he did not
C place much reliance upon what the witness said, and one reason was the manner in which the witness said it, and the qualification and uncertainty which he seemed to imply. That is what one would naturally expect in the light of ordinary knowledge, because, obviously, it is somewhat speculative to put a limit so definite as three days when the whole period is only seven days, as here. But then there is something more which impresses me very much, and that is that this case was
D heard, as it ought to be, with a medical assessor; and that means that you have an independent expert view, which was made use of by the learned judge who tried the case. Under these circumstances, I think that if the matter had been left to a jury it would have been properly left to a jury as containing evidence on which the jury could be asked to come to a conclusion and if they had come to a conclusion it could not have been said that there was no evidence; and I think the Court of
E Appeal in the present case had no business to interfere with the finding of the county court judge. It is not a case of guess work, it is a case of inference, and, I think, a case of inference which was justified, at any rate up to the point that we are precluded from interfering with the finding which was made.

LORD DUNEDIN.—I concur. I think it quite impossible, for the reasons which
F have been given by the Lord Chancellor, to say that there was no inference on which the county court judge could have come to the result that he did, and, if that is so, upon the decided authorities the judgment of the Court of Appeal must be wrong.

LORD ATKINSON.—I entirely concur. I think that there are only two explanations in this case; either that this rupture which resulted in the man's death
G occurred from natural causes, or that it was brought about by his work. When I ask myself whether the evidence is equally consistent with those two theories, I must come to the conclusion that the weight of evidence is altogether in favour of the second and not the first, and that being an entire question of fact, there was evidence, in my opinion, before the county court judge to sustain the conclusion to which he had come, and, therefore, his decision ought not to be disturbed.

H **LORD BUCKMASTER.**—The noble and learned Lord upon the Woolsack has effectively expressed the opinion I hold in this case, and to his statement I desire to make no addition.

Appeal allowed.

Solicitors: *King, Wigg & Brightman*, for *Bertham Mather*, Chesterfield; *Peacock & Goddard*, for *Elliot, Smith & Co.*, Mansfield.
I

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

A

MORGAN *v.* CALDWELL

[KING'S BENCH DIVISION (Bray, A. T. Lawrence and Shearman, JJ.,), April 2, 1919]

[Reported 88 L.J.K.B. 1141; 121 L.T. 148; 83 J.P. 213; 35 T.L.R. 381; 17 L.G.R. 330; 26 Cox, C.C. 425; 14 Asp.M.L.C. 437]

B

Shipping—Seaman—Rations—Rations furnished during voyage—Larceny—Seaman taking unconsumed rations ashore—No instructions given to seaman about taking rations ashore, but knowledge that shipowners disapproved of practice—Property in unconsumed rations remaining in shipowners—Merchant Shipping Act, 1906 (6 *Edw.* 7, *c.* 48) *s.* 25.

By the Merchant Shipping Act, 1906, s. 25, the master of a ship is required C to furnish provisions to every member of the crew in accordance with a scale set out in the Act. The appellant, a seaman, was a member of the crew of a steamship. During a voyage the members of the mess to which the appellant belonged agreed that they would not consume the tins of milk and marmalade issued to them as part of the rations furnished in accordance with s. 25 of the Act, but would keep the tins, share them out equally, and take them home D at the end of the voyage. Accordingly, when the vessel docked the appellant carried from the ship in his bag two tins of marmalade and three tins of milk. When stopped by the police at the dock gates and asked whether he had any ship's stores in his bag, the appellant replied: "No." On searching the bag the police found the tins of marmalade and milk and in explanation the appellant told the police that he had saved them up on the voyage. The appellant E was charged with larceny of the tins. He was convicted by the magistrate who found as a fact that, although the steamship company had given no instructions to the crew that they were not to take unconsumed rations ashore, the appellant knew that the company disapproved of that practice. On appeal by Case Stated,

Held: the mere fact that the appellant knew that the company disapproved F of rations being taken ashore was not sufficient to establish mens rea on his part since, for his conviction to be good, it had to be proved that he knew that he was taking away the property of another; as this fact had not been established the conviction ought to be quashed.

Per SHEARMAN, J.: Rations furnished to seamen under s. 25 of the Merchant Shipping Act, 1906, which were unconsumed remained the property of the G shipping company.

Notes. As to provisions furnished to seamen, see 30 HALSBURY'S LAWS (2nd Edn.) 213, 214; and for cases see 41 DIGEST 223. As to larceny, see 10 HALSBURY'S LAWS (3rd Edn.) 763 et seq. For the Merchant Shipping Act, 1906, s. 25, see 23 HALSBURY'S STATUTES (2nd Edn.) 792.

H

Case Stated by the stipendiary magistrate for the city of Liverpool.

The appellant, a seaman, was charged before the stipendiary magistrate at Liverpool that he did, on July 19, 1918, feloniously steal two tins of marmalade and three tins of milk, the property of his employers, the Booth Steamship Company Limited. On the hearing of the charge the following facts were proved or admitted:—1. The appellant was a member of the crew of the steamship *Michael*, belonging to the I Booth Steamship Company Limited. 2. The steamship had been on a voyage from and to the port of Liverpool which lasted about twelve weeks, and on that voyage the appellant was one of a mess of ten of the crew to whom rations had been served in bulk weekly, in accordance with the scale of provisions required by s. 25 of the Merchant Shipping Act, 1906, to be supplied to the crew during the voyage. 3. It had been agreed between the members of the mess to which the appellant belonged that the tins of milk and marmalade so served out to them should not be opened during the voyage, but should be kept and shared equally between the members of

the mess for the purpose of being taken home by them respectively after the voyage. 4. In pursuance of this arrangement the appellant carried from the ship the two tins of marmalade and the three tins of milk, the subject-matter of the charge against him. 5. The arrangement amongst the members of the mess as to the keeping of the marmalade and milk and the carrying away of the same by the members of the mess at the termination of the voyage was not sanctioned by or known to the steamship company.

On behalf of the appellant it was contended before the learned stipendiary magistrate that upon the above-mentioned facts the appellant had committed no offence, inasmuch as he was entitled by law to his due share of the rations served out in bulk, and that he was perfectly entitled to choose whether he would consume them during the voyage or retain them and take them home for consumption after the conclusion of the voyage. On behalf of the prosecution it was contended that, although it was quite true that the steamship company were bound to supply the statutory amount of rations to the appellant, such rations were served out by the company on the express understanding that they were to be consumed during the voyage and that they were supplied for that purpose only; that the property in such part of the rations as remained unconsumed at the end of the voyage was in the company; and that the appellant had no legal right to take the rations away from the steamship.

The stipendiary magistrate convicted the appellant (who had agreed to be tried by a court of summary jurisdiction) but agreed to state a Case for the opinion of the High Court as to whether his decision was right in point of law. The Case Stated came before the Divisional Court in the first instance on Dec. 17, 1918, when it was sent back for amplication by the magistrate, the court desiring that he should state whether the appellant might have taken the rations under a claim of right, mistaken or otherwise, or whether he took the property feloniously. The court also desired that the magistrate should state the facts upon which he based his judgment. Accordingly the following statement was added to the original Case Stated:—(a) The appellant was stopped on leaving the gate of the Harrington Dock, where the steamship *Michael* had been berthed, by two members of the Liverpool police force. He was carrying a sailor's kit bag, which appeared to be full and heavy. In accordance with the regular practice of the police at Liverpool, the constables asked the appellant what was in the bag, and the appellant produced a ticket signed by an officer of the ship, containing the words: "Pass bearer with one bag—personal effects." The constables then asked what was meant by personal effects, and the appellant replied, "My own clothing." The police then inquired whether he had any ship's stores or contraband goods in the bag. He said "No." On searching the bag the police found two 7lb. tins of marmalade and three small tins of milk, the subject of the charge, which were of the value of about £1. On being asked by the police to account for his possession of the goods, the appellant replied that they were the milk and marmalade which he had saved up on the voyage. He was then asked whether the officer who signed his pass knew that the milk and marmalade were in the bag with his clothing, and he answered "No." He was further asked whether he had obtained permission to take the milk and marmalade ashore, and whether he had "declared" the goods to the customs' officer. To each of these questions he replied in the negative, and stated that only his mates knew of the fact that the goods were being taken away. On being taken to the police station and subsequently charged with stealing the above-named articles, the property of the Booth Steamship Co., he made no reply. (b) The practice which obtained on board the steamship *Michael*, with regard to serving out the rations of jam or marmalade (of which the two 7lb. tins of marmalade were part) during a voyage, was that a 7lb. tin of jam or marmalade was issued one week for the mess, of which the appellant was a member, and in the following week two 7lb. tins were issued, thus making an issue of three 7lb. tins of jam or marmalade every fortnight. (c) The general instructions (which were proved by the evidence of the chief steward of the steamship

Michael) issued by the Booth Steamship Company to the crew of the vessel were that no member of the crew was to take any provisions ashore which had been purchased abroad by the seaman himself, without the consent of the captain. Although it was not proved that any such instructions with regard to rations had been actually given, or that such instructions were posted on the ship, the appellant was well aware of the fact that the Booth Steamship Company disapproved of the seamen taking their unconsumed rations ashore, the more so as such disapproval was in accordance with the practice at the time of most of the other shipping companies in Liverpool. (d) In spite of the knowledge of such disapproval the appellant carried away the said marmalade and milk from the steamship *Michael* without the knowledge and consent of the captain or any person in authority on the ship. The magistrate concluded his additional statement as follows: "It was upon the facts stated above and in the case stated by me on Oct. 14, 1918, that I based my judgment that the appellant had taken away from the ship the said tins of marmalade and milk feloniously. I considered that as a matter of law the property in the unconsumed rations issued to the crew must be deemed to remain and be in the Booth Steamship Co. I further considered that the suggestion that the appellant had taken the property under a claim of right, made in good faith, was negatived by the fact that the appellant knew that the Booth Steamship Company expressly disapproved of such action, and the further fact that the appellant had carried away the property in a clandestine manner."

By s. 25 of the Merchant Shipping Act, 1906:

> "(1) The master of every ship for which an agreement with the crew is required under the Merchant Shipping Acts shall . . . furnish provisions to every member of the crew (who does not furnish his own provisions) in accordance with the scale set out in the first schedule to this Act, and for the purposes of s. 199 of the principal Act (which provides for compensation in the case of short or bad provisions) every such member of the crew of the ship shall be deemed to have stipulated by his agreement for provisions in accordance with that scale."

Abinger for the appellant.

Leslie Scott, *K.C.*, and *Maxwell* for the respondent, the chief constable of Liverpool.

BRAY, J.—I am of opinion that in this case the appeal must be allowed, as I do not think that the appellant should have been convicted on the evidence and the facts which we have before us.

There is a question of great difficulty raised by the parties, and that is whether, under s. 25 of the Merchant Shipping Act, 1906, the rations which are served out by the master of the ship to the seamen become the absolute property of the seamen or not. However, I do not think that it is necessary to decide this point in the present instance, and if these proceedings have been brought for the purpose of testing it, I am sorry for it. It is quite possible for the steamship company to thresh the matter out in another way if they are desirous of doing so—namely, by asking for a declaration or something of that kind. That is not what is desired here, and since it is, as I have said, unnecessary to answer this particular question to-day, I shall not express any opinion whatsoever as to it. But, assuming that the property in the rations—that is, in that portion of the rations which remained unconsumed at the end of the voyage—was still in the steamship company, it would be incumbent upon the prosecution to show that there was mens rea on the part of the present appellant. In other words, there ought not to have been a conviction recorded against this seaman unless there was evidence to show that he knew that he was doing wrong in taking something which was the property of another. Now, do the facts in the present case go to the length of showing that the appellant knew that he was taking what he knew to be the property of the steamship company? In my opinion they do not. It is admitted that there were no instructions given to the

seamen with reference to the taking of rations ashore, although I will assume, as I think was the case, that the seamen knew (and this included the appellant) that the steamship company disapproved of the practice. But this is quite consistent with the property in the rations being in the seaman. I can quite understand the desire of the steamship company that the rations which were supplied should be consumed on board ship, especially as they were supplied for the benefit of the seaman and to maintain him in good health, and no doubt they were fully entitled to stipulate that they should be so consumed. But the mere fact of their disapproval of the practice of taking away rations which remained unconsumed at the end of the voyage is not, in my opinion, a sufficient justification for the finding that there was mens rea on the part of the appellant, as has been found by the learned stipendiary. For the reasons which I have stated I think that the appellant should not have been convicted, and that the appeal should be allowed.

A. T. LAWRENCE, J.—I am of the same opinion, and I quite agree with my Lord in feeling that there is considerable difficulty as to the interpretation of s. 25 of the Merchant Shipping Act, 1906, with regard to the property in the unconsumed rations. I think that it is possible that the property in the same passes to the seaman upon delivery to him, but still this is not altogether clear. It has been argued on behalf of the respondent that, since there are no words in the statute which expressly pass the property in the rations to the seaman, there is strong ground for considering that the property remains in the shipping company, because I fully agree that the policy of the Act is to be looked at, and that policy is undoubtedly that the seamen should be provided with proper and adequate food upon a voyage so as to enable them to remain in good health and fit to perform their ordinary duties as seamen. It is on this ground that I find the difficulty of determining in my own mind whether the property in the rations did or did not pass to the seamen when the same were delivered to them on board ship. It is not necessary, however, to decide the present case upon that point, for without it I am quite satisfied from the facts set out in the case stated that the appellant should not have been convicted. The learned stipendiary appears to me to negative the bonâ fides of the claim of the appellant to the property without any evidence whatsoever. He says, in his additional statement,

> "I am satisfied, and found as a fact, that although it was not proved that any such instructions [that is, instructions with regard to the rations remaining the property of the shipping company] had been actually given, or that any notices of such instructions were posted on the ship, yet the appellant was well aware of the fact that the Booth Steamship Co. disapproved of the seaman taking his unconsumed rations ashore, the more so as such disapproval was in accordance with the practice at the time of most of the other shipping companies in Liverpool."

Now, in my judgment there was no evidence of that whatever, and later on it appears that the ground on which he based his decision was this:

> "I considered that as a matter of law the property in the unconsumed rations issued to the crew must be deemed to remain and be in the Booth Steamship Co. I further considered that the suggestion that the appellant had taken the property under a claim of right, made in good faith, was negatived by the fact that the appellant knew that the Booth Steamship Company expressly disapproved of such action."

It is all inference, and I am of opinion that no man ought to be convicted of the offence of larceny when it is not quite clear that he was doing an act which he knew was wrongful and with a felonious intent. I think, therefore, that this conviction ought to be quashed.

SHEARMAN, J.—I have been in considerable doubt during the course of the argument, but my doubts are not strong enough to lead me to differ from the

conclusion at which my two brothers have arrived. I think that it is quite arguable that there was some evidence upon which the learned stipendiary might have found a felonious intention on the part of the appellant, and I believe he so intended to find; but the language of his finding is so doubtful that it would not be doing justice to the appellant if we failed to give him the benefit of the doubt and set the conviction aside. That is quite sufficient for the purpose of the present case, and from the form in which the case stated is presented to us it is not really necessary to go any further. But a point of some interest has been raised as to the meaning of s. 25 of the Merchant Shipping Act, 1906, in connection with the property in rations served out to seamen during a voyage when a portion of such rations are unconsumed. My learned brothers have felt some doubt as to this matter. I feel no doubt whatever. The section of the Act of 1906 merely gives directions as to the furnishing or supply of provisions which are intended solely for consumption on board ship during the voyage. I have not the slightest hesitation in expressing the opinion that the unconsumed rations remain the property of the shipping company. However, that point is not really necessary for the decision in the present case as the conviction cannot stand upon another ground. On that ground I am, under the circumstances, in full accord with the conclusion at which my two brothers have arrived—namely, that this appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitors: *Alexander Smith*, for *John A. Berhn*, Liverpool; *F. Venn & Co.*, for *E. R. Pickmere*, Liverpool.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

MONAGHAN *v.* RHODES & SON

[Court of Appeal (Lord Sterndale, M.R., Atkin and Younger, L.JJ.), November 21, 24, 1919]

[Reported [1920] 1 K.B. 487; 89 L.J.K.B. 379; 122 L.T. 537]

Master and Servant—Duty of master—Provision of safe plant—Stevedores—Dangerous means of access from deck to hold allowed to be used as substitute for original safe means provided by ship—Dangerous substitute seen in use by employer—Injury to servant—Claim against employer—Defence—Volenti non fit injuria.

The plaintiff was a workman employed by the defendants who were stevedores engaged on loading a ship. During the loading the defendants so blocked up with cargo the iron ladders leading from the deck to the hold that the ladders could not be used. In consequence some of the defendants' workmen obtained from the ship's officer a rope ladder which was fastened at the top to the coamings of the hatch and swung loose some feet from the bottom of the hold. The plaintiff knew the rope ladder was dangerous and had pointed this out to the defendants. As the plaintiff was going up the rope ladder it swung, his hand was caught between the ladder and the coamings, and in trying to free himself he fell to the bottom of the hold and was injured. The rope ladder was seen by one of the defendants, but he did not interfere with its use. By reg. 6 of the Docks, Harbours, and Canals, Loading, Unloading and Coaling Order, 1904, the shipowners were under a duty to maintain safe means of access by ladder from the deck to the hold and when the defendants first sent their work-

men on the ship this duty was being properly performed by the provision of the iron ladders. In an action by the plaintiff against the defendants claiming, inter alia, damages for common law negligence in allowing improper means of access to the hold to be used, the trial judge found that the rope ladder was not a reasonably safe means of access, but held that the defendants were not guilty of negligence in allowing it to be used. On appeal,

Held: (i) once it was ascertained that the original safe means of access had gone, that another means of access of obvious danger had been substituted for it, and that the defendants had seen the dangerous substitute, but had not interfered with its use, the defendants were guilty of negligence; (ii) the defence of volenti non fit injuria was not open to the defendants since there was no evidence that the plaintiff undertook the risk of the dangerous rope ladder. *Williams* v. *Birmingham Battery and Metal Co., Ltd.* (1), [1899] 2 Q.B. 338, applied.

Notes. Regulation 6 of the Docks, Harbours, and Canals, Loading, Unloading, and Coaling Order, 1904, has been replaced by reg. 11 of the Docks Regulations, 1934 (S.R. & O. 1934, No. 279) and under the Regulations of 1934 it is expressly made the duty of the shipowner master or officer in charge of the ship to comply with reg. 11.

Applied: *Bowater* v. *Rowley Regis Corpn.*, [1944] K.B. 476. Referred to: *Abbott* v. *Isham* (1920), 124 L.T. 734; *Baker* v. *James*, [1921] All E.R.Rep. 590; *Russell* v. *Criterion Film Productions, Ltd.*, [1936] 3 All E.R. 627; *Wilsons and Clyde Coal Co.* v. *English*, [1937] 3 All E.R. 628.

As to a master's duty to provide proper plant and appliances, see 25 Halsbury's Laws (3rd Edn.) 511; and for cases see 34 Digest 196 et seq. As to the defence of volenti non fit injuria, see 25 Halsbury's Laws (3rd Edn.) 515; and for cases see 36 Digest (Repl.) 150 et seq.

Cases referred to:

(1) *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338; 68 L.J.Q.B. 918; 81 L.T. 62; 47 W.R. 680; 15 T.L.R. 468, C.A.; 34 Digest, 195, *1590*.

(2) *Griffiths* v. *London and St. Katherine Docks Co.* (1884), 12 Q.B.D. 493; 50 L.T. 755; 32 W.R. 831; affirmed (1884), 13 Q.B.D. 259; 53 L.J.Q.B. 504; 51 L.T. 533; 49 J.P. 100; 33 W.R. 35, C.A.; 36 Digest (Repl.) 153, *801*.

(3) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 34 Digest 202, *1657*.

(4) *Biddle* v. *Hart*, [1907] 1 K.B. 649; 76 L.J.K.B. 418; 97 L.T. 66; 23 T.L.R. 262; 51 Sol. Jo. 229; 10 Asp. M.L.C. 469, C.A.; 34 Digest 225, *1888*.

Appeal by the plaintiff, Patrick Monaghan, from the decision of Greer, J., sitting without a jury at the Liverpool Assizes. The facts of the case sufficiently appear from the following judgment.

Langdon, K.C., and *J. W. Ross-Brown* for the appellant.

Miller, K.C., and *J. E. Singleton* for the respondents, W. H. Rhodes and Son.

LORD STERNDALE, M.R.—Although I have felt some difficulty about the present case, I think on the whole that this appeal should be allowed. The facts can be stated quite shortly. The plaintiff, Patrick Monaghan, was a workman in the employment of the defendants, W. H. Rhodes & Son, who were stevedores and who were working on the loading of a ship. During the loading they so blocked up the iron hold ladders with cargo that they could not be used. In consequence some of the stevedores' men obtained from the ship's officer a rope ladder called a "Jacob's ladder." I understand that a Jacob's ladder means a rope ladder swinging loose. In the present case that is what it was. A rope ladder was fastened at the top to the coamings of the hatch and swung loose some feet from the bottom of the hold. As the plaintiff was going up this ladder it swung and his hand got caught between the ladder and the coamings. In trying to free himself he fell

to the bottom of the hold and was badly injured. That is all that it is necessary to say about the facts of the present case except that after the rope ladder had been supplied one of the defendant firm himself came and saw that the ladder was being used and he did not interfere.

The action was first founded on reg. 6 of the Order made under s. 79 of the Factory and Workshop Act, 1901, which provides that in circumstances applicable to the present case

> "there shall be maintained safe means of access by ladder or steps from the deck to the hold in which work is being carried on, with secure handhold and foothold continued to the top of the coamings."

One of the conditions of its being considered to be safe is that the cargo shall be "stowed sufficiently far from the ladder to leave at each rung of the ladder sufficient room for a man's feet." That condition of things had been destroyed by the stowing of the cargo up against the iron ladders so that there was not sufficient room left for a man's feet. The plaintiff first founded his cause of action on the obligation of the defendants to provide proper appliances and means of work. This rope ladder, it was said, was one of the things which they had to supply, or rather the means of access afforded at that time by this rope ladder was an appliance which they had to supply. The learned judge in the court below thought that wrong, and I agree. The obligation under the Factory and Workshop Act, 1901, is placed on the shipowner and not on somebody doing work on the ship. Therefore I think that that part of the allegation of the plaintiff fails.

But there is another allegation on which I think that he is entitled to succeed, and that is this: That the defendants were negligent in allowing improper means of access to the hold of the ship to be used. In order to arrive at that, I accept, as I am bound to do, the learned judge's finding that such a swinging ladder as this was not a reasonably safe means of access, and that it was a very dangerous thing for workmen to use. I do not think that I have any right to do anything except take the learned judge's finding on the evidence before him in respect of that. There was evidence both ways. There was evidence that these rope ladders were never used for this kind of work on board ship. There was evidence that they were constantly used, and that they were the ordinary common thing to use, and that there was no danger. I do not think that I have any right to speculate as to what I might myself think about the weight of the evidence on the one side or the other. The learned judge heard the witnesses, and decided that those who said that this was an unusual and dangerous thing were right, and that, I think, I must accept. It is quite true that witnesses of very considerable experience said that this was the common thing to use, and there is no danger. The learned judge did not accept that evidence, and I do not think I have any right to interfere with his finding.

That being so, it seems to be clear that the danger was obvious to anybody who saw what was being done, and as there was evidence by one of the defendant firm that he had seen this ladder in use, he must have seen, if he had exercised reasonable care, according to that finding of the learned judge, that it was dangerous. What the learned judge said about the witness's conduct was this: He found that he was not negligent after having discovered that the ladder was a dangerous thing. Having found that he was not negligent, the learned judge, in my opinion, then went on to explain the meaning of that finding of not being negligent. He said:

> "I think that the employers and stevedores are bound to supply such hooks and slings and other articles that they usually supply for the purposes of the business. They are bound to supply them reasonably safe. But they are entitled, on the other hand, to assume that the owners of the ship will perform their duty under the statute and the regulations made thereunder. And if when they send their workmen to work they provide the usual and necessary tools, which are provided by the stevedore, it is no part of their duty to go to

A the ship to see that the ship is ready to perform its statutory duty. It is no part of their duty to see that the ship performs its duty; and the mere fact that an employer happened to go down and knew that this ladder was in use does not in my judgment, make him responsible in law to his employees, who could themselves appreciate the danger just as much as he could himself. He did not investigate the matter at all; he did what I suppose is done every day, he B assumed that everything was all right and that there was no occasion for him to interfere."

Those are the grounds for the finding of no negligence, and, in my opinion, they come to this: The defendants had a right to assume that the shipowners would perform their statutory duty of providing this means of access properly: and the C learned judge puts that as being the position when they sent their workmen to work. At that time the iron ladders were absolutely as they should be. They only became incapable of being used afterwards because something happened in the course of the loading. The learned judge, with the greatest respect to him I say it, seems to have overlooked the consideration that there was personal knowledge on the part of the defendants that that state of things no longer existed, and that a D substitute—an emergency means of access—had been put there, which, according to the learned judge's finding, was obviously a dangerous thing. He seems to have overlooked the question of whether under these circumstances, the defendants were not negligent in making no protest and not interfering. I think that that is where the learned judge went wrong. When once it was ascertained that the original safe means of access had gone and that another—one of obvious danger—had been E substituted for it, and the defendants had seen that obviously dangerous thing, and did not interfere, it follows that the defendants were negligent.

It was said that the principle of the decision in *Griffiths* v. *London and St. Katherine's Docks Co.* (2) applied to the present case, and that because the plaintiff knew of the danger and had remonstrated with the defendants formally about it, he could not recover. I do not think that that principle does apply to a case F of this kind where the cause of action rests on personal negligence in the supervision by the employers. I think, therefore, that this appeal must be allowed, and judgment entered for the plaintiff for the amount found by the learned judge in the court below—namely, £600, with costs here and below.

ATKIN, L.J.—I assume the common law duty of an employer to be as stated by G LORD HERSCHELL in *Smith* v. *Baker & Sons* (3); that is to say, to take reasonable care to provide appliances and maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk. It may be that the nature of the employment is such that the appliances or part of them are provided by some person other than the employer. But that does not relieve the latter of his common law duty, though it may very well be that he is H not responsible for a defect in the plant which may have arisen by the negligence of the actual owners of the appliances without his negligence. A typical case of that description is *Biddle* v. *Hart* (4). There a workman employed by a stevedore brought an action against his employer by reason of the defects in the tackle for unloading a ship. The tackle was the property of the shipowners and was usually provided by them. But it was in fact defective. The learned judge in the court I of first instance non-suited the plaintiff. But it was held by the Court of Appeal that that was wrong, because it was quite possible even in that state of things that the employer might himself be guilty of negligence. The duty of the employer remains, notwithstanding that it may be that in a proper case he discharges that duty if the circumstances are such that he might reasonably be found to have relied on his previous experience of those persons who in fact supplied the appliances. In the present case, however, one of the employers was proved to have seen the appliance which the learned judge has found to be dangerous. In these circumstances it appears to me that the negligence of the employer is established once

you acquiesce, as I do, in the finding of the learned judge that the use of the ladder in the circumstances in which it was used was a dangerous use. A

But then it was said that the workman must have known the danger, and appreciated it equally with the employers. That was what happened in *Griffiths* v. *London and St. Katherine's Docks Co.* (2). That point is really disposed of, so far as we are concerned, by the decision in *Williams* v. *Birmingham Battery and Metal Co., Ltd.* (1). In that case an action was brought under Lord Campbell's Act. But the duty cast on the employer would be the duty at common law. The plaintiff there (the widow of a deceased workman) complained that the employer had not provided reasonable means of access for enabling the deceased to ascend to or descend from an elevated tramway on which he had to work. The jury found that there was a danger, and that the deceased had the same means of knowing that it was dangerous as the defendant, and did know it was dangerous. On that the learned judge in the court of first instance entered judgment for the defendant. But the Court of Appeal set aside that judgment and entered judgment for the plaintiff. That case raised the very point which is before us in the present case, and it was held that, once a duty is established on the employer, in order to escape liability the employer must establish that the workman has taken on himself a risk without the precautions which might be taken to obviate it. In that case it was decided that the question of whether or not the workman had undertaken that risk was a question of fact to be determined on the circumstances of each case. To my mind that case is binding on us. That being so, there appears to me to be no evidence at all that the workman in the present case undertook the risk of this dangerous ladder. Consequently his knowledge of the risk is immaterial. In my opinion, therefore, there being a breach of duty on the part of the employers which in fact caused damage to the plaintiff, he is entitled to recover damages, and judgment should be entered for him. B C D E

YOUNGER, L.J.—I agree.

Appeal allowed. F

Solicitors: *Attenborough & Son*, for *R. Barrow-Sicree*, Liverpool; *Finch, Jennings & Tree*, for *Syers, Dixon & Barrell*, Liverpool.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

ROURA AND FORGAS *v.* TOWNEND AND OTHERS

[King's Bench Division (Roche, J.), October 29, 30, November 14, 1918]

[Reported [1919] 1 K.B. 189; 88 L.J.K.B. 393; 120 L.T. 116; 35 T.L.R. 88; 14 Asp.M.L.C. 397; 24 Com. Cas. 71]

Insurance—Marine insurance—Constructive total loss of vessel—Balance of probability against recovery by owners—Need of notice of abandonment—Extinguishment of loss—Restoration of vessel before action—Delay—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60.

The plaintiffs sold 6,000 tons of jute to Spanish buyers under contracts which provided for shipment of the jute for Valencia, and also stipulated, as an essential term, that the latest time for performance was the month of January, 1918. For this purpose the plaintiffs chartered a steamship, and, by a voyage policy dated Nov. 7, 1917, and underwritten by the defendants, insured their profit on the charter. The policy was against marine and war risks, and included capture of the vessel by the enemies of Great Britain, was against total and/or constructive total loss of steamer only, and excluded all claims arising from delay and/or deterioration and/or loss of market in respect of war only. On Nov. 10, 1917, while on the insured voyage, the steamer was captured in the Indian Ocean by a German raider. A prize crew from the raider was placed on board, as well as a large number of passengers from other prizes which had been taken and sunk. Some bombs were also placed by the Germans on board the steamer to be used if necessary to destroy her. The insured steamer was used by the raider as a collier consort and as a relief carrier of prisoners. She was disguised, and the two vessels voyaged, sometimes together and sometimes separately, towards Germany. At one point some vessels were sighted, which gave rise to some expectation of recapture. On Feb. 24, 1918, the insured steamer grounded in Danish territorial waters, and on Feb. 27, 1918, the German prize crew left her. A salvage company was employed by the shipowners and succeeded in refloating the vessel on Mar., 9, 1918. She was then considerably damaged and was under repair until September, 1918. No notice of abandonment had been given by the shipowners, who were not insured. In an action on the policy claiming that the vessel was, owing to her capture by the Germans, a constructive total loss, and that the plaintiffs had thereby lost their profit on the charterparty,

Held: (i) it was not merely uncertain whether the owners of the vessel would recover her in a reasonable time; the balance of probability was that they would never recover her at all; and there was, therefore, a constructive total loss within s. 60 of the Marine Insurance Act, 1906. *Polurrian Steamship Co., Ltd.* v. *Young* (1), [1915] 1 K.B. 922, applied. (ii) the giving of a notice of abandonment was not an integral element of a constructive total loss; (iii) the capture of the vessel resulted in a total loss to the plaintiffs of their rights and profits under the charter, and the restoration of the vessel itself to its owners did nothing to extinguish or minimise the plaintiff's loss; (iv) the claim was not a claim arising from delay: *Russian Bank for Foreign Trade* v. *Excess Insurance Co.* (2), [1918] 2 K.B. 123, distinguished.

Notes. Applied: *Holmes* v. *Payne*, [1930] All E.R.Rep. 322. Considered: *Petros M. Nomikos, Ltd.* v. *Robertson*, [1939] 2 All E.R. 723; *Atlantic Maritime Co., Inc.* v. *Gibbon*, [1953] 2 All E.R. 1086. Referred to: *Carras* v. *London and Scottish Assurance Corpn., Ltd.*, [1935] All E.R.Rep. 246; *Vrondissis* v. *Stevens*, [1940] 3 All E.R. 74; *Pesquerias Secaderos de Espana S.A.* v. *Beer* (1946), 175 L.T. 495.

As to constructive total loss, see 22 HALSBURY'S LAWS (3rd Edn.) 149 et seq.; and for cases see 29 DIGEST 272 et seq. For Marine Insurance Act, 1906, s. 60, see 13 HALSBURY'S STATUTES (2nd Edn.) 42.

Cases referred to:

(1) *Polurrian Steamship Co., Ltd.* v. *Young*, [1915] 1 K.B. 922; 84 L.J.K.B. 1025; 112 L.T. 1053; 31 T.L.R. 211; 59 Sol. Jo. 285; 13 Asp.M.L.C. 59; 20 Com. Cas. 152, C.A.; 29 Digest, 273, *2313*.

(2) *Russian Bank for Foreign Trade* v. *Excess Insurance Co.*, [1918] 2 K.B. 123; 87 L.J.K.B. 872; 118 L.T. 645; 34 T.L.R. 383; 14 Asp.M.L.C. 316; 23 Com. Cas. 325; affirmed, [1919] 1 K.B. 39; 88 L.J.K.B. 209; 119 L.T. 733; 35 T.L.R. 42; 63 Sol. Jo. 40; 14 Asp.M.L.C. 362, C.A.; 29 Digest 219, *1750*.

(3) *Rankin* v. *Potter* (1873), L.R. 6 H.L. 83; 42 L.J.C.P. 169; 29 L.T. 142; 22 W.R. 1; 2 Asp.M.L.C. 65, H.L.; 29 Digest 278, *2259*.

(4) *Ruys* v. *Royal Exchange Assurance Corpn.*, [1897] 2 Q.B. 135; 66 L.J.Q.B. 534; 77 L.T. 23; 13 T.L.R. 444; 8 Asp. M.L.C. 294; 2 Com. Cas. 201; 29 Digest 266, *2146*.

(5) *Tunno* v. *Edwards* (1810), 12 East, 488; 104 E.R. 190; 29 Digest 30, *2462*.

(6) *Andersen* v. *Marten*, [1908] A.C. 334; 77 L.J.K.B. 950; 99 L.T. 254; 24 T.L.R. 775; 52 Sol. Jo. 680; 11 Asp.M.L.C. 85; 13 Com. Cas. 321, H.L.; 29 Digest 216, *1725*.

Action tried by ROCHE, J., in the Commercial List.

The plaintiffs, merchants, bought or held in Calcutta some 6,000 tons of jute. These goods they sold to Spanish buyers under contracts which involved shipment of the goods at Calcutta for Valencia, and also involved as an essential term that the latest time for performance was the month of January, 1918. On Sept. 18, 1917, the plaintiffs chartered the Spanish steamship *Igotz Mendi*, then trading, and about to arrive at Delagoa Bay, to proceed to Calcutta to load the jute in question, and to proceed thence to Valencia to deliver her cargo. The cancelling date in the charter was Dec. 31, 1917.

By a voyage policy of marine insurance dated Nov. 7, 1917, underwritten by the defendants, the plaintiffs insured their interest in the venture, which was valued at £30,000 on profit on charter so valued. The insured voyage was at and from Delagoa Bay, via Colombo to Calcutta and until sailed, and the policy was against marine and war risks, including in the latter risks capture by the enemies of Great Britain, and against total and/or constructive loss of steamer only, and excluded all claims arising from delay and/or deterioration, and/or loss of market in respect of war only. The *Igotz Mendi* herself was not insured by her owners against either marine or war risks.

On Nov. 4, 1917, the *Igotz Mendi* sailed from Delagoa Bay with a cargo of coal for Colombo, and on Nov. 10, 1917, was captured in the Indian Ocean by the German raider, *Wolf*. A prize crew from the *Wolf* was placed on board, as well as a large number of persons, passengers from other prizes which the *Wolf* had taken and sunk. The *Igotz Mendi* was disguised and the two vessels voyaged sometimes in company and sometimes separately. At one point in the voyage, which was at this time directed towards the coast of Norway and thence to Germany through the North Atlantic, vessels were sighted which gave rise to some expectation of recapture. The Spanish mate was thereupon emboldened to throw overboard the bombs which had been put on board the *Igotz Mendi* by the Germans to be used, if required, for the destruction of the prize. Subsequently the prize crew was strengthened and a new supply of bombs was placed on board. On Feb. 23, 1918, application was made to Lloyd's by the plaintiffs to secure the *Igotz Mendi* being posted as missing, but on Feb. 27, 1918, before she was so posted, news arrived that she had stranded on the coast of Denmark in a fog whilst in charge of the German prize crew. The German prize crew left the vessel and the Spanish crew

also left after rehoisting the Spanish flag. A salvage company was employed by the shipowners, who succeeded in refloating the vessel on Mar. 9, 1918. She was considerably damaged, and was under temporary and permanent repair in Denmark and Spain until September, 1918.

The shipowners, being uninsured, had neither right nor duty to give any notice of abandonment or to take any such steps as would have been appropriate had they been insured.

On Mar. 14, 1918, the plaintiffs issued their writ in the action claiming to be paid as on the amount insured.

MacKinnon, K.C., and *Le Quesne* for the plaintiffs.
R. A. Wright, K.C., and *Simey* for the defendants.

Cur. adv. vult.

Nov. 14, 1918. **ROCHE, J.**, read a judgment in which he stated the facts and continued: The case for the plaintiffs, shortly stated, was that the *Igotz Mendi* was, by reason of the capture, a constructive total loss, and that by reason of such capture and constructive total loss they had suffered a total loss of their profit on the charterparty. They did not suggest that they had given any notice of abandonment, but said that as regards their interest there was nothing to abandon and no notice was required. The defendants agreed that this was so, and did not rely upon the absence of a notice of abandonment by the plaintiffs. The defence was in substance rested on three grounds: (i) That there never was a constructive total loss of the ship; (ii) that if there was, restoration before action precluded a claim; (iii) that the claim arose from delay and was excluded by the express terms of the policy. As to the first point, it was said that to constitute constructive total loss of the ship two constituent elements were necessary: (i) A state of facts external to the shipowner such as to warrant an election by him to treat the loss as total; and (ii) an election by the shipowner to so treat the loss expressed by a timely notice of abandonment. The defendants' case was that neither element was present in this case. With regard to the external facts the matter is now regulated by s. 60 of the Marine Insurance Act, 1906, which provides, amongst other things, that there is a constructive total loss where the assured is deprived of his ship or goods by a peril insured against, and it is unlikely that he can recover the ship or goods. In *Polurrian Steamship Co., Ltd.* v. *Young* (1) the Court of Appeal decided that this provision imposed a more onerous proof upon the assured than the case law on the subject had imposed, and that the test of unlikelihood of recovery had now been substituted for uncertainty of recovery. I, of course, act upon that decision. It was conceded that in this case the ship was out of the owners' possession for three and a half months, but it was contended that it was never securely in the possession of the Germans. It was asserted, I hope and believe with truth, that the squadrons and patrols of the navies of Great Britain, her Allies, and associates were numerous and vigilant, and that recapture was probable or not unlikely. On the other hand, it is to be remembered that the seas are wide and the nights were dark and long during the initial stages of the voyage, and, apart from any knowledge which may be permitted to a court with regard to German practices in the destruction of merchant shipping, the evidence as to the sinking of all other prizes by the *Wolf* and as to the placing of bombs on board of the *Igotz Mendi* convinces me that the *Igotz Mendi* would not, save by some unexpected accident, have survived to be recaptured. I regard her actual recovery as due to a somewhat surprising combination of circumstances, and I find that the test laid down by KENNEDY, L.J., in *Polurrian Steamship Co., Ltd.* v. *Young* (1) is satisfied, and I hold that it was not merely uncertain whether her owners would recover her in a reasonable time, but that the balance of probability was that they would never recover her at all.

With regard to notice of abandonment by the shipowner, there was no dispute that in general such a notice is necessary; the point of debate was whether the

giving of such notice is an integral element of a constructive total loss, or is rather a condition precedent to a claim by the owner of ship or goods based upon such a loss. There are expressions in the Marine Insurance Act, 1906, ss. 60, 61, which support, some one view, some the other. A large number of cases were cited to me containing sentences of a like variable import, but it was contended by the defendants that the balance of authority was in their favour. I agree that modes of expression have been used by judges which support the defendants' argument, but other, and often the same, judges elsewhere use expressions of the contrary import. In truth, it is not satisfactory or useful to treat as definitions mere modes of expression adopted by judges whose minds were not directed to definition or to the distinction now in question. As to real authority, in my judgment it is against the defendants. In particular the ratio decidendi in *Rankin* v. *Potter* (3) is opposed to their contention; see especially the judgment of LORD CHELMSFORD, and the cases cited by him (L.R. 6 H.L. at pp. 156–158). A condition precedent to a right of action may well be dispensed with in a proper case, but such dispensation would seem to be a nugatory and indeed impossible process to apply to an essential element of a thing itself. As regards the present action the scope of the defendants' argument is curious and far-reaching. Their counsel when pressed on the point did not shrink, and in this they were entirely logical, from the conclusion that here, since the shipowner was uninsured and since in that state of facts no notice of abandonment by him was possible, there never could be a constructive total loss of this ship and the risk never attached. I do not find myself in agreement with the defendants' reasoning or their conclusions, and I accordingly decide against their contention on this part of the case.

The next point taken on behalf of the defendants, namely, that the restoration of the ship to the shipowner before this action was brought renders the claim unmaintainable, really depends upon much the same line of reasoning as that which I have dealt with in connection with notice of abandonment. This action is not by the shipowners, but the defendants' contention really involved a view that under this policy the real agreement between the parties was that the plaintiffs' right to indemnity was measured by the shipowners' right and ability to recover as for a constructive total loss. If this were the agreement the plaintiffs would fail, since it is well established that, at all events where there has been no acceptance by underwriters of an antecedent notice of abandonment, restoration of a captured ship before action brought disentitles a shipowner from bringing or succeeding in an action to receive payment as for a constructive total loss; see *Ruys* v. *Royal Exchange Assurance Corpn.* (4), and the cases were discussed. But although there are dicta in reported cases, e.g., those made by the judges during the argument in *Tunno* v. *Edwards* (5) (12 East, at p. 490), upon the strength of which it can be contended that the reason of this rule is that there is no constructive total loss until the eventual fate of a ship is determined, yet I think that this argument is contrary to a large body of decisions; see in particular *Andersen* v. *Marten* (6) and the exhaustive review of the earlier decisions by KENNEDY, L.J., in *Polurrian Steamship Co., Ltd.* v. *Young* (1); see also PHILLIPS ON INSURANCE, vol. 2, ss. 1530 and 1531. What is perhaps more important is that the argument is contrary to the Marine Insurance Act, 1906, s. 60, which makes probability and not the event the test. The true view, in my judgment, is that restoration precludes recovery, not because in such a case there never was a constructive total loss, but because an assured cannot under a contract of indemnity, although he may at one time suffered a loss, recover in respect of such loss if before action it has already been made good to him. Here no such objection to recovery can be opposed to the plaintiff's claim. I have already held that there was a constructive total loss of the *Igotz Mendi* by her capture, and before the ship was restored to the owners such capture resulted in a total loss to the plaintiffs of their rights and profit under the charter. In short, the event agreed upon as necessary to give a right to indemnity had happened, and had irrevocably caused the loss of the subject-matter of the insurance. In these

A circumstances, as the restoration of the vessel itself to its owners did nothing to extinguish or minimise the plaintiff's loss so also it cannot, in my judgment, operate to extinguish or to bar the plaintiffs' claim.

There remains the defence based upon the fact that claims arising from delay were excluded by the express terms of the policy. It was said that it was the lapse of the time during which the *Igotz Mendi* was in German hands that caused the B loss, and that such lapse of time was delay within the meaning of the exceptions. The reasoning of BAILHACHE, J., in *Russian Bank for Foreign Trade* v. *Excess Insurance Co.* (2) was relied upon in support of this part of the defendants' case. The decision of BAILHACHE, J., in that case has been affirmed by the Court of Appeal on a ground which has no bearing on the present case. I understand that the Court of Appeal did not consider, or, at any rate, did not express any opinion, whether C they adhered to the view of BAILHACHE, J., on this point of the delay due. It is certainly, therefore, undesirable and, in my view, it is also unnecessary that I should express any opinion on that matter. It is sufficient to say that, in my judgment, this is a very different case. In that case, the adventure or voyage upon which certain goods were to be despatched and on which they were insured was frustrated. The cause of frustration was not a capture or loss of the ship as it was here, D but a requisition of the ship amounting at most to a restraint. Moreover, in that case the subject-matter of insurance and thing for which a loss was claimed was a quantity of goods. In this case it is in substance the venture itself which is insured. In that case it was decided that in the circumstances indicated the exception of claims arising from delay barred the claim for the loss of the goods based on the loss of the particular adventure which was in progress. Here I have E decided that the *Igotz Mendi* was not merely delayed, but was captured and lost, although she was afterwards found and recovered, and I have decided that, in consequence, the venture, being the profit on charter, was lost, and I also decide that the claim to recover for that loss is not a claim arising from delay. I give judgment for the plaintiffs for the amount claimed, with costs.

F *Judgment for plaintiffs.*

Solicitors: *Parker, Garrett & Co.*; *William A. Crump & Son.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

INDIAN AND GENERAL INVESTMENT TRUST CORPN. *v.* BORAX CONSOLIDATED, LTD.

[KING'S BENCH DIVISION (Sankey, J.), November 11, December 9, 1919]

B

[Reported [1920] 1 K.B. 539; 89 L.K.J.B. 252; 122 L.T. 547; 36 T.L.R. 125; 64 Sol. Jo. 225]

Conflict of Laws—Contract—Performance in England—Discharge by performance in foreign country—Interest—Contract for payment of yearly interest by American corporation—Proper law of contract English law—Right of corporation to deduct income tax payable under American law from interest due under contract.

C

By an indenture in English form and executed in the United Kingdom, dated Nov. 24, 1905, made between the plaintiffs, the defendants, and an American railroad company, the defendants covenanted to pay or make good to the plaintiffs any default by the railroad company in paying to the plaintiffs the interest on a sum of money advanced by the plaintiffs to the railroad company and secured by a bond. The plaintiffs and defendants were English corporations incorporated under the Companies Acts. The railroad company was a corporation incorporated under the laws of New Jersey in the United States of America. It was provided by the indenture that it should be construed and the rights of all parties should be regulated by the law of England, and the railroad company agreed to be bound by the jurisdiction of the English courts and, for the purpose of any legal proceedings, to accept service of process upon it made at the offices of the defendants in England. The interest on the bond was payable in England. On April 2, 1918, the plaintiffs were paid the half-yearly interest due on the bond on April 1, less a certain sum which had been deducted by the railroad company in respect of income tax due from the company to the American government under the income tax laws of the United States. The plaintiffs alleged that this was a default by the railroad company, and demanded from the defendants the sum deducted. The defendants refused to pay and the plaintiffs brought an action to recover the sum. The defendants contended that the railroad company, being a corporation incorporated in America, was subject to and bound by the income tax Acts of the United States, that by virtue of those Acts the company was entitled to deduct and withhold the income tax from the payments of interest due to the plaintiffs, and that, consequently, there was no default by the railroad company. The plaintiffs contended that the United States income tax Acts did not discharge the railroad company from their obligation to pay all the interest due under the English indenture, and that the rights of the plaintiffs against the defendants were not diminished by those Acts.

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Held: since there was no English statute providing that payment of income tax to another country discharged a debt owed under an English contract, no principle of common law that a contract made and to be performed in England could be discharged by performance in another country, and no justification for implying into the contract a term that the United States income tax Acts were to be enforceable against the plaintiffs in England, the railroad company were not entitled to deduct income tax due under the law of the United States from the interest owed by them to the plaintiffs, and the defendants were, therefore, liable to make good this default by the company.

I

Smith v. *Buchanan* (1) (1800), 1 East. 4 and *Spiller* v. *Turner* (2), [1897] 1 Ch. 911, applied.

Jacobs v. *Credit Lyonnais* (3) (1884), 12 Q.B.D. 589, distinguished.

Notes. The provision in English law that a person liable to pay yearly interest may deduct income tax from the interest payable and shall be acquitted and discharged of the money represented by the deduction as if the sum had actually been paid, is now contained in the Income Tax Act, 1952, s. 169 (1) (d).

Applied: *Pass* v. *British Tobacco Co.* (Australia) (1926), 42 T.L.R. 771; *Keiner* v. *Keiner*, [1952] 1 All E.R. 643.

As to liability to pay interest being governed by the proper law of the contract, see 7 HALSBURY'S LAWS (3rd Edn.) 83, 84; and for cases see 11 DIGEST (Repl.) 420 et seq.

Cases referred to:

(1) *Smith* v. *Buchanan* (1800), 1 East. 6; 102 E.R. 3; 4 Digest (Repl.) 645, *5738*.

(2) *Spiller* v. *Turner*, [1897] 1 Ch. 911; 66 L.J.Ch. 435; 76 L.T. 622; 45 W.R. 549; 41 Sol. Jo. 452; 9 Digest (Repl.) 639, *4256*.

(3) *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589; 53 L.J.Q.B. 156; 50 L.T. 194; 32 W.R. 761, C.A.; 11 Digest (Repl.) 432, *775*.

Action tried without a jury.

By an indenture dated Nov. 24, 1905, and made between the Tonopah and Tidewater Railroad Co. (hereafter referred to as "the railroad company") of the first part, the defendants of the second part, and the plaintiffs of the third part, the defendants covenanted with the plaintiffs to pay or make good to the plaintiffs any default of the railroad company in paying to the plaintiffs the sum of £12,500 half yearly on April 1, and Oct. 1, being 5 per cent. per annum on the sum of £500,000 advanced by the plaintiffs to the railroad company and secured by a bond. By cl. 4 of the indenture it was provided:

"The railroad company shall duly pay and remit to the trustees [the plaintiffs] in London the principal moneys, premiums, and interest at 5 per cent., secured by the said bonds so that the same respectively shall be in the hands of the trustees [the plaintiffs] fifteen days before the dates on which the same respectively shall fall due, and be payable, and the trustees shall apply the moneys received by them from the railroad company in respect of interest on the said bond or bonds in the first place in paying to the holders of the certificates interest at the rate of 4½ per cent. per annum on the amounts secured by the certificates held by them respectively. Such interest shall be paid to the holders of certificates on the 15th day of April and the 15th day of October in each year. And the trustees [the plaintiffs] shall after payment of interest at the time being outstanding, in the next place pay the balance of the said moneys received by them in respect of the interest on the said bond to the Borax Company [the defendants]."

The interest on the bonds in the said clause referred to was payable in the United Kingdom. Clause 8 provided:

"The Borax Company [the defendants], in pursuance of the said agreement and in consideration of the payment to them of ½ per cent. per annum out of the interest at the rate of 5 per cent. payable on the said bond or bonds, or the payment to them of the balance of the interest payable on the said bond or bonds in accordance with clause 4 hereof, covenant with the trustees [the plaintiffs] as follows: (a) If the railroad company shall make default in the fulfilment of any of the stipulations of clause 4 hereof they the Borax Company [the defendants] will pay to the trustees [the plaintiffs], at the expiration of seven days after demand in writing thereof shall have been made upon the Borax Company [the defendants] by or on behalf of the trustees [the plaintiffs] the sum or sums of money in payment of which the railroad company shall have made default. . . .(e) This covenant and guarantee shall be a continuing security and shall remain in operation until the redemption or payment of the whole of the said bonds."

By cl. 27 it was provided that the indenture should be construed and the rights of all parties claiming thereunder be regulated by the law of England, and the railroad company agreed that for the purposes of any legal proceedings that might be necessary in connection with the indenture, service of all such process upon it might be made on it at the offices of the defendants in the United Kingdom. The railroad company was a corporation incorporated under the laws of the state of New Jersey in the United States. The plaintiffs and defendants were English corporations incorporated under the English Companies Acts. The indenture was in English form and was executed in the United Kingdom. On April 2, 1918, the plaintiffs were paid the sum of £11,025 on account of the sum of £12,500, being the half year's interest at 5 per cent. on the £500,000, due on April 1. By letter dated April 9, 1918, the plaintiffs demanded the balance of £1,475 from the defendants, being the amount in respect of which they alleged the railroad company had made default, but the defendants did not pay. The plaintiffs thereupon brought this action to recover that amount, or, alternatively, the sum of £225, being the said sum of £1,475 less £1,250 repayable to the defendants by the plaintiffs in consideration and in the event of the performance by the defendants of their contract contained in cl. 8 (a) of the indenture. The defendants in their defence contended (inter alia) that the railroad company, being a corporation incorporated in America, was subject to and bound by the income tax laws of the United States, and that by virtue of those laws they were entitled to deduct and withhold income tax at the rate of 2 per cent. from the payments of interest to the plaintiffs, and that consequently there was no default by the railroad company. The defendants referred to and relied on certain sections of the Income Tax Act of the United States of America, 1916, Ch. 463, as amended by the War Income Tax Act, 1917, Ch. 63. By their reply, the plaintiffs said that even if the railroad company were entitled by the said laws of the United States to deduct the tax, the said laws did not discharge the railroad company from their obligations under the indenture and bond, and that the rights of the plaintiffs against the defendants thereunder were not affected or diminished by the said laws.

Leslie Scott, *K.C.*, and *Latter* for the plaintiffs.
Finlay, *K.C.*, and *Bremner* for the defendants.

Cur. adv. vult.

Dec. 9, 1919. **SANKEY, J.**, read the following judgment: In this case the plaintiffs advanced a sum of £500,000 to an American railway company, known as the Tonopah and Tidewater Railroad Co., who agreed to pay interest thereon in London at the rate of 5 per cent. The rights of the parties are regulated by an indenture dated Nov. 24, 1905, made between the railroad company, the defendants, and the plaintiffs, in pursuance of which the defendants guaranteed the payment of the interest as follows: [His Lordship read cll. 4, 8, and 27, of the deed of trust set out above and proceeded:] Subsequently, in the years 1916 and 1917, the United States of America passed certain income tax laws, and the point at issue in this case is whether the railroad company are entitled to deduct the amount they have paid for income tax to the United States Government from the sums they agreed to pay to the plaintiffs for interest, it being contended on their behalf that the company was and is a corporation incorporated in America and subject to and bound by the said Acts and entitled thereunder to deduct and withhold tax at the rate of 2 per cent. from the payment of the interest mentioned. No evidence was called before me, and the facts were not disputed, the question of liability alone being argued. It is only necessary to reiterate: (i) That the contract and the rights of all persons claiming thereunder are to be regulated by the law of England; and (ii) that the sum due for interest is payable in London. It was urged on behalf of the plaintiffs that they are entitled to succeed upon the ground that payment of the 5 per cent. mentioned in the contract is not discharged by the payment to them of a smaller sum in England and of the balance to the

A United States of America taxing authorities. Now it may be stated as a general proposition of English law that an agreement by A. to pay B. a certain sum is not discharged by the payment to B. of a sum of less amount and the payment to C. of the balance, unless (i) this position is created by statute or common law, or (ii) by stipulation express or implied between the parties.

As to (i), is the position taken up by the defendants created by statute or common B law? It is provided by ss. 102 and 103 of the English Income Tax Act of 1842 (5 & 6 Vict., c. 35) that where a person is under a liability to pay yearly interest of money he may make a deduction therefrom in respect of income tax, and "shall be acquitted and discharged of so much money as such deduction shall amount to as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable." In other words, there is an express C Act of Parliament which permits payment to the English income tax authorities to be a discharge pro tanto of the debt which a person owes in respect of yearly interest to another. There is no Act of Parliament which allows payment of income tax to another country to be reckoned as a discharge. As to the common law, as far back as 1800, in *Smith* v. *Buchanan* (1), it is laid down that "it is D impossible to say that a contract made in one country is to be governed by the law of another." In that case it was held that a discharge in the State of Maryland under a commission of bankrupt is not a bar to an action for a debt arising in England against the bankrupt by a creditor a subject of this country, for, as LORD KENYON said, "it might as well be contended that if the state of Maryland had enacted that no debts due from its own subjects to the subjects of England E should be paid, the plaintiff would have been bound by it." In STORY'S CONFLICT OF LAWS (8th Edn.), at p. 488, the learned author says:

> "A discharge of a contract by the law of the place where the contract was not made or to be performed, will not be a discharge of it in any other country."

In *Spiller* v. *Turner* (2) the facts were as follows: An English company, which F carried on business in a colony, passed resolutions under which a class of guaranteed preference stockholders became entitled to a cumulative payment of interest at the rate of 6 per cent. per annum in priority to the other stockholders. By a subsequent Act of the colonial legislature a duty, in the nature of income tax, was imposed on all dividends or interest paid out of assets in the colony to the members of companies carrying on business therein, and it was declared that the G duty payable in respect of the amount received by any member should be a debt due by him to the Crown. It was held by KEKEWICH, J., that the contract between the preference and ordinary stockholders being an English contract, the rights under it of preference stockholders, not domiciled in the colony, were not affected by the colonial Act, and that they were therefore entitled to their 6 per cent. without any deduction in respect of the colonial duty. The learned counsel for H the defendants relied strongly upon a note in PROFESSOR DICEY'S CONFLICT OF LAWS (2nd Edn.), p. 554, upon the well-known case of *Jacobs* v. *Crédit Lyonnais* (3). It is to be observed, however, that in that case different circumstances existed from those in the present one. There the contract was to be performed by shipment by a French company at an Algerian port, an operation which was lawful by French law at the time the contract was made, although at the time for fulfil- I ment of the contract the performance was forbidden by such law. No circumstances of that character exist in the present case, and different considerations apply. Whilst it is the duty of an English court to enforce an English taxing Act, it is no part of its duty to enforce the taxing Act of another country. I have, therefore, come to the conclusion that there is no statute and no principle of the common law which justifies the defendants in their refusal to pay.

As to (ii), is there any stipulation, express or implied, between the parties upon which the defendants can rely to justify the position they have taken up?

"It is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts . . . if a contract made in England by English subjects or residents, and upon which payment is to be made in England, has to be performed in part abroad, it might not be unreasonable to assume that the mode in which any part of it has to be performed abroad was intended to be in accordance with the law of the foreign country, and to construe the contract as incorporating silently to that extent all provisions of a foreign law which would regulate the method of performance, and which were not inconsistent with the English contract,"

per BOWEN, L.J., in *Jacobs* v. *Crédit Lyonnais* (3) (12 Q.B.D. at p. 604). Now admittedly there is no express stipulation, and in my view the court would not be justified in reading into this English contract an implication that the plaintiffs agreed that the provisions of an American taxing Act should be enforceable against them in England. The implication is just the other way. The contract expressly provides that it shall be construed and that the rights of all persons claiming thereunder shall be regulated by the law of England. The railroad company agreed to be bound in all things by the jurisdiction of the English courts, and that service of the writ upon the defendants in London should be deemed to be good and effectual service of the writ upon the railroad company. It is impossible to hold that a contract so expressed impliedly incorporates a right in the railroad company to deduct American income tax from the sums they have agreed to pay in London, in accordance with English law. In my opinion, the plaintiff's contention is correct and they are entitled to my judgment.

Judgment for plaintiffs.

Solicitors: *Maddison, Humm & Co.*; *Ashurst, Morris & Crisp.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

Re BOULTER. CAPITAL AND COUNTIES BANK, LTD. *v.* BOULTER

[CHANCERY DIVISION (Younger, J.), March 20, 22, 1918]

[Reported [1918] 2 Ch. 40; 87 L.J.Ch. 385; 118 L.T. 783]

Trust—Infant—Education—Maintenance—Infant contingently entitled to income of fund on attaining twenty-one—Application of intermediate income for benefit of infant—Conveyancing Act, 1881 (44 & 45 *Vict.*, *c.* 41), *s.* 43—*Lord Cranworth's Act* (23 & 24 *Vict.*, *c.* 14), *s.* 26.

Where a fund was set apart in the hands of trustees in trust for an infant who was contingently entitled to the income of the fund on attaining twenty-one years, the trustees were **held** to be entitled to apply the intermediate income of the fund for or towards the maintenance or education of the infant, although that intermediate income would not belong to the infant on attaining twenty-one years, but the accumulations thereof would form an accretion of the corpus of the fund, there being no contrary intention expressed in the will creating the trust.

So **held** where the will came into operation in 1917.

Re Dickson. Hill v. *Grant* (1) (1885), 29 Ch.D. 331, and *Re Bowlby. Bowlby* v. *Bowlby* (2), [1904] 2 Ch. 685, distinguished.

Notes. As to the position where the settlement or testamentary instrument creating the trust came into operation after 1925 see Trustee Act, 1925, s. 31 (26 HALSBURY'S STATUTES (2nd Edn.) 50).

Applied: *Re Raine, Tyerman* v. *Stansfield*, [1929] 1 Ch. 716. Considered: *Re Stapleton, Stapleton* v. *Stapleton*, [1946] 1 All E.R. 323. Referred to: *Re Leng, Dodsworth* v. *Leng*, [1938] Ch. 821.

As to the maintenance of and advancement for infants, see 21 HALSBURY'S LAWS (3rd Edn.) 168 et seq.; and for cases see 23 DIGEST (Repl.) 459 et seq. For Conveyancing Act, 1881, see 20 HALSBURY'S STATUTES (2nd Edn.) 411.

Cases referred to:

(1) *Re Dickson, Hill* v. *Grant* (1885), 29 Ch.D. 331; 54 L.J.Ch. 510; 52 L.T. 707; 33 W.R. 511; 1 T.L.R. 331, C.A.; 23 Digest 461, *5328*.

(2) *Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685; 73 L.J.Ch. 810; 91 L.T. 573; 53 W.R. 270; 48 Sol. Jo. 698, C.A.; 23 Digest 461, *5331*.

(3) *Re Buckley's Trusts* (1883), 22 Ch.D. 583; 52 L.J.Ch. 439; 48 L.T. 109; 31 W.R. 376; 23 Digest (Repl.) 413, *4847*.

(4) *Re Medlock, Ruffle* v. *Medlock* (1886), 55 L.J.Ch. 738; 54 L.T. 828; 23 Digest (Repl.) 415, *4862*.

(5) *Hanson* v. *Graham* (1801), 6 Ves. 239; 31 E.R. 1030; 44 Digest 435, *2617*.

(6) *Re George* (1877), 5 Ch.D. 837; 47 L.J.Ch. 118; 37 L.T. 204; 26 W.R. 65, C.A.; 23 Digest (Repl.) 466, *5390*.

(7) *Re Scott, Scott* v. *Scott*, [1902] 1 Ch. 918; 71 L.J.Ch. 475; 86 L.T. 348; 50 W.R. 454; 18 T.L.R. 470; 28 Digest (Repl.) 573, *872*.

(8) *Re Judkin's Trusts* (1884), 25 Ch.D. 743; 53 L.J.Ch. 496; 50 L.T. 200; 32 W.R. 407; 23 Digest (Repl.) 415, *4861*.

(9) *Re Cooper, Cooper* v. *Cooper*, [1913] 1 Ch. 350; 82 L.J.Ch. 222; 108 L.T. 293; 57 Sol. Jo. 389; 23 Digest (Repl.) 466, *5382*.

Also referred to in argument:

Re Eyre, Johnson v. *Williams*, [1917] 1 Ch. 351; 86 L.J.Ch. 257; 116 L.T. 469; 61 Sol. Jo. 336; 23 Digest (Repl.) 416, *4867*.

Re Humphreys, Humphreys v. *Levett*, [1893] 3 Ch. 1; 62 L.J.Ch. 498; 68 L.T. 729; 41 W.R. 519; 9 T.L.R. 417; 37 Sol. Jo. 439; 2 R. 436, C.A.; 28 Digest (Repl.) 597, *1099*.

Re Cotton (1875), 1 Ch.D. 232; 45 L.J.Ch. 201; 33 L.T. 720; 24 W.R. 243; 23 Digest (Repl.) 459, *5303*.

Re Woodin, Woodin v. *Glass*, [1895] 2 Ch. 309; 64 L.J.Ch. 501; 72 L.T. 740; 43 W.R. 615; 39 Sol. Jo. 558; 12 R. 302, C.A.; 23 Digest (Repl.) 416, *4865*.

Adjourned Summons by trustees to ascertain rights to apply trust income for the maintenance of an infant.

Stanley Carr Boulter by his will, dated Sept. 14, 1916, appointed his son Reginald Stanley Lewis Boulter and Robert Abercromby Gordon executors thereof and the Capital and Counties Bank, Ltd., trustees thereof. He gave certain legacies and specific bequests and then bequeathed to his trustees, free of all duties, the sum of £8,000 deferred stock in the Mercantile Investment and General Trust Co., Ltd., part of a larger sum then standing in his name, upon trust to permit the same or any part thereof to remain in its then state of investment, or, with the consent of his said son R. S. L. Boulter during his lifetime, and afterwards at the discretion of his trustees, to sell and convert the same or any part thereof and invest any money produced by such sale and conversion in manner thereinafter authorised (which stock and the investments for the time being representing the same were thereinafter referred to as his grandchildren's fund), and to stand possessed thereof upon trust to pay the income thereof to the child or children of his son Cyril Stanley Carr Boulter in equal shares, if more than one, on their respectively attaining the age of twenty-one years during their respective lives, the share of a female child to be for her separate use without power of anticipation,

and as and when each of the children of his said son should die (whether they should survive him or die in his lifetime) he directed that his trustees should hold a share of his grandchildren's fund proportionate in value to the number of children of his said son, upon trust, both as to corpus and income, for the issue of the same deceased child, who being male should attain the age of twenty-one years or being female should attain that age or marry, and in equal shares if more than one, with gift over, in the event of there being no issue of any such deceased child who should attain a vested interest, to the surviving children of his said son and their issue, and in default of any issue of any of the children of his said son attaining a vested interest to hold the whole of his grandchildren's fund, both corpus and income, upon trust for the children of his daughter Ethel Gladys May Bendall and his son Stanley John Boulter for their absolute benefit in equal shares per stirpes. He devised and bequeathed his real estate and the residue of his personal estate to his trustees upon trust for sale and conversion, and, after payment out of the proceeds of his funeral and testamentary expenses and debts and the legacies and duties, to divide his residuary trust funds into six equal parts, and to hold each of such parts upon certain trusts respectively for two of his sons (including Reginald Stanley Lewis Boulter, but not Cyril Stanley Carr Boulter) and his four daughters and their respective issue. The testator died on Jan. 5, 1917, and his will was duly proved. The testator's son Cyril Stanley Carr Boulter (who took no benefit under the will) had issue one child only, Sheilah Boulter, who was an infant about ten years old. The testator at the time of his death was the registered holder of more than £8,000 deferred stock in the Mercantile Investment and General Trust Co., Ltd., and his executors assented to the bequest of the grandchildren's fund and transferred to the trustees £8,000 of that stock to be held upon the trusts declared in respect of the fund.

By a settlement, dated Mar. 29, 1916, the testator had transferred certain stocks and policies of assurance on the life of Cyril Stanley Carr Boulter to the Capital and Counties Bank, Ltd., to hold the same upon certain trusts for Sheilah Boulter during her life, and after her death for her issue. The income at present arising from the stocks thereby settled was about £72 a year. Cyril Stanley Carr Boulter was a stockbroker, but was now an officer in the army and not engaged in his business, and, as the father of Sheilah Boulter, requested the trustees to pay to him as such father the income of the grandchildren's fund for the maintenance and education of Sheilah Boulter. The trustees were willing that such income or part thereof should be applied for that purpose if they had power to do so, but they were advised that it was doubtful whether, as Sheilah Boulter was contingently entitled on attaining twenty-one to the income of the fund for life only, they were entitled under s. 43 of the Conveyancing Act, 1881, to apply the intermediate income for her maintenance. They, therefore, issued a summons to decide whether the intermediate income could be so applied, and, if so, what annual sum should be so applied, and, if it were not so applicable, what should be done with such intermediate income. Reginald Stanley Lewis Boulter was appointed to represent the persons entitled to the residuary trust funds. Both Mrs. Ethel Gladys May Bendall and Stanley John Boulter had issue, and Elizabeth Planché Bendall, an infant daughter of Mrs. Bendall, was appointed to represent the persons claiming to be entitled to the grandchildren's fund in default of issue of Cyril Stanley Carr Boulter attaining a vested interest therein.

By s. 43 of the Conveyancing Act, 1881:

"(1) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same

purpose, or any person bound by law to provide for the infant's maintenance or education, or not. (2) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year. (3) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

By s. 26 of Lord Cranworth's Act, 1860:

"In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not; and such trustees shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in proper securities for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

W. A. Jolly for the trustees.
C. J. Mathew, K.C., and *J. F. Carr* for the infant.
L. Mossop for the residuary legatees.
W. G. Hart for the infant Elizabeth Planché Bendall.

Cur. adv. vult.

Mar. 22, 1918. **YOUNGER, J.,** read a judgment in which he stated the terms of the will and the facts as above stated and continued: In these circumstances the question which I have now to determine is whether, according to the true construction of those provisions of the testator's will to which I have referred, and under the statutory power conferred by s. 43 of the Conveyancing Act, 1881, or otherwise, the intermediate income of the grandchildren's fund until the defendant Sheilah Boulter shall attain the age of twenty-one years is applicable to her maintenance. Upon the terms of s. 43 itself, apart from any judicial construction that may have been placed upon it, and assuming that no contrary intention appears in the will of the testator, the question so propounded, so far as that section is concerned, would appear to admit of only one answer. The case comes within the express words of the statute. There is here property held by trustees in trust for an infant for life contingently on her attaining the age of twenty-one years. Why, then, may not the trustees, in the very terms of sub-s. (1) of the section in that event provided, at their sole discretion pay to the infant's parent or otherwise apply for or towards the infant's maintenance, education, or benefit the income of that property or any part of it? The answer is that they are prevented by a qualification which it is said the Court of Appeal has decided to be implicit in the subsection. The Court of Appeal has decided, so it is said,

that the subsection only applies where the income in question, if not applied in maintenance, would belong to the infant on attaining twenty-one; that the income here in question can, having regard to sub-s. (2) as interpreted in *Re Bowlby* (2), never belong to the infant; and that, accordingly, sub-s. (1) has no application to the case. It results, as is contended and admitted, that the power in the particular event conferred apparently in express terms by sub-s. (1) can never be exercised by reason of the operation of sub-s. (2). Manifestly such a result is not lightly to be accepted. I have to consider whether I must submit to it.

Now, the primary purpose, both of s. 43 of the Conveyancing Act, 1881, and s. 26 of Lord Cranworth's Act, 1860, which it at once superseded and overlapped, was to save the insertion in wills and other instruments of clauses usually set out at length there. Any construction of these sections, therefore, which altered as little as possible the law as it existed apart from them is to be preferred: see *Re Buckley's Trusts* (3). Particularly, it is not to be assumed that the legislature was in these sections authorising the application for the maintenance of infants of funds which apart from them would belong to other people: *Re Dickson* (1). For this reason, as also because the summons here asks whether maintenance may be allowed for this infant otherwise than under s. 43, it will be convenient to consider very briefly how far, apart altogether from either section and from any special provisions in the constating instrument, maintenance can be provided for an infant out of the income of a contingent legacy, and what is the destination of the income of the legacy not applied in maintaining him.

The law on this subject is now, I think, quite settled. It depends, first, to some extent upon the question whether the testator was the father of or stood in loco parentis to the infant. In that case, even if the legacy be not by the testator directed to be set apart for the benefit of the legatee, the legacy will bear interest for maintenance for such period as no maintenance is expressly provided for the infant by the testator: see *Re Bowlby* (2). On the other hand, a contingent legacy in favour of an infant of whom the testator is not the father, or towards whom he does not stand in loco parentis, and which is not directed to be set apart for the benefit of the infant, bears no interest, either for maintenance or otherwise, until it vests: *Re Dickson* (1). Where, however, a legacy is directed to be set aside for the benefit of the objects of the gifts as soon as the contingency happens, then the fund carries all its accretions from the moment when it is so set aside: *Re Medlock, Ruffle* v. *Medlock* (4); and, whether an infant legatee be or be not one towards whom the testator stood in loco parentis, and whether the interest of the infant when vested is a right to the corpus or an interest for life only, the court may allow maintenance out of the intermediate income, and the income not so applied will be accumulated as part of the contingent legacy, and, in the language of Sir William Grant in *Hanson* v. *Graham* (5) (6 Ves. at p. 249), will "follow the fate of the principal." The court, however, will not generally give maintenance out of such income if the father is living. There are exceptions to this rule under one or more of which the father in the present case, at least for the duration of the war, may come. He has, however, to bring himself within them.

It is with reference to that state of the law that s. 26 of Lord Cranworth's Act and s. 43 of the Conveyancing Act fall to be interpreted, as above explained. Upon s. 26 of Lord Cranworth's Act four points should for present purposes be emphasised. (i)—and this is true also of s. 43 of the Act of 1881, so that I will not repeat the observation in connection with that section—the section relates only to funds which have been set apart in the hands of trustees. It has no application unless and until an appropriation is made. It is dealing, therefore, with income available for application in such circumstances. (ii) The section has no application unless the interest in the fund to which the infant is entitled is an absolute interest in the corpus of the fund. (iii) The only income, under the section, available for intermediate maintenance of the infant is income which

will be his if he becomes entitled to the property: see *Re George* (6). Inasmuch, however, as the section only deals with property set apart for the infant, and only with property to the corpus of which the infant will on the contingency happening be entitled, the limitation has little practical operation in this section. Its omission from s. 43 of the Act of 1881 rather than its insertion here is the important matter for the purpose of the present case. (iv) The powers are exercisable by the trustees without the intervention of the court, and whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not, a valuable innovation upon the general law as above appears.

It is convenient now to proceed to s. 43 of the Act of 1881 in order to note the points in which it goes beyond the earlier section. [HIS LORDSHIP read s. 43 (1), (2) and (3).] While, as in the case of s. 26, the section only relates to property set apart in the hands of trustees and its powers are exercisable by the trustees without the intervention of the court and on the same principles as those conferred by s. 26, there are two marked innovations, on which, indeed, the present case turns. The contingent interest of the infant need no longer necessarily be a right to the entire corpus of the fund; the new section applies and extends to a life interest as well as to any greater interest. Again, it is no longer in terms necessary that the income to be applied should be income "to which the infant may be entitled in respect of such property" as in s. 26; "the income of that property or any part thereof" is now described to be the fund applicable for maintenance. When the general law as above stated as well as the provisions of sub-s. (2) are considered, the reason for both alterations in the section becomes obvious, or rather the second is consequential on the first. For the section is now extended to a contingent life interest in a fund set apart for an infant. The intermediate income of that fund may by general law be applied for his maintenance, but it is not and never will be his. So far as it is unapplied it follows the fate of the fund. If the contingency happens, it is added to the capital; if it does not happen, it goes with the capital. This, as now authoritatively decided by the Court of Appeal in *Re Bowlby* (2), overruling *Re Scott, Scott* v. *Scott* (7), is the effect of sub-s. (2) of s. 43. If, therefore, s. 43 (1) was ever to apply to the case of an infant entitled contingently for his life, it was essential that the condition imposed by s. 26 of Lord Cranworth's Act—viz., that the income applicable should be income to which "he may be entitled in respect of the property"—should disappear. Accordingly, the condition does disappear, and there is substituted as the fund applicable "the income of the property or any part thereof"; in other words, the income which by general law is applicable under the direction of the court in the same event.

In these circumstances the statement of COTTON, L.J., in *Re Dickson* (1) can only, it would seem, be explained by the fact that the lord justice was then considering only the case before him, which was that of a contingent interest in the corpus of the fund, and to such a case only was his mind directed. If he had had present to his mind the actual alteration effected in s. 26 of the older Act by s. 43 of the Conveyancing Act, he could not, I think, have used these words (29 Ch.D. at p. 336):

> "Undoubtedly a few words were left out, but one cannot guess why they were left out, nor, indeed, why this section was introduced into the Act at all. It was possibly to codify the law."

And the result of s. 43, as above explained, is thus stated by Mr. Wolstenholme (see CONVEYANCING ACTS by WOLSTENHOLME AND TURNER (3rd Edn.), p. 95), in terms which, as KAY, J., in *Re Judkin's Trusts* (8), said (25 Ch.D. at p. 748) appear to be an accurate statement of its effect:

> "When income will go with capital if and when capital vests, then income is applicable for the benefit of the infant under the section; otherwise not."

This view, following, as it does, the words of the Act, and carrying out also the general law apart from the Act, was apparently adopted, although, I agree, without argument, by FARWELL, J., in *Re Cooper*, *Cooper* v. *Cooper* (9), and is, I should have thought, clearly right from every point of view.

It is, however, said that the Court of Appeal has interpreted the section otherwise and has decided that it has no application to any income to which the infant on the contingency happening is not himself absolutely entitled. In my opinion, that assertion is not made out when the grounds on which it is based are examined. It rests exclusively on a passage to be found in the judgment of COTTON, L.J., in *Re Dickson* (1) (29 Ch.D. at p. 336) already cited, and in a passage of COZENS-HARDY, L.J., in *Re Bowlby* (2) ([1904] 2 Ch. at p. 711). *Re Dickson* (1) was, as I have already said, a case of a gift of the corpus of a fund contingent on the legatee attaining twenty-one. In that case it was not set apart in the hands of trustees, and, accordingly, did not come under either section, but, so far as the quantum of estate was concerned which the infant there took, it was, as I have shown, the only interest to which s. 26 of Lord Cranworth's Act applied. In the course of his judgment COTTON, L.J., said (29 Ch.D. at p. 336):

> "That to my mind leads very strongly to the conclusion that this section does not extend the effect of Lord Cranworth's Act. Under that Act it had been decided that the infant could not be maintained out of the income, unless, if he had attained twenty-one, he would have become entitled to the past income, as well as to the corpus of the property. In my opinion the case is the same under the present statute."

That is strictly correct, although not very apt. In the case of such an interest there is no difference between the two sections in the result. In such a case neither section has any application unless the income will in fact go to the legatee if and when he receives the principal. COTTON, L.J., however, is not even remotely dealing with the case of the legatee being entitled for life only. The later passage in his judgment in the same case already cited shows he had no such case in mind; his observations cannot, therefore, properly be extended to such a case. The subsequent passage in the judgment of COZENS-HARDY, L.J., in *Re Bowlby* (2) is more difficult. There the lord justice says (2) ([1904] 2 Ch. at p. 711):

> "It is settled that s. 43 has no application, unless, apart from the Act, the infant would under the terms of the will be entitled to the arrears of income on attaining twenty-one: *Re Dickson* (1). This must mean either as tenant for life or absolutely. If a share of residue is given absolutely to an infant contingently on his attaining twenty-one, the infant will be entitled to both capital and arrears of income on attaining twenty-one, and s. 43 will apply. But if the infant only becomes tenant for life of the share of residue with its accretion on attaining twenty-one, the case does not fall within the language of s. 43, as interpreted by the Court of Appeal."

There, however, it must be noted that the lord justice bases his view exclusively on *Re Dickson* (1) and presumably on the passage from COTTON, L.J.'s judgment already cited. He expresses no view of his own to the same effect, and he does not apparently notice that the statement in *Re Dickson* (1) had no reference to a life interest to which he, again without expressing any opinion of his own, treated it as applicable. Further, the lord justice had just decided, overruling *Re Scott* (7), that the accumulated income under sub-s. (2) of s. 43 became a mere accretion to capital, and I do not think he could have intended by the observations I have read to hold, as a necessary result, that the power expressly conferred by s. 43 (1) in the event mentioned could in the result never be exercisable. He would not, I feel sure, have done so had it been present to his mind that there had been omitted from s. 43 the words in s. 26 which would have produced that result. Again, in *Re Bowlby* (2) maintenance had been allowed, and the propriety of the allowance was not questioned either by the lord justice or any other member of the court.

Lastly, the observation of the lord justice was a dictum only; it was, I think, plainly not concurred in by ROMER, L.J.—clarum et venerabile nomen—who clearly thought the daughter there was entitled to maintenance under s. 43, while the judgment of VAUGHAN WILLIAMS, L.J., was mainly directed to other matters.

In the result, therefore, I cannot find that there has been any decision of the Court of Appeal to the effect stated. If there were, I should, of course, be bound to follow it whatever my own opinion might be. In the absence of such a decision, however, I conceive myself entitled to adopt the view of the statute I have stated—a view not only in accord with its express terms, but with the principle of construction applicable to such matters. It remains only to consider whether there is in this will any statement of a contrary intention which would exclude the operation of the section. There is none. Counsel for the residuary legatees admits that no part of the income of this fund falls into residue, and all of it passes with the legacy.

Solicitors: *Wingfield, Blew & Kenward; Stanley, Woodhouse & Hedderwick.*

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

Re HATCH. HATCH *v.* HATCH

[CHANCERY DIVISION (Sargant, J.), February 6, 7, 1919]

[Reported [1919] 1 Ch. 351; 88 L.J.Ch. 147; 120 L.T. 694; 63 Sol. Jo. 389]

Income Tax—Annuity—Payment without deduction of income tax—Recovery of arrears—Right to retain out of beneficial interest in residue—Income Tax Act, 1842 (5 & 6 *Vict.*, *c.* 35), *ss.* 102, 103—*Income Tax Act*, 1853 (16 & 17 *Vict.*, c. 34), *s.* 40.

In 1885, a husband and wife entered into a separation deed, in which, after reciting a decree for judicial separation and an order of the Divorce Court giving the wife permanent alimony of £200 per annum, the husband covenanted that he would, in substitution for the permanent alimony directed by the court, pay the wife £200 per annum, with a proviso that, if the husband should make default in so doing, the wife should be at liberty to enforce payment by process under the order as though default had been made in payment under the order, it being the intention of the deed that nothing in it should in any way prejudice the wife's rights or remedies under the decree or the order. The husband died in 1907, and by his will he bequeathed his residuary estate to trustees on trusts in favour of his four sons, one of whom died in 1915 having appointed his mother (the wife) his sole executrix and universal legatee. The husband during his lifetime and his executors after his death had paid the wife's annuity without deducting income tax.

Held: (i) on the true construction of the deed, the wife's annuity was payable subject to income tax: *Re Barry's Trusts* (1), [1906] 1 Ch. 678; [1906] 2 Ch. 358, applied; (ii) the overpayments having been made under a mistake of law were not recoverable from the wife and could not be deducted from future payments of the annuity or from the wife's share in the husband's residuary estate: *Warren* v. *Warren* (2) (1895), 72 L.T. 628, applied.

Notes. The Income Tax Acts, 1842 and 1853, have been repealed. See now the Income Tax Act, 1952, s. 169 (32 HALSBURY'S STATUTES, 2nd Edn., 162).

Distinguished: *Re Woolridge, Woolridge* v. *Coe*, [1920] W.N. 78. Criticised: *Re Diplock's Estate*, [1948] 2 All E.R. 318. Referred to: *Ministry of Health* v.

Simpson, [1950] 2 All E.R. 1137; *Turvey* v. *Denton* (1923), Ltd., [1952] 2 All E.R. 1025.

As to deduction of tax from an annuity, see 20 HALSBURY'S LAWS (3rd Edn.) 368 et seq.; and for cases see 28 DIGEST (Repl.) 169 et seq. As to money paid under a mistake of law, see 26 HALSBURY'S LAWS (3rd Edn.) 924 et seq.; and for cases see 35 DIGEST 158 et seq.

Cases referred to:

(1) *Re Barry's Trusts*, *Barry* v. *Smart*, [1906] 1 Ch. 768; 75 L.J.Ch. 415; 94 L.T. 537; 54 W.R. 448; affirmed [1906] 2 Ch. 358; 75 L.J.Ch. 676; 95 L.T. 165; 54 W.R. 621; 50 Sol. Jo. 615, C.A. 28 Digest (Repl.) 179, *727*.

(2) *Warren* v. *Warren* (1895), 72 L.T. 628; 43 W.R. 490; 11 T.L.R. 355; 13 R. 485; 28 Digest (Repl.) 178, *715*.

Also referred to in argument:

Viscount Frankfort de Montmorency v. *Viscountess Frankfort de Montmorency* (1845), 4 Notes of Cases, 280; 28 Digest (Repl.) 177, *712*.

Countess of Shrewsbury v. *Earl of Shrewsbury* (1906), 22 T.L.R. 598; 28 Digest (Repl.) 179, *728*.

Blount v. *Blount*, [1916] 1 K.B. 230; 85 L.J.K.B. 230; 114 L.T. 176; 28 Digest (Repl.) 178, *716*.

Re Shaw, *Smith* v. *Shaw*, [1918] P. 47; 87 L.J.P. 49; 118 L.T. 334, C.A.; 28 Digest (Repl.) 197, *821*.

Chadwick v. *Pearl Life Insurance Co.*, [1905] 2 K.B. 507; 74 L.J.K.B. 671; 93 L.T. 25; 54 W.R. 78; 21 T.L.R. 456; 28 Digest (Repl.) 171, *693*.

Currie v. *Goold* (1817), 2 Madd. 163; 56 E.R. 295; 28 Digest (Repl.) 186, *763*.

Re Akerman, *Akerman* v. *Akerman*, [1891] 3 Ch. 212; 61 L.J.Ch. 34; 65 L.T. 194; 40 W.R. 12; 23 Digest (Repl.) 448, *5163*.

Re Musgrave, *Machell* v. *Parry*, [1916] 2 Ch. 417; 85 L.J.Ch. 639; 115 L.T. 149; 60 Sol. Jo. 694; 28 Digest (Repl.) 187, *770*.

Re Ainsworth, *Finch* v. *Smith*, [1915] 2 Ch. 96; 84 L.J.Ch. 701; 113 L.T. 368; 31 T.L.R. 392; 43 Digest 961, *4004*.

Re Robinson, *McLaren* v. *Public Trustee*, [1911] 1 Ch. 502; 104 L.T. 331; 55 Sol. Jo. 271; sub nom. *Re Robinson*, *McLaren* v. *Robinson*, 80 L.J.Ch. 381; 43 Digest 960, *4002*.

Adjourned Summons to determine questions on the construction of the will of the testator, A. D. Hatch.

In 1885, the testator, A. D. Hatch, and his wife, Laura Hatch, entered into a separation deed reciting that in 1882 a decree for their judicial separation had been made by the Divorce Court, and that in 1883 an order of the court had been made giving the wife £200 per annum permanent alimony by monthly payments and a further sum for maintenance of the children. By this deed the parties covenanted as follows: (i) That the husband should, in substitution for the permanent alimony and maintenance directed by the court, pay the wife £200 a year for her separate estate without power of anticipation and £100 per annum for maintenance of the children for so long as he was liable under the order to make the payments provided for under the order; (ii) that the wife should not take proceedings directly or indirectly to recover the sums or any part thereof; and (iii) the wife released her power to apply for further or other alimony. There was a proviso in the deed that, if the husband should make default under the agreement in payment of any instalment, the wife should be at liberty to enforce payment by process under the order as though default had been made in payment under the order, it being the intent and meaning of the deed that nothing therein contained should in any way prejudice the rights or remedies of the wife under the decree for judicial separation or under the recited order otherwise than in restraint and prevention of her right to make any investigation into the property and affairs of the husband or for obtaining any further or other allowance from

him. In 1907 the husband died, and by his will he bequeathed his residuary estate to his trustees on trust for sale and to divide the proceeds of sale between his four sons, and he directed that each part should be appropriated to each son, and settled the share of each son on him and his children. One son died in 1915, a bachelor, having appointed his mother, Laura Hatch, his sole executrix and universal legatee. The husband during his life paid his wife the £200 without deducting income tax, and his executors after his death did the same. By an order made by SARGANT, J., on June 7, 1916, it was declared that, in the events which had happened, the one-fourth of the residuary estate directed to be appropriated to one son of the testator—namely, Edgar—belonged to his mother, Laura Hatch, as the executrix of his will absolutely. A question now arose whether the testator, and after his death his executors, had acted properly under a deed of separation in paying an amount thereunder to the testator's wife free of income tax, or whether they ought to have deducted tax, and, if they ought to have deducted tax, could they now deduct any payments already made out of the residuary estate of the testator in respect of income tax on the said annuity from any payments of such amounts subsequently becoming payable to the wife or from any sum or sums payable or to become payable to her out of the residuary estate of the testator.

J. F. W. Galbraith for the summons.

Dighton Pollock for the annuitant, the wife.

Stafford Crossman for the persons interested in the residuary estate of the testator.

E. F. Spence for other parties in the same interest.

SARGANT, J., stated the facts, and continued: Three questions have been raised on the present summons: first, whether on the construction of the deed of separation income tax ought to have been deducted before any payment of the annuity to the wife; secondly, if it ought to have been so deducted, then whether the amount overpaid in the past can be deducted from future payments of the annuity; and thirdly, if not, then whether the amount overpaid can be retained by the applicants out of a share of the testator's residuary estate to which the annuitant became beneficially entitled under the will of one of her children. The first question is, in my opinion, concluded by *Re Barry's Trusts* (1); and even assuming, which to my mind is by no means clear, that, under the order of the Divorce Court, the alimony was payable to the annuitant free of income tax, it does not at all follow that the annuity which was substituted for alimony by the deed of covenant was equally free from income tax. After the husband's death, the annuity was not alimony at all and was payable solely under the terms of the deed. This created a direct contract on the part of the husband to pay the annuity to the annuitant during her life, which, in my opinion, falls directly within the provisions of the Income Tax Acts.

The second question is whether the tax which was not in fact, but which ought to have been, deducted in respect of the past payments of the annuity can now be made good to the residuary estate of the testator out of future payments of the annuity. It has been admitted and, in my opinion, rightly admitted by counsel for the persons interested in the residuary estate of the testator, that this point is concluded by *Warren* v. *Warren* (2), and that the overpayments having been made under a mistake of law there is no debt recoverable from the annuitant which would entitle the applicants to deduct the amount overpaid from the future payments of the annuity under the covenant contained in the deed. It has, however, been contended, and this is the third point to be determined, that, although that may be the case with regard to the question of retention out of future payments of the annuity, the applicants are nevertheless entitled to retain the amount of such overpayment out of the share of the residuary estate of the testator to which the annuitant became beneficially entitled under the will of her son, Edgar.

It is said that the annuitant, having received out of the residuary estate of the testator a larger payment than she was entitled to as a creditor, is not entitled to receive any further part of that estate until that estate has been recouped the amount of such overpayments out of the share to which the annuitant has become beneficially entitled.

That would, no doubt, be so if the overpayments had been made under a mistake of fact, since, in that case, the estate would be a creditor of the annuitant; but here the estate is not a creditor of the annuitant, because the mistake is one of law, and what is sought is to set off against the beneficial interest of the annuitant in the estate something short of a debt—something which never was a debt owing by her, and cannot, therefore, be made available for the purpose of reducing the amount payable to her in respect of her beneficial interest. Assume for a moment that, by a mistake of law, the annuitant as a creditor had been paid too little, so that the residuary legatees had received too much, would it be open to the annuitant to stop the distribution of the estate until the sums by which the residuary legatees had been overpaid had been deducted? To ask that question is, in my opinion, to answer it. The fact is that, the payment having been made under a mistake of law, the parties are left as they are without any resultant rights. I am of opinion, therefore, that, in respect of these past payments to the annuitant, which comprised the amount of the tax, there is no right in the applicants to retain such overpayments, either out of future payments of the annuity under the deed, or out of the share of the annuitant in the residuary estate of the testator.

Solicitors: *Smiles & Co.; Bennett & Ferris; Reid, Sharman, White & Brutton.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

THE KINGSWAY

[Court of Appeal (Pickford, Bankes and Scrutton, L.JJ.), July 22, 23, 1918]

[Reported [1918] P. 344; 87 L.J.P. 162; 122 L.T. 651; 14 Asp.M.L.C. 590]

Shipping—Collision—Damages—Measure—Temporary repairs—Detention—Estimated cost of permanent repairs—Estimated period of detention—Possibility of ship being lost or damaged before permanent repairs done.

In 1915 the plaintiff's ship suffered damage in a collision due to the fault of the defendants' ship. Owing to the war then in progress it was unreasonable or impossible to effect permanent repairs at the time or before the hearing of the plaintiff's claim for damages, and so temporary repairs were effected immediately after the collision.

Held: the damages to which the plaintiffs were entitled included (i) the cost of the temporary repairs; (ii) damages in respect of detention during the execution of those repairs; (iii) damages in respect of the estimated cost of permanent repairs and an estimated period of detention during such repairs; in estimating these damages the court must take into account the chance that before permanent repairs could be effected the plaintiff's ship might be lost, or might suffer other damage which could be repaired at the same time as the permanent repairs were effected.

Principle stated by Bowen, L.J., in *The Argentino* (1) (1888), B.P.D. at p. 201, applied.

Decision of Hill, J. (1918), 122 L.T. 651, affirmed.

Per **Curiam**: If at the time of the reference to assess damages the plaintiff's ship had already been lost, the plaintiffs would not have been entitled to damages in respect of the estimated cost of the permanent repairs or of the estimated demurrage during such repairs.

The Glenfinlas (2), noted post, p. 365, approved.

Notes. Applied: *The York*, [1929] P. 178. Referred to: *The Chekiang*, [1925] P. 80; *Admiralty Comrs.* v. *Susquehanna* (*Owners*), *The Susquehanna*, [1926] All E.R.Rep. 124; *The London Corporation*, [1935] All E.R.Rep. 393; *Carslogie Steamship Co.* v. *Royal Norwegian Government*, [1952] 1 All E.R. 20.

As to measure of damages for shipping collisions, see 30 HALSBURY'S LAWS (2nd Edn.) 855–863; and for cases see 41 DIGEST 800–813.

Cases referred to:

(1) *Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino* (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 6 Asp.M.L.C. 348; affirmed (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp.M.L.C. 433, H.L.; 41 Digest 802, *6627*.

(2) *The Glenfinlas* (1917), unreported (see note post, p. 365).

(3) *The Philadelphia*, [1917] P. 101; 86 L.J.P. 112; 116 L.T. 794; 14 Asp. M.L.C. 68, C.A.; 41 Digest 809, *6708*

(4) *Mersey Docks and Harbour Board* v. *Marpessa* (*Owners*), *The Marpessa*, [1907] A.C. 241; 76 L.J.P. 128; 97 L.T. 1; 23 T.L.R. 572; 51 Sol. Jo. 530, H.L.; 41 Digest 808, *6690*.

Appeal by the defendants from a decision of HILL, J., reported 122 L.T. 651, affirming the report of the Liverpool District Registrar, who assessed the damage sustained by the plaintiffs, the Allan Line, by reason of a collision between their steamship *Grampian* and the defendants' steamship *Kingsway*.

On May 14, 1915, a collision took place in the Mersey between the *Grampian* and the *Kingsway*. The *Grampian*, which was bound from Liverpool to Quebec and Montreal with passengers, mails, and cargo, put back to Liverpool, where temporary repairs were effected. She resumed her voyage on May 18, and continued trading until May, 1917, when she was requisitioned by the government. On Oct. 25, 1916, the *Kingsway* was pronounced by the President (SIR SAMUEL EVANS) alone to blame for the collision, and on June 12, 1917, at the instance of the owners of the *Kingsway*, the plaintiffs, who had wished to delay filing their claim until the whole of the damage had been ascertained, which would probably not be until after the end of the war, were ordered by HILL, J., to file their claim within three weeks. The claim was filed on July 3, and went to a reference on Aug. 2, 1917. The claim included the following items: (i) Temporary repairs, £609 3s. 11d.; (ii) estimate for permanent repairs (time, sixteen days), £2,155; (iii) estimated surveyor's fees in connection with permanent repairs, £52 10s.; (iv) detention during temporary repairs, four days at £600 per day, £2,400; (v) detention during permanent repairs, sixteen days, estimated at £600 per day, £9,600; (vi) estimated insurance, wages, and incidental expenses during permanent repairs, £1,740. The registrar allowed items (i), (ii), and (iii) in full, and the following amounts in respect of the other items: (iv) £2,380, (v) £1,600, and (vi) £861 5s. 3d. The defendants petitioned the court in objection to the registrar's report, claiming that items (ii)–(vi) both inclusive should be disallowed.

On June 10, 1918, HILL, J., read a reserved judgment dismissing the defendant's petition, and affirming the registrar's report. In dealing with the assessment of damages in respect of the estimated cost and expense of effecting permanent repairs, and in respect of the estimated demurrage during such repairs, HILL, J., said: "the plaintiffs have proved with sufficient certainty that the ship will be laid up for permanent repairs for sixteen days. Of course, that is subject to the chance that she may be lost or that she may suffer other damage, and that the repair of that damage and the execution of the permanent repairs can be effected at the

same time. But these chances, while they must be taken into account in fixing the amount of damages to be allowed, do not, in my opinion, make no damages recoverable. If they did, it would be difficult to see how, in any action of negligence whereby a person loses the use of his property or of himself, anything could be awarded for prospective loss, for the property may be destroyed or he himself may die the next day. But, undoubtedly, when proved with that degree of certainty which the law requires, prospective loss is a proper element in damages for negligence causing injury to property or to the person. These chances are matters to be weighed, but nothing more. Then as to amount. The £100 a day has been taken by the registrar and merchants because that was the Blue Book rate paid by the Government to the owners when the ship was under requisition. In May, 1915, the profit rate of the free ship was £600 a day. It being reasonably certain that the detention for permanent repairs will not take place until after the war, requisitioning, whether under the Defence of the Realm Regulations or under the Royal Prerogative and Blue Book rates, will have ceased to operate. Perhaps the chance of legislation to give some power to the Government to requisition or to fix rates after the war ought to be taken into account; but it is a pure speculation whether Parliament in its wisdom will think the interests of the country served in times of peace by taking ships out of the control of shipowners or will think it either prudent or just to limit freights or to divide the earnings of ships between the Government and owners. On the other hand, it can hardly be doubted that, for some considerable time after the conclusion of peace, the demand for shipping will exceed the supply and rates of freight be high—much higher than Blue Book rates, which were originally fixed in the autumn of 1914, before the war had begun to have any effect in increasing the demand relatively to the supply of shipping, or in a resulting rise in freights. Taking all these things and all the chances into consideration, I should myself have taken a much higher rate per day that £100 as the probable loss of profit. As to the other items—wages, insurance and incidentals—they have been estimated by the registrar and merchants, and there is no reason to think them over-estimated. In the result, the registrar and merchants have allowed £1,600, plus the other smaller items, as the prospective damages by delay during permanent repairs. For reasons which I have stated, I do not agree with the principle on which the registrar proceeded; but, applying what I conceive to be true principle, I think the amount awarded is a very moderate estimate of prospective loss established with reasonable certainty and discounted by a due consideration of all the chances. I hesitated at one time as to whether I ought not to send the case back to the registrar and merchants on this matter of prospective detention. But the facts are before me, and as I think the amount allowed does not err on the side of excess, I think there is no advantage to be gained by not myself disposing of the whole case. The report will be confirmed and the petition dismissed with costs." The defendants appealed.

Wright, K.C., and *Lewis Noad* for the defendants.
Laing, K.C., and *C. R. Dunlop* for the plaintiffs.

July 23, 1918. **PICKFORD, L.J.**—I think that this case involves no question of principle. In the first place, I wish to emphasise that the measure of damages applicable to a ship is in no way different from that which is applicable to any other chattel. The nature of the thing damaged does not in any way affect the assessment of the damages. That was stated in *Gracie (Owners)* v. *Argentino (Owners)*, *The Argentino* (1), by BOWEN, L.J., in the following passage (13 P.D. at p. 201):

"A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages

for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves; but this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, on the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage. On the other hand, the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone."

That passage, so far as I know, has never been in question, and has been cited with approval in this court in *The Philadelphia* (3). It is there stated quite distinctly that the principle is the same. Sometimes it is called restitutio in integrum; sometimes it is called "compensation" for the loss sustained. It does not matter what it is called; the wrongdoer is bound to pay the party to whom he has done the wrong compensation for the damage done. A difficulty, of course, often arises in assessing that compensation where it is necessary to asssess the loss that will arise in the future. The difficulties are very much lightened where all the facts are known, and all the damage has been repaired, and it only remains to be seen how great the loss has been. In fact, where the repairs have been done and the detention has taken place, all the elements are present on which to ascertain what the actual damage is. The difficulty has arisen in this case, because the reference has been held to assess compensation to the damaged ship before the repairs have been done, and before the amount of the loss by detention could be ascertained, and counsel have not been able to cite any case in which that has occurred. In this case we have to look into the future and estimate, on an examination of the probable circumstances that will exist in the future, what will be the loss. It seems to be a novelty in the assessment of damages in the Admiralty Court; it is an everyday matter in the common law courts, and the difficulties of coming to a proper estimate are not difficulties of law or principle, but of fact.

The circumstances of the present case are these. The *Grampian*, an Allan liner, was damaged by the *Kingsway*. The *Grampian* was in government service at the time, and the government would not allow her to be off duty in order that permanent repairs might be done; and, besides, the state of the shipyards and repair shops is such at present that it is very difficult to get any permanent repairs done. Therefore, as this vessel was not so damaged as to be unable to navigate, temporary repairs were done, she was made seaworthy, and is still working under government requisition. The learned judge and the registrar have both found that it was reasonable and proper in the circumstances to do that, and there is nothing original in doing temporary repairs first and permanent repairs afterwards. That course is followed constantly where the damage occurs in a place where there are no proper facilities for permanent repairs. The plaintiffs, according to the learned judge, wished the inquiry as to damages to stand over until the whole of their damages were definitely ascertained, which was not likely to be during the war. They, therefore, did not file a claim. The defendants thereupon applied by summons, saying that they objected to the reference being hung up indefinitely, and in July, 1917, the learned judge ordered the plaintiffs to file their claim. In those circumstances the reference took place, and inquiry arose as to what, if anything, is to be allowed for permanent repairs, and what, if anything, is to be allowed for detention of the ship.

Counsel for the defendants hesitated to adopt the proposition that the result was to cut off the whole of the permanent repairs and the whole of the detention, even though it might be almost certain to be incurred. They said that the plaintiffs must prove their actual damage. It is quite true that they actually said that only as to the detention. It seems to me, however, that it must apply to both

damage and detention. You can only recover for actual damage, and if actual damage means damage which you do ascertain, in fact, upon circumstances having happened which would ascertain it, you must cut off both of these heads of claim. It seems to me that that proposition cannot be maintained for a moment. Counsel for the defendants said that, however much injury was done by detention, it must be shown that a loss has been, in fact, incurred; that is to say, that the ship has been in fact detained for a time during which she would have obtained profitable employment. That, again, means that the wrongdoer, who very properly has asked that the damages should be assessed at once, before the time for doing the permanent repairs has arrived, is to escape liability altogether, although in the opinion of the court there will be detention during a time in which the ship might be earning, because the time has not yet arrived. That position seems to me to be wholly untenable.

I think the judge was quite right in the view he took. He took this view, and I should agree if it were necessary to decide it, that if at the time of a reference the ship had been in fact lost, as was the case in *The Glenfinlas* (2), and, therefore, the repairs never could be done, and, at the time of her loss, the time of her detention never could be a loss of profitable employment to the shipowner at all—then these damages could not be recovered. When I speak of the ship as lost, I mean lost by some circumstances other than the collision. Suppose that after the collision she had been sunk by perils of the sea, then it would be clear that the shipowner was not at the loss of those permanent repairs because he never would or could do them; therefore he never would spend the money and would not be entitled to be repaid the money. The same would be true with regard to detention. She never could be, by reason of this accident, detained from profitable employment, because she had gone, and never could get any profitable employment; but that is not this case. In this case the ship is still there; she is still on the sea, and the judge was of opinion that the repairs would be done, subject, of course, to the possible loss of the ship—that is a circumstance he would have to consider. He was also of opinion, and there was evidence on which he was entitled to be satisfied, that the ship would in all probability be detained during the repairs for sixteen days, and that she during that time would have been able, if not detained, to have obtained profitable employment. These are all matters of fact he has to ascertain. Looking into the future, he has to consider what is the proper compensation for these repairs and this detention, which, in his opinion, would have to be done and would take place. He has to consider all the circumstances, all the chances, all the probabilities, and he has then to assess the amount; and if he has done that, not acting on any wrong principle, it is not, it seems to me, for this court to interfere with the assessment which has been arrived at by the registrar. The registrar, I agree with the judge, has proceeded probably on a wrong principle with regard to detention. The judge has arrived at the same result by applying, in my opinion, the right principle, and if he has done that, then any small miscalculations are not things this court should correct.

Mersey Docks and Harbour Board v. *Marpessa* (*Owners*), *The Marpessa* (4), shows that it is not for this court, nor for the House of Lords nicely to weigh the conclusions of fact at which the registrar and the judge have arrived, but to ascertain whether they have applied the right principle. In my opinion, in this case they proceeded on a right principle. The reasoning of HILL, J., seems to me to be sound. I think the decision appealed from right, and the appeal should be dismissed with costs.

BANKES, L.J.—I agree.

SCRUTTON, L.J.—I agree.

Appeal dismissed.

Solicitors: *Batesons, Warr & Wimhurst*, Liverpool; *Hill, Dickinson & Co.*, Liverpool.

NOTE.—*The Glenfinlas* (1917), unreported. On Mar. 4, 1917, a collision occurred at St. Nazaire between the plaintiffs' steamship *Western Coast* and the defendants' steamship *Glenfinlas*, whereby the former was damaged. Temporary repairs were done to the *Western Coast* at St. Nazaire, and an estimate was made for permanent repairs, but these were never done. The *Western Coast* was then requisitioned by Government, and during her service, on Nov. 14, 1917, she was sunk by a mine. In an action of damage the defendants admitted liability subject to a reference to assess damages. At the reference the plaintiffs claimed damages in respect of permanent repairs and detention. The defendants admitted that the plaintiffs were entitled to damages for permanent repairs, excluding drydocking and the services of a surveyor; but they denied that the plaintiffs were entitled in respect of the last two items as part of the permanent repairs, or in respect of detention. A witness called by the plaintiffs stated that the vessel would not have been repaired until after the war. The registrar (Mr. E. S. Roscoe), assisted by the merchants, allowed the plaintiffs the cost of drydocking and the services of a surveyor as part of the cost of the repairs, but refused to allow them damages for detention. The learned registrar said that it was clear law that the owner of a vessel which had been in collision was entitled to the cost of repairs even if they had not been executed.—*The Endeavour* (1890), 6 Asp.M.L.C. 511, which case had been frequently followed in the registry. Such estimated cost was the measure of an actual injury resulting in actual damage to the plaintiffs' property and was part of the cost of repairs. It should therefore be allowed. The damages for detention, however, were in his view inadmissible. Being merely consequential damages, they were on a different footing from the estimated cost of repairs for an actual injury to the plaintiffs' chattel. The principle applicable was restitutio in integrum, which did not include damages for a loss of time which had not occurred. The claim for loss of the use of the vessel could not, therefore, be allowed.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

Re PACKARD. PACKARD *v.* WATERS

[CHANCERY DIVISION (Sargant, J.), October 14, 1919]

[Reported [1920] 1 Ch. 596; 89 L.J.Ch. 301; 123 L.T. 401]

Will—Condition—Condition precedent—Legacy subject to execution of settlement within fixed time—Ignorance of condition—Failure to perform—Ability to comply with condition—Time not of the essence—Failure to perform through ignorance of condition—No gift over—Effect of residuary gift.

The testator gave a legacy to his daughter on the condition that she should, within one year of his death, settle on certain trusts of the will a sum to which she was entitled under a settlement. There was no gift over in the event of this condition not being complied with, and no direction that the legacy should fall into residue. Through ignorance of the condition, no settlement was made within one year of the testator's death, but some years after an insufficient settlement was executed in intended compliance with the condition. The corpus was still intact, the income had been paid as it would have been if there had been a proper settlement, and the daughter was willing to execute a proper settlement.

Held: assuming that the condition was a condition precedent, time was not of the essence of the condition, and it could still be complied with.

Notes. Applied: *Re Goodwin, Ainslie* v. *Goodwin* (1924), 93 L.J.Ch. 331; *Re Goldsmith's Will Trusts, Brett* v. *Bingham*, [1947] 1 All E.R. 451. Referred to: *Re Gage, Lloyds Bank, Ltd.* v. *Holland*, [1946] Ch. 332.

As to conditions in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 103 et seq.; and for cases see 44 DIGEST 464 et seq.

Cases referred to:

(1) *Wheeler* v. *Bingham* (1746), 1 Wils. 135; 3 Atk. 364; 95 E.R. 535, L.C.; 44 Digest 483, *3026*.

(2) *Hollinrake* v. *Lister* (1826), 1 Russ. 500; 38 E.R. 193; 44 Digest 482, *3005*.

(3) *Taylor* v. *Popham* (1782), 1 Bro. C.C. 168; 28 E.R. 1059, L.C.; 44 Digest 469, *2889*.

Also referred to in argument:

Simpson v. *Vickers* (1807), 14 Ves. 341; 33 E.R. 552; 44 Digest 469, *2891*.

Paine v. *Hyde* (1841), 4 Beav. 468; 49 E.R. 420; 44 Digest 474, *2929*.

Lloyd v. *Branton* (1817), 3 Mer. 108; 36 E.R. 42; 44 Digest 485, *3046*.

Originating Summons.

The testator, Edward Packard, was twice married. He had several children by his first marriage, and he had only two children by his second wife, one being a son who died an infant in 1882 and the other being the defendant, Alice E. Waters, then Alice Elizabeth Packard. Under a settlement, made on Aug. 12, 1868, a sum of £5,000 was settled which, subject to her mother's life interest, vested in Alice E. Waters. Under another settlement, made on Mar. 23, 1874, the testator in the first place conveyed property to secure the payment of the sum of £5,000 settled by the settlement of 1868, and in the second place, provided that, after the payment of that sum, the residue of the proceeds of sale of the property then to be sold should be divided, subject to the testator's appointment by deed or will, amongst his children. The testator died on Oct. 27, 1899, having by his will, dated Aug. 23, 1895, appointed Edward Packard, H. W. Packard and Charles Cheston executors and trustees thereof, and, after giving some pecuniary and specific legacies and devising certain lands, and reciting the settlement of 1868 and that his daughter "Alice Elizabeth Packard is at present entitled (on the decease of the survivor of myself and my said wife) to the sum of £5,000 by the said indenture covenanted to be paid by me to the trustees thereof," the testator gave all his residuary estate to his trustees on trust for conversion, and to invest a sufficient part thereof to produce a specified income for his widow. And he directed that, "subject as aforesaid," the trustees should hold the residuary estate on trust to pay a son £10,000 and to pay the trustees of each of two other daughters' settlement (such daughters being Mary Cheston the wife of Charles Cheston, and Henrietta Ellen Mack) the sums of £5,000 and £4,000 respectively, to be held on the trusts of those settlements. The will then provided as follows:

"And to pay to my daughter, Alice Elizabeth Packard (but only on the condition hereinafter mentioned), such a sum as, together with the sum of £5,000 to which she is entitled under the said recited settlement of Aug. 11, 1868, and any other sums which I may hereafter advance to her or for her benefit, will make up the sum of £10,000 . . . I direct that my trustees shall hold my residuary personal estate upon trust to divide the same equally among my said son Osborne Burgess Packard and my said daughters Mary Cheston, Henrietta Ellen Mack, and Alice Elizabeth Packard, in equal shares: Provided always and I declare that the legacy of £5,000 and the bequest of part of my residuary personal estate to my daughter Alice Elizabeth Packard are made upon the express condition that she shall within one year of my death settle or cause to be settled the sum of £5,000 to which she is entitled under the said settlement of Aug. 11, 1868, and the share which I have appointed to her of

the funds subject to the settlement of Mar. 23, 1874, upon such trusts as are hereinafter declared of the provision made for her by this my will. And I direct my trustees to stand possessed of the legacy hereinbefore bequeathed to my daughter Alice Elizabeth Packard and of her share in my residuary personal estate (if by compliance with the last clause she becomes entitled thereto)"

on certain trusts which, shortly stated, were the usual settlement trusts, under which she took a life interest, subject to which the corpus was settled on her children, if any, and, in default of any children attaining twenty-one years of age, to such persons as she should by will or codicil direct. Later on the will provided that, if a settlement should be made on the marriage of Alice E. Packard, it should be lawful for the testator's trustees to hand over the legacy of £5,000 and her share in the residue to the trustees of that settlement. No further sum was advanced by the testator to Alice Elizabeth Packard, so that there was in effect a legacy to her of £5,000. Alice E. Waters (then Alice E. Packard) was never clear from the conditions imposed by the will of the testator. She left everything, as did the other members of the family, in the hands of a firm of solicitors in which Charles Cheston was a partner, and they managed the estate generally, but in the year 1905 her mother became aware of the condition in the will as to a settlement and wrote to Charles Cheston suggesting that, in view of the condition, it would be desirable that a settlement should be made and that the condition should be complied with. On that, Charles Cheston sent a letter in reply rather pooh-poohing the doubts that had been raised; but, on being pressed, he said he thought that the settlement might as well be made, and, accordingly, he drew up a settlement to be executed by Alice E. Packard, and she, without the least demur, on Oct. 21, 1905, executed the settlement in the form in which he drew it. This settlement was very hurriedly drawn, and it did not strictly comply with the directions which were contained in the will; it did not cover one of the items that the lady was directed to settle, and was in other ways ineffective. As the court found, it was a very poor document and did not effectually comply with the conditions of the will. On Dec. 1, 1909, Alice Elizabeth Packard married Basil E. M. Waters, and her mother died on Aug. 16, 1918. Ever since the death of the testator, the legacy of £5,000 and the share of residue had been treated as if a settlement such as was directed by the will had been executed. No such settlement had ever been made by Mrs. Waters, so that, although no proper settlement was in fact executed, the disposition of the income from the property—and down to the commencement of the present proceedings there had been no question about the disposition of the corpus—had been in accordance with the directions given in the will of the testator. Mrs. Waters was perfectly willing to execute a proper supplementary document for the purpose of giving effect to the conditions prescribed by the will.

Edward Packard, the surviving trustee and executor of the will of the testator, took out an originating summons against Alice Elizabeth Waters, Henrietta Ellen Mack and Marjorie Nellie Dixon, a trustee of Mrs. Mack's marriage settlement, for the determination of the questions (i) whether, on the construction of the will of the testator and in the events which had happened, Alice E. Waters had, by executing the settlement of Oct. 21, 1905, complied with the condition in the will with reference to the legacy of £5,000 and one-fourth of the residue given by the will so as to entitle her to the legacy and share of residue; and (ii) whether the legacy ought to be treated as having failed and the bequest of the share of residue ought to be treated as undisposed of by the will, or whether it was still competent to Alice E. Waters in any way to comply with the condition.

Nicholson Combe for the plaintiff.
Beebee for the defendants Mrs. Waters and Mrs. Mack.
C. Johnston Edwards for Mrs. Mack's settlement trustees.

SARGANT, J., stated the facts, and continued: Mrs. Waters is now perfectly willing to execute a proper supplementary document for the purpose of giving effect to the conditions prescribed by the will, and, therefore, the question arises whether the term of one year mentioned in the will is really to be treated by the court as being of the substance of the condition. A question may arise on the words of the will whether the condition is a condition precedent or condition subsequent. On that I do not think it is necessary for me to express an opinion. Counsel for the defendants has been content, for the purposes of his argument, to treat the condition as if it were a condition precedent, and I will deal with the matter on that footing.

It is to be observed that here there is no gift over to any other persons in the event of the condition not being complied with. And it has been laid down in a number of cases, the best of which I think for the present purpose is *Wheeler* v. *Bingham* (1), that a mere residuary gift, without a direction that the legacy or fund in question shall fall into the residue on non-compliance with the condition, is not in itself a gift over to some other person. That being so, it seems to me that the principle to be applied is that which is laid down in ROPER ON LEGACIES (4th Edn.), p. 767, in the cases which are there referred to. In most of those cases, the condition imposed on the legatee was a condition as to payment of money or a condition as to the release of claims, and in those cases it was held that, where there was no gift over, so that there was no question of divesting an interest vested in such ultimate donee, the mere time of payment or release was not of the essence of the condition, and, accordingly, that a subsequent release or a subsequent payment by the legatee might amount to a substantial compliance with the condition. But the principle on which the cases were decided was not limited to the payment of money or a release of claims. That appears in *Hollinrake* v. *Lister* (2). The learned judge there, while himself limiting the principle to cases, or using language which only extends the principle to cases, where there is a question of release or payment of money, quotes with approval the language of THURLOW, L.C., in *Taylor* v. *Popham* (3). He says (1 Russ. at p. 508):

> "The distinction is recognised in *Taylor* v. *Popham* (3), a case which, in one respect, is stronger than the present; for there Taylor, the legatee, had not only omitted to execute the release within three months, as required by the will, but had absolutely refused to execute the release, and filed a bill to assert claims incompatible with it. Yet even there LORD THURLOW thought that Taylor was not bound by what he had done, or omitted to do, and that he was still at liberty to comply with the condition."

It is to be noticed that, in ROPER ON LEGACIES (4th Edn.), p. 767, the learned author, citing from SWINBURNE ON TESTAMENTS AND WILLS (Part 4, s. 6, art. 10), a well-known book, refers to the example of non-compliance with a condition, not as to paying money or to the release from debts, but with regard to the erection of a monument within a very short time after the testator's death. But the really important thing is, that the language of the lord chancellor in *Taylor* v. *Popham* (3) is clearly not limited to cases as to release from debts or payment of money but applies generally to the performance of a condition precedent outside the time mentioned in the will but under such circumstances that the parties can be placed in substantially the same position as if the terms of the will had been strictly complied with.

It seems to me that there is nothing to show that the direction that the settlement should be executed within twelve months is more than a directory provision. It is not of the essence or the substance of the condition; and it is quite clear that all the parties interested can be placed in precisely the same position as if the condition had been literally and accurately complied with, because the funds, which ought to have been settled within twelve months of the death of the testator, have throughout been treated as if they had been so settled, and they can be now

settled in the way required, so that there will be a continuous settlement of the funds as from the death of the testator. In my judgment, therefore, the case is one in which there has been—I will not say no forfeiture but—no necessary failure to obtain the benefit of these two legacies, the legacy and the share of residue, given by the will. If Mrs. Waters executes a settlement as directed by the will—probably it would be a supplementary settlement to make good the ineffective partial settlement made in 1905—she will, on that settlement being executed, have complied substantially with the conditions imposed by the will, and will be entitled to have the funds in question applied in accordance with the will.

Solicitors: *Broad & Son.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

THE GAGARA

[COURT OF APPEAL (Bankes, Warrington and Duke, L.JJ.), February 13, 14, 1919]

[Reported [1919] P. 95; 88 L.J.P. 101; 122 L.T. 498; 35 T.L.R. 259; 63 Sol. Jo. 301; 14 Asp.M.L.C. 547]

Constitutional Law—Foreign sovereign State—Immunity from legal process—Provisional recognition of foreign government—Writ in rem claiming possession of ship—Setting aside writ.

The plaintiffs issued a writ in rem against a ship which was in the possession of the Esthonian government, who moved to set the writ aside. The British government had, for the time being, and with all necessary reservations as to the future, recognised the Esthonian National Council as a de facto independent body and had received informal diplomatic representatives of the provisional government.

Held: the provisional recognition of the Esthonian National Council accorded it for the time being the status of a foreign sovereign, and, as a sovereign Power could not be impleaded in the British courts, the writ must be set aside.

Notes. Distinguished: *The Annette*, *The Dora*, [1919] P. 105. Considered: *The Jupiter*, [1924] All E.R. Rep. 405; *Musmann* v. *Engelke*, [1928] 1 K.B. 90. Referred to: *Duff Development Co.* v. *Kelantan Government*, [1924] All E.R. Rep. 1; *The Arantzazu Mendi*, [1938] 3 All E.R. 333; *Compañia Naviera Vascongada* v. *Steamship Cristina*, [1938] 1 All E.R. 719; *Kahan* v. *Federation of Pakistan*, [1951] 2 K.B. 1003; *U.S.A.* v. *Dollfus Mieg. et Compagnie S.A.*, [1952] 1 All E.R. 572; *Nizam of Hyderabad* v. *Jung* [1957] 1 All E.R. 257.

As to immunity from suit of foreign states, see 1 HALSBURY'S LAWS (3rd Edn.) 52, 61, and ibid., vol. 7, pp. 265–267; and for cases see 1 DIGEST 48–50, 110, 111, and 11 DIGEST (Repl.) 622 et seq.

Cases referred to:

(1) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp. M.L.C. 234, C.A.; 1 Digest 110, *140.*

(2) *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 10 T.L.R. 115; 9 R. 447, C.A.; 11 Digest (Repl.) 615, *435.*

(3) *The Broadmayne*, [1916] P. 64; 85 L.J.P. 153; 114 L.T. 891; 32 T.L.R. 304; 60 Sol. Jo. 367; 13 Asp.M.L.C. 356, C.A.; 1 Digest 109, *131.*

Also referred to in argument:

City of Berne v. *Bank of England* (1804), 9 Ves. 347; 32 E.R. 636, L.C.; 22 Digest (Repl.) 142, *1290.*

Peru Republic v. *Dreyfus Bros. & Co.* (1888), 38 Ch.D. 348; 57 L.J.Ch. 536; 58 L.T. 433; 36 W.R. 492; 4 T.L.R. 333; 11 Digest (Repl.) 617, *441.*

The Manilla (1808), 1 Edw. 1; 165 E.R. 1011.

The Helena (1801), 4 Ch. Rob. 3; 1 Digest 118, *178.*

Appeal from a judgment of HILL, J.

HILL, J., found the following facts: On Jan. 1, 1919, the plaintiffs, described in the writ as the West Russian Steamship Co., Ltd., procured to be issued out of this court a writ in rem against "the steamship *Gagara*, now sailing under the name of the *Kajak*, and the parties interested in the said steamship," and procured the ship, which was lying in the Port of London, to be arrested by the marshal. In the affidavit to lead warrant of arrest, the plaintiffs were stated to be "A corporate body incorporated under the laws of Russia having their registered office at Petrograd and to be the true and lawful owners of the said steamship." The writ was indorsed with a claim for possession as owners. It stated the ship to be of the port of Petrograd. As required by R.S.C., Ord. 5, r. 15, in actions of possession, notice of the commencement of the action was given to the Consul-General of Russia. On Jan. 9 appearance under protest was entered, and a summons was taken out asking that the writ, service and all subsequent proceedings be set aside on the ground that the owners of the *Gagara* were the Esthonian government. The matter having been adjourned into court, the summons was amplified by a notice of motion alleging (i) that the court had no jurisdiction, (ii) that, if it had, it ought in its discretion to refuse to entertain the suit. The grounds on which it was said that the court had no jurisdiction were (a) the dispute was between two foreigners as to a foreign ship; (b) the ship was and is in the service of the Esthonian government; (c) the ship was the property of the Esthonian government; and (d) the ship had been properly and lawfully condemned as prize by a decree of the Esthonian government. The facts appearing from the affidavits filed for the plaintiffs were as follows: The plaintiffs in 1914 purchased the *Gagara*, and she was transferred to the company, and in July, 1914, was registered in the name of the company as owners at Petrograd under the Russian merchant flag. During the earlier part of the war, the *Gagara* was under some form of requisition in the service of the government of the Czar, and afterwards, by arrangement with the company, in the service of the government which succeeded—Prince Zeroff's government. The Bolshevik government, having come into power on June 21, 1918, declared the whole of the Russian mercantile fleet, including the *Gagara*, to be national property, and in April, 1918, enacted the formalities for fulfilling such declaration. During the spring and summer of 1918, the *Gagara* was at Petrograd under repairs which were being done under the Bolshevik government. The employees of the company's office were left there, but the directors were forcibly turned out. In the autumn of 1918 the Bolshevik government loaded a cargo of wood on the *Gagara*, and sent her on a voyage to Copenhagen under the captain who had originally been appointed by the company, with some of the old crew and others put aboard by the Bolshevik government. The Bolshevik government had changed her name from *Gagara* to *Severnaja Kommuna*. The next that was heard of her was that the *Gagara* had proceeded to Reval on a voyage to Copenhagen, and then that the vessel and her crew had been seized by the Esthonian government, which had put on board another crew, and that the company's Reval branch had addressed to "The Ministry of Trade and Industry of the Esthonian Provisional Government" a protest dated Dec. 14, 1918, wherein they stated that they learned that the ship had been seized by the Esthonian government as a prize of war, and protested that the ship was seized by the Bolsheviks quite illegally and protested against the ship and her cargo being considered a prize of war, and laid on the Esthonian government all the responsibility for whatever might happen to the ship in future. Accordingly, the managing director, who held the power of attorney of the company, began the present proceedings. A number of affidavits having been filed relating to the status of

the Esthonian government, the learned judge thought it right to inform the Foreign Office and to invite its assistance, and the legal representatives of the Crown stated that His Majesty's Government "has for the time being, provisionally, and with all necessary reservations as to the future, recognised the Esthonian National Council as a de facto independent body, and accordingly has received certain gentlemen as informal diplomatic representatives of the Esthonian Provisional government," and, further, that the present view of His Majesty's Government, again without in any way binding them as to the future, was that the government so recognised was such a sovereign Power as could, if it thought fit, set up a Prize Court. It appeared from documents in the case that the provisional recognition of the Esthonian National Council and Provisional Government was antecedent to the date in December when the ship was seized at Reval, and it continued to this day.

HILL, J., said that if, for the time being, the Esthonian National Council was recognised by His Majesty's Government as a de facto independent body, and the Esthonian Provisional Government as its executive, the courts of this country must, for the time being, recognise it also. The plaintiffs must seek their remedy in the Esthonian courts. The writ, the warrant of arrest, and all subsequent proceedings must be set aside with costs, and the motion must be allowed.

The plaintiffs appealed.

Inskip, K.C. (*Dumas* and *J. R. Ellis Cunliffe* with him), for the plaintiffs.
Bateson, K.C., and *F. L. Hinde* for the defendants.

BANKES, L.J.—This is an appeal from a decision of HILL, J., which he gave under the following circumstances: The West Russian Steamship Co., Ltd., brought an action in rem against the steamship *Gagara*, now sailing under the name of *Kajak*, and the parties interested in the steamship. The same plaintiffs also brought an action against the freight. They alleged that they were the owners of the steamship, and claimed a declaration to that effect, and an injunction against persons removing the vessel or her cargo, or permitting the same to be removed, and a decree condemning the defendants in costs and damages. An appearance was entered under protest, and a motion was then made to the Admiralty Court to set aside the writ and all subsequent proceedings on the ground that the court had no jurisdiction to entertain the action, on four grounds: (i) The dispute was between two foreigners as to a foreign ship; (ii) the steamship was and is in the service of the Esthonian government; (iii) the vessel and her cargo were the property of that government; and (iv) the vessel has been properly and lawfully condemned as prize by a decree of that government. HILL, J., dealt with the case in reference to the claim that the vessel was the property of the defendants and had been lawfully condemned as a prize, and he gave no decision in reference to the point that the dispute was between two foreigners as to a foreign ship. The plaintiffs appealed.

The question which HILL, J., decided, and which we have to decide, is whether the Esthonian National Council has been recognised by the government of this country as having the status of a foreign sovereign. If so, it is not disputed that the courts of this country will not allow that council to be impleaded in any of these courts. The principle on which that practice proceeds was laid down in *The Parlement Belge* (1), in a passage which was quoted by LORD ESHER, M.R., in *Mighell* v. *Sultan of Johore* (2), and which is as follows ([1894] 1 Q.B. at p. 159):

> "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public

property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

From that passage, it appears that the principle arises from international comity, and the rule is there laid down with reference to matters in respect of which the court will not exercise its territorial jurisdiction. HILL, J., in his judgment, indicated the grounds on which he thought that the claim of the defendants came within the rule so laid down. He said:

"In the first place, the Esthonian government is in actual possession of the ship, and that government states that the ship is being used by it for public purposes. The plaintiffs invite the court to take that possession away by arrest of the ship, and ultimately by decree to transfer it to the plaintiffs. But to permit the arrest is to compel the Esthonian government either to submit to the jurisdiction of the court or to lose their de facto possession, and to compel the Esthonian government to submit to this court the question of the ownership of the *Gagara*. In accordance with the principles laid down in *The Parlement Belge* (1) and *The Broadmayne* (3), I conceive I cannot compel the Esthonian government to submit to the jurisdiction. But if that difficulty could be got over, there remains this further difficulty. The Esthonian government seized the ship jure belli, and condemned her as the property of their enemy, the Bolshevist government."

On those grounds, HILL, J., came to the conclusion that the case was one in reference to which the court would not exercise jurisdiction, provided the court was satisfied that the defendants were recognised by our government as a foreign Sovereign. With that part of his judgment I entirely agree.

The question, therefore, which remains is whether HILL, J., was right in coming to the conclusion that the evidence before him was such that he ought to come to the conclusion that the Esthonian National Council had been recognised as having the status of a foreign sovereign. On that point, I refer to a passage in LORD ESHER, M.R.'s judgment in *Mighell* v. *Sultan of Johore* (2), and particularly to a passage in KAY, L.J.'s judgment, as to the materials on which the court is justified in acting, and constrained to act, in such a matter. LORD ESHER says ([1894] 1 Q.B. at p. 158):

"I am of opinion . . . that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign."

KAY, L.J., says (ibid. at p. 161):

"The status of a foreign sovereign is a matter of which the courts of this country take judicial cognisance—that is to say, a matter which the court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course, the court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany."

Then he goes on to say, dealing with the letter from the Colonial Office, signed by an official there, and purporting to be written by the direction of the Secretary of State for the Colonies (ibid. at p. 162):

"Proceeding as it does from the office of one of the principal secretaries of state, and purporting to be written by his direction, I think it must be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty con-

descends to state to one of her courts of justice that an individual cited before it is an independent sovereign, I think that statement must be taken as conclusive."

In the present case, the statement is in the fullest sense authoritative. It emanates from the Foreign Office, and was presented to HILL, J., by His Majesty's Attorney-General; and the only question is whether it amounts to a statement that the Esthonian National Government has the status of a foreign independent sovereign. The materials before the court consist partly of certain letters passing between the Foreign Office and some gentlemen who addressed the Foreign Office as being the authorised representatives of Esthonia, and partly of a statement by the Attorney-General and by junior counsel for the Treasury at the hearing before HILL, J. The submission of counsel for the plaintiffs, as I understand it, is that, so far as the statements in the letters of the Foreign Office are concerned, they are deliberately ambiguous statements of a benevolent character, and not such an emphatic and deliberate statement of fact as the court should require; and he further says that no statement as to the recognition of a sovereign state can be sufficient unless it appears that the recognition is irrevocable. On that last point he cites two passages from WESTLAKE'S INTERNATIONAL LAW, part 1, Peace, p. 57, and OPPENHEIM'S INTERNATIONAL LAW (2nd Edn.) vol. 1, p. 119. He has also cited passages from HALL, HALLECK (INTERNATIONAL LAW (4th Edn.) vol. 1, p. 90), and WHEATON (INTERNATIONAL LAW (5th Edn.) p. 37). It does not appear, however, that those writers entirely agree on that particular point. At any rate, their statements have reference to conditions very different from the exceptional conditions existing as regards the status of states in Europe at the time that this dispute arose. I read the letters of the Foreign Office as being statements which recognise to the full the sovereignty of Esthonia, but with the limitation that, under the exceptional conditions due to the setting up of the Peace Conference, no undertaking could be given to continue the recognition if conditions altered, and I think that that would be a sufficient statement to compel the court to decline jurisdiction in reference to any matter which comes within the principle laid down in the passage which I have read from the judgment in *The Parlement Belge* (1). But, however that may be, I think myself that the statements which were made by the law officers of the Crown are free from the objections that counsel for the plaintiffs suggested were to be found in the letters of the Foreign Office. The Attorney-General said:

> "Our own government—and looking at the affidavits in this case I see the statement is no less true, whether the Government of France or of the Government of Italy—has, for the time being provisionally, and with all necessary reservations as to the future, recognised the Esthonian National Council as a de facto independent body, and accordingly, has received a certain gentleman as the informal diplomatic representative of that Provisional Government. The state of affairs is of necessity provisional and transitory. The matter remains to be determined in the way which has been described."

Junior counsel for the Treasury, at a later stage, said:

> "If it would assist the court I have the Attorney-General's authority for stating to the court that, in the present view of His Majesty's Government, and without in any way binding itself as to the future, the Esthonian Government is such a government as could, if it thought fit, set up a Prize Court."

Reading those deliberate statements of the law officers of the Crown as expressing the attitude of the government towards the Esthonian National Council, I cannot help feeling that, if the court were to exercise jurisdiction in respect of such a dispute as arises in this action, they would not be acting in accordance with what was pointed out in *The Parlement Belge* (1) as being the principle of international comity, and that there would be a divergence of action as between the courts of

this country and the statements that have been made by the government of the country as to the attitude which this country was prepared to adopt.

On those grounds I think that the view of HILL, J., was right.

WARRINGTON, L.J.—I agree for the same reasons, and have nothing to add.

DUKE, L.J.—I agree.

Appeal dismissed.

Solicitors: *Ince, Colt, Ince & Roscoe; William A. Crump & Son.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

R. *v.* SHEPHARD

[COURT OF CRIMINAL APPEAL (Bray, A. T. Lawrence and Shearman, JJ.), March 31, 1919]

[Reported [1919] 2 K.B. 125; 88 L.J.K.B. 932; 121 L.T. 393; 83 J.P. 131; 35 T.L.R. 366; 26 Cox, C.C. 483; 14 Cr. App. Rep. 26]

Criminal Law—Murder—Incitement—Incitement to murder unborn child—Child subsequently born alive—Offences against the Person Act, 1861 (24 & 25 *Vict.*, *c.* 100), *s.* 4.

By the Offences against the Person Act, 1861, s. 4: ". . . whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person . . . shall be guilty of a misdemeanour . . ."

A person who incites a pregnant woman to murder her child when born, which child is subsequently born alive, may properly be convicted of an offence under s. 4 of the above Act.

Quære: whether such conviction could be upheld if the child was born dead.

Notes. As to incitement to murder, see 10 HALSBURY'S LAWS (3rd Edn.) 729, 730; and for cases see 14 DIGEST (Repl.) 120, 121. For the Offences against the Person Act, 1861, see 5 HALSBURY'S STATUTES (2nd Edn.) 786.

Appeal on a point of law against a conviction at the Central Criminal Court of incitement to murder.

The indictment preferred against the appellant charged him with having on Sept. 20, 1917, "solicited and endeavoured to persuade C. M. W. thereafter to murder a newly-born child lately before then born of her body." On the date mentioned the appellant wrote a letter to the said C. M. W., who was then about six weeks pregnant, suggesting that she should lie on the child when born and asking her not to let it live.

F. C. W. Werninck for the appellant.

Travers Humphreys, for the Crown, was not called on to argue.

The judgment of the court was delivered by

BRAY, J.—The appellant was convicted on an indictment which charged him with an offence under s. 4 of the Offences against the Person Act, 1861. That section makes it an offence to solicit any person to murder "any other person." There is no doubt that the woman was solicited by the appellant to murder her child which was to be born. The question we have to decide is whether the case

comes within the section, it being a fact that at the date when the solicitation took place the child was unborn. Looking at the question from a common-sense point of view, there can be no doubt. The essential thing is that when the murder is to be committed there should be a person capable of being murdered. If that is the fact, it is immaterial that such person was not in existence when the incitement to murder took place. In the present case the child was born alive, and that is enough to bring the offence within the section. It is not necessary to decide whether the appellant could have been convicted if the child had been born dead. The conviction against the appellant must be upheld and the appeal is dismissed.

Appeal dismissed.

Solicitors: *A. E. Cubison; Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

HANBURY *v.* BATEMAN

[CHANCERY DIVISION (Sargant, J.), November 15, 1918]

[Reported [1920] 1 Ch. 313; 89 L.J.Ch. 134; 122 L.T. 765]

Power of Appointment—Exercise—Time for exercise—Contingent power to person for own benefit—Exercise before contingency—Subsequent happening of contingency—Validity of exercise.

A power of appointment given to a specified person for his or her own benefit and expressed to be dependent on a contingency is as a rule capable of being exercised either before or after the happening of the contingency. The court is inclined to treat the contingency as a condition of the operation of the appointment rather than as a condition of the exercise of the power.

Dalby v. *Pullen* (1) (1824), 2 Bing. 144, approved.

Notes. This case is reprinted only for the point dealt with in the headnote. Part of the judgment dealing with the wording of s. 2 (v) of the Conveyancing Act, 1881 (repealed), has been omitted as it has no application to the different wording of the corresponding section, s. 205 (1) (ii), of the Law of Property Act, 1925.

As to contingent powers, see 30 HALSBURY'S LAWS (3rd Edn.) 262, 263; and for cases see 37 DIGEST 422–426.

Cases referred to:

(1) *Dalby* v. *Pullen* (1824), 2 Bing. 144; 9 Moore, C.P. 300; 2 L.J.O.S.C.P. 121; 130 E.R. 261; 37 Digest 422, *313*.

(2) *Wandesforde* v. *Carrick* (1871) 5 I.R.Eq. 486; 37 Digest 422, *313 i.*

(3) *Countess of Sutherland* v. *Northmore* (1729), 1 Dick. 56; 21 E.R. 188; 40 Digest (Repl.) 787, *2702*.

(4) *Eden* v. *Wilson* (1852), 4 H.L.Cas. 257; 10 E.R. 461; 37 Digest 422, *315*.

Also referred to in argument:

Logan v. *Bell* (1845), 1 C.B. 872; 14 L.J.C.P. 276; 5 L.T.O.S. 346; 135 E.R. 786; 37 Digest 422, *314*.

Action for a declaration.

The Hon. Charles S. M. Bateman Hanbury, one of the younger sons of the late Lord Bateman, who had acquired the estate and interest of the present Lord Bateman in the Shobdon Court property, brought this action against the present Lord Bateman as the personal representative of his father, the late Lord Bateman, and certain mortgagees, for inter alia a declaration that a certain sum of £10,000 was not validly charged and was not a valid and subsisting charge on the said property under a certain deed dated May 29, 1883. The defendant by his defence

alleged that his father had validly exercised the power of appointment and that the charge was subsisting. A

In 1854 William, Lord Bateman, married Agnes Kerrison, now the Dowager Lady Bateman. At the date of resettlement of the Shobdon Court Estates by indenture dated Mar. 25, 1880, the Dowager Lady Bateman was entitled in certain contingencies to certain settled property herein referred to as "the Kerrison Estates." By the indenture of Mar. 25, 1880, the Shobdon Court Estates were B with certain other estates settled upon William, Lord Bateman, for life, and after his death, which happened in 1901, subject to a term of 500 years, vested in trustees for securing portions upon the present Lord Bateman for life with remainder in strict settlement to his issue male in tail male in the usual form. The indenture contained a proviso as follows:

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"Provided always and it is hereby agreed and declared that in case the said Lady Bateman shall during the lifetime of the said Lord Bateman become entitled to the possession or to the receipt of the rents and profits of certain hereditaments situate in the counties of Norfolk and Suffolk and whereof by virtue of the limitations contained in the wills of Matthias Kerrison and Sir Edward Kerrison, respectively deceased, and of an indenture dated Mar. 24, 1853, she is tenant for life in remainder expectant on the death and failure of D issue of Sir Edward Clarence Kerrison, and which hereditaments have by an indenture bearing even date with these presents been settled in accordance with the terms of the hereinbefore mentioned family arrangement, it shall be lawful for the said Lord Bateman by any deed or deeds with or without power of revocation or new appointment or by will or codicil (but subject and without prejudice to the said term of 500 years and the trusts thereof) to charge all E or any part of the Kelmarsh Estates and Shobdon Court Estates hereby limited and appointed with the payment to him the said Lord Bateman or any other person or persons and his or their executors, administrators, or assigns, of any sum or sums of money not exceeding in the whole the sum of £10,000, with interest for such sum or sums after any rate not exceeding £4 10s. per cent. per annum from the time or times of such sum or sums respectively being so F charged or from any later time or times."

Before Lady Bateman came into possession of the Kerrison Estates—namely, on May 29, 1883—the late Lord Bateman by deed of that date, in exercise of the power of appointment contained in the resettlement, purported irrevocably to appoint, subject and without prejudice to the term of 500 years and the trusts G thereof, that in case Lady Bateman should during his lifetime become entitled to the possession or receipt of the rents and profits of the Kerrison Estates, then and in such case and thereupon and thenceforth all the Kelmarsh Estates and the Shobdon Court Estates, limited as mentioned in the resettlement, should be subject to and charged with the payment to him, his executors, administrators, and assigns, of the sum of £10,000, with interest thereon as therein mentioned. And by the H same indentures in further exercise of the same powers, he appointed the estates so charged unto trustees for a term of 1,000 years, to commence from the day when Lady Bateman should be entitled during her lifetime to the rents and profits of the Kerrison Estates, upon trust for securing the money so charged. Lady Bateman became entitled to the Kerrison Estates on July 3, 1886. On Dec. 10, 1895, William, Lord Bateman, and his trustee in bankruptcy conveyed to the I defendant mortgagees to secure large sums of money, inter alia, "the principal sums" and interest, equities of redemption, and other estates and interests of himself and his trustee in bankruptcy under and by virtue of certain indentures included therein, being the indentures dated May 29, 1893, above referred to.

Rolt, K.C., and *Christopher Farwell* for the plaintiff.
Romer, K.C., and *J. M. Stone* for the mortgagees.
Stafford Crossman for the present Lord Bateman.
G. W. Brabant and *A. L. Ellis* for the other defendants.

A **SARGANT, J.**—The first point that I have to determine here is a separate point from the other points arising, and therefore can be dealt with without waiting for the arguments on the other questions. It is whether a sum of £10,000 purporting to be charged, by an indenture dated May 29, 1883, on the Shobdon Court Estates, was validly charged. If it was validly charged on those estates, there will be a subsequent question whether it may have ceased to be such a charge by virtue B of the Statute of Limitations.

I have first to deal with the question whether it was validly charged, and the main point arises on the construction of the clause in the indenture of resettlement of Mar. 25, 1880. [HIS LORDSHIP stated the facts and continued:] I had thought, before the interesting argument which I have heard, that the point was completely covered by authority, and, after having listened to the argument, I feel convinced C that that is so. The principal authorities are those mentioned in FARWELL ON POWERS (3rd Edn.), p. 166, and particularly *Wandesforde* v. *Carrick* (2) and *Countess of Sutherland* v. *Northmore* (3); but there is also a most important case not actually referred to on that page, but referred to on the following page without being cited—namely, *Dalby* v. *Pullen* (1). The summary of the cases in the second edition of FARWELL ON POWERS, p. 144, is in these terms: D

> "A power presently given to a designated person to be exercised upon a contingency can be well exercised before the contingency happens."

In the third edition it is suggested that that statement of the law is liable to misconstruction, and an alternative statement is suggested which is printed in large type, and is in these terms: E

> "A power presently given to a designated person, the exercise of which does not depend upon the happening of a contingency, but an appointment under which can only take effect after the happening of a contingency, can be well exercised before the contingency happens."

I must say that I prefer the statement of the law in the second edition, because, F although it may possibly be liable to misconstruction, it does give one some guidance in these matters, while the suggestion in the third edition, though no doubt accurate, seems to me really to partake of the nature of a truism. If the exercise of it does not depend on the happening of a contingency, but the appointment under it can only take effect after the happening, it is of course clear that it can be well exercised. That appears to be assumed in the words "the exercise of G which does not depend upon the happening of the contingency." However, after having considered the cases to which I have referred, I think the rule may be stated both accurately and so as to be useful by way of guidance in these terms—that is to say: A power given to a designated person for his benefit (that is the only class of power one must deal with) and expressed to be dependent on a contingency, is as a rule capable of being exercised either before or after the happening of the H contingency. The court is inclined to treat the contingency as a condition of the operation of the appointment rather than as a condition of the exercise of the power.

The cases I have mentioned, and particularly *Dalby* v. *Pullen* (1), bear out that proposition completely. LORD ST. LEONARDS is quoted as saying in *Eden* v. *Wilson* (4) (4 H.L.Cas. at p. 283): I

> "It has been decided many times that a power to operate upon a contingent event, like that of a death, may be exercised in the lifetime of the party upon whose death alone that contingency can take effect; otherwise you might never exercise it at all."

That seems to be an accurate statement no doubt, but possibly a narrower statement than would be sufficient for the decision of this case, but I do not think it is in any way antagonistic to the way in which I have stated the rule. It may be an additional consideration that the power otherwise could not be exercised at all, but, apart from that consideration, I think the cases bear out the rule which I

have endeavoured to put into precise language. I think that in such cases as this the reason of the rule is fairly obvious. What is of importance is not whether the power is exercised at a particular time or not, but whether the contingency has happened which makes it expedient that the power should be available. Here, apparently, it was thought that if Lady Bateman became entitled to the Kerrison Estates, then the Shobdon Court Estate and the Kelmarsh Estate could bear a larger charge upon them for the benefit of Lord Bateman. The question whether the two sets of estates became vested in the person of Lady Bateman was entirely independent of the question of the time at which Lord Bateman could exercise the power. The words "in case the said Lady Bateman shall become entitled" are not temporal words, but words referring to a contingency, an event, and I can find nothing in the subsequent words to indicate that the power had to be exercised at any particular period. Some stress was laid upon this, that the sum of £10,000 was only to bear interest from the time of the sum being so charged, but I think that those words "the sum being so charged" are at least as referable to the operation of the charge as to the exercise of the charge. That being so, I have not to decide one or two other interesting questions which were raised whether the defective appointment was cured by virtue of an indenture that was executed subsequent to the occurrence of the event, and particularly by virtue of a deed of Dec. 10, 1895, in which both the late Lord Bateman and his trustee in bankruptcy joined; but I indicate my view that, as far as the mortgagees under that indenture are concerned, there was, if not an actual execution of the power, still such a transaction as would be made effective in equity in favour of the mortgagees.

Solicitors: *Fowler, Legg & Young*; *G. F. Hudson, Matthews & Co.*; *Hammond & Richards.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

GRANT, SMITH & CO. AND MCDONNELL, LTD. *v.* SEATTLE CONSTRUCTION AND DRY DOCK CO.

[Privy Council (Lord Buckmaster, Lord Parmoor and Lord Wrenbury), June 24, 26, 27, July 24, 1919]

[Reported [1920] A.C. 162; 89 L.J.P.C. 17; 122 L.T. 203]

Insurance—Marine insurance—Hire of dry-dock—Agreement to insure against marine risks—Dry-dock sinking in harbour, not due to marine risks.

The appellants hired from the respondents for two years a dry-dock to be used in the construction of caissons and other similar work at Victoria, British Columbia. By the hiring agreement, the appellants covenanted to insure the dry-dock for the benefit of the respondents in a sum of not less than 75,000 dollars against marine risks, and to deliver the dry-dock on the termination of the lease in as good a condition as it was when they hired it, fair wear and tear excepted. The appellants admitted that the dry-dock was seaworthy and fit for the work contemplated. They failed to insure it, and, while it was being used in the harbour for the contemplated work, it collapsed owing to inherent unfitness and not to any condition of wind or sea. The dry-dock had been constructed some years and its value was only 34,500 dollars.

Held: the loss of the dry-dock not being due to a marine risk, the respondents were only entitled to recover as damages 34,500 dollars.

Notes. Considered: *Samuel* v. *Dumas*, [1924] All E.R.Rep. 66; *The Stranna*, [1938] 1 All E.R. 458.

As to the perils insured against in marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 73 et seq.; and for cases see 29 DIGEST 197 et seq.

Cases referred to:

(1) *Wilson, Sons & Co.* v. *Xantho* (*Cargo-Owners*) (1887), 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 766; 6 Asp.M.L.C. 207, H.L.; 29 Digest 197, *1567*.

(2) *E. D. Sassoon & Co.* v. *Western Assurance Co.*, [1912] A.C. 561; 81 L.J.P.C. 231; 106 L.T. 929; 12 Asp.M.L.C. 206; 17 Com. Cas. 274, P.C.; 29 Digest 199, *1584*.

Also referred to in argument:

Herring v. *Janson* (1895), 1 Com. Cas. 177; 29 Digest 163, *1192*.

Davidson v. *Burnand* (1868), L.R. 4 C.P. 117; 38 L.J.C.P. 73; 19 L.T. 782; 17 W.R. 121; 3 Mar.L.C. 207; 29 Digest 194, *1538*.

Thames and Mersey Marine Insurance Co. v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484; 56 L.J.Q.B. 626; 57 L.T. 695; 36 W.R. 337; 3 T.L.R. 764; 6 Asp.M.L.C. 200, H.L.; 29 Digest 197, *1575*.

Hamilton, Fraser & Co. v. *Pandorf & Co.* (1887), 12 App. Cas. 518; 57 L.J.Q.B. 24; 57 L.T. 726; 52 J.P. 196; 36 W.R. 369; 3 T.L.R. 768; 6 Asp.M.L.C. 212, H.L.; 29 Digest 203, *1624*.

Appeal and Cross-appeal from a judgment of the Court of Appeal for British Columbia, dated Nov. 5, 1918, affirming a judgment of CLEMENT, J.

The facts are stated in the judgment of the Board.

S. S. Taylor, K.C. (of the Canadian Bar), for the appellants.

E. P. Davis, K.C. (of the Canadian Bar), and *M. Macnaghten, K.C.*, for the respondents.

LORD BUCKMASTER.—Two appeals are brought in this case: the one by the appellants seeking to reverse the judgment of the Court of Appeal of British Columbia awarding against them and in favour of the respondents the sum of 44,500 dollars, as to 10,000 dollars for rent of a dry-dock, and as to 34,500 dollars as damages for breach of contract; the other by the respondents asking to increase the amount awarded to the sum of 85,000 dollars, thereby restoring the judgment of the trial judge, who decreed that sum in their favour.

The appellants in the principal appeal are contractors in a large way of business, and, in May of 1914, they were engaged in the construction of a breakwater in the harbour of Victoria, British Columbia, for the Dominion Government. In order to carry out this work, it was determined to construct the foundation by concrete caissons, the dimensions of which, according to the appellants' statement, were to be 30 ft. high, 80 ft. long, and 40 ft. wide, the weight being 2,300 tons. To place these in position, the appellants proposed to employ a floating dry-dock, on which the caissons were to be built, two at a time, the dry-dock being then submerged sufficiently to allow the caissons to float off, when the dry-dock would be raised and the operation recommenced. The respondents possessed a dry-dock which appeared suitable for the operation. It was 325 ft. long, with 100 ft. beam and 14 ft. depth. On each side and running its full length were walls 10 ft. wide and 30 ft. high, with machinery for admitting and excluding the water and operating the dock. It was made of wood and had been in use since the day of its construction in 1893, having been purchased by the respondents in July, 1913. Negotiations for the hire of this dock took place in April, 1914, between Mr. Paterson, the president of the respondent company, and the appellants' manager, Mr. Bassett. In the end these negotiations resulted in the grant of a lease from the respondents to the appellants of the dry-dock for a period of two years, at a rental of 15,000 dollars per annum, payable monthly in advance. The lease was dated May 20,

1914, and, as the whole dispute depends on the measure of the obligation thereby accepted by the appellants, it is desirable to set out in full the relevant clauses. These are clauses numbers 2, 3, 4, 6 and 7.

"2. The lessee will take delivery of said dry-dock at the plant of said lessor in Seattle, Washington, and for the purpose of this lease the seaworthiness of said dry-dock and its fitness for the work contemplated by said lessees are hereby admitted by the lessee.

3. The lessee agrees to have said dry-dock insured for the benefit of said lessor in some company or companies satisfactory to the lessor, in the sum of not less than seventy-five thousand (75,000.00) dollars, against both marine and fire risks, and to pay the premiums on such insurance and keep the same in full force during the term of this lease, or of any extensions thereof.

4. Said dry-dock shall be used by the lessee in its construction work on caissons and other similar work at or near Victoria, British Columbia. Said dry-dock shall not be used by said lessee, nor shall such use be permitted by it, in dry-docking for ship repair work or other similar work in competition to the business of the lessor or other companies engaged in similar business.

6. The lessee further covenants to re-deliver said dry-dock to said lessor at its plant in Seattle, Washington, upon the termination of this lease, in as good condition as the same was in at the time of its delivery to said lessee hereunder, except for natural wear and tear.

7. In the event said lessee makes default in the payment of said rent, or any part thereof, as the same becomes due and payable under the terms hereof, or makes default in any of the other covenants or obligations of the lessee hereunder, then said lessor shall have the right to retake possession of said dry-dock and terminate this lease, but without prejudice to its right to recover from said lessee rentals for the entire term and all damages sustained by the lessor by such breach or breaches of the covenants of the lessee herein."

It was intended to use the dry-dock in the Esquimault harbour, part of the harbour of Victoria, but not in the Royal Roads. It is stated by the appellants, and not disputed, that this harbour is a harbour of particularly quiet water, and very favourable for the work that was contemplated. Delivery was given of the dock at Seattle, it was successfully navigated from Seattle to the harbour; but the contemplated insurance was never effected, and without its protection the appellants proceeded to use the dock in connection with their operations. For this purpose, they built a further structure in the form of a gantry on each side of the walls of the dock, and placed on each structure a travelling crane. The first two of the caissons were then built, one on each side of the dock; owing to their weight, there were signs that the timbers in the centre of the dock were giving way and rising under the pressure—a difficulty which the appellants remedied by placing in the centre some 819 tons of gravel. Further difficulties seem also to have occurred owing to the sagging of the transverse struts in the hull. But it is unnecessary to consider these matters in detail. On Jan. 31, 1915, the process of submerging took place under the charge of Mr. Kennedy—an expert operator who had worked on the dock before its transfer to the appellants. This operation appears to have begun successfully, but ended in disaster. For some reason that it is not easy exactly to define, the dock listed as it went down. The uppermost wall, which was thus inclined at an angle, broke off. The whole success of the operation was destroyed and the dock lost beyond hope of recovery.

In these circumstances, the respondents, on Sept. 2, 1915, took proceedings to recover against the appellants the rent due under the lease, and claiming 150,000 dollars damages for loss of the dock, or, alternatively, 75,000 dollars for breach of the covenant to insure. They based their claim largely on the alleged negligent use by the appellants, and they did not in terms rely on the claim for re-delivery of the dock at the end of the term—an omission no doubt explained by the fact that the term had not expired by effluxion of time when the proceedings began.

The main answer of the appellants was based on a charge of fraud against Mr. Paterson. They said that he had falsely and fraudulently represented the capacity of the dock and the use to which it had formerly been put, and further that, with a dishonest purpose, he concealed from them material facts which, in the circumstances, it was his duty to disclose. This charge was expressly negatived by the learned judge who heard the evidence, and stated his opinion in these words:

> "I have no hesitation in saying that Mr. Paterson's statement about the dock's capacity and the likelihood of her doing the proposed work, were the honest statement of belief actually entertained by him at the time, and in fact strongly adhered to at the trial."

This question was again investigated by the Court of Appeal, who supported the finding in this respect of CLEMENT, J. GALLIHER, J.A., said:

> "I am unable to find fraud. The evidence to establish fraud should be clear and convincing, and I cannot say that this is so,"

and with his judgment MARTIN, J.A., agreed. MCPHILLIPS, J.A., took the same view, and expressed his conclusion as follows:

> "The appellants laid fraud in the case, and evidence was laid to support this; but it was not found by the learned trial judge, and I entirely agree with the learned judge."

These opinions were not merely an echo of the judgment of CLEMENT, J. They depended on the complete review of the evidence and a careful and new investigation of all the circumstances. It would be contrary to the established practice of this Board—a practice based on principles designed to secure finality in litigation and to promote the ends of justice—to reinvestigate a question of this description, when a man has successfully defended his honour and character before his own courts.

Counsel for the appellants fairly recognised this difficulty, but sought to avoid it by asking their Lordships' attention to further evidence which was not placed in argument before either of the courts. The concession of the respondents that this evidence might be seen enabled the appellants to avail themselves of its use. Apart from such concession, their Lordships would have been compelled to reject its admission. The concession, though generous in form, was of little value to the appellants in substance. The further evidence on which he relied consisted merely of an entry in a book to the effect that an attempt made on Mar. 13, 1914, to dock a vessel known as the *A. G. Lindsay* had failed. It had been stated at the trial that this record had been lost, and the appellants asserted that they had only discovered it in the respondents' office after the hearing. Whatever weight that assertion might have possessed had it been urged as a reason for re-hearing, it cannot influence their Lordships' mind in determining the value of the evidence which they are called on to examine. It amounts to nothing beyond the fact that, for a reason unknown, under circumstances unexplained, an attempt on a particular day to use the dock for the *A. G. Lindsay* had failed. Such a statement is wholly insufficient to cause a review of the charge of fraud. With the failure of this charge, all complaint as to the stability and utility of the dock for its contemplated purpose ends, since cl. 2 not only negatives any suggestion of a warranty of fitness, but makes the appellants themselves admit that it was fit.

The rest of the appellants' case depends on the argument that, as the term had not expired, the time for re-delivery of the dock had not arisen at the date of the writ, and it was, therefore, impossible to claim damages for its loss. If the claim of the respondents depends merely on a covenant to deliver at the expiration of the lease by effluxion of time this contention ought, in their Lordships' opinion, to prevail. The statement of claim was not, and could not have been, based on any breach of a covenant so construed, nor could amendment remedy this defect. But their Lordships do not think that it need be so regarded. It is admitted that the dock is lost past recovery; it is also established that the appellants have not paid

the rent due under the lease, nor have they effected the insurance provided by cl. 3. These breaches gave the respondents the right to retake possession of the dock and terminate the lease; and, though no actual attempt to take possession was made, the institution of these proceedings, with a claim for rent up to the writ and subsequent damages, is in itself sufficient evidence of the lessors' intention in this respect. The appellants have not, indeed, suggested that the lease is still on foot; nor, even if it were possible to establish that position, could it have been done without payment of the rent and repair of the breach of the broken covenant to insure. So regarded, the covenant for re-delivery has arisen and might have been properly included in the statement of claim, though the form leaves much to be desired in this respect. The substance to which their Lordships look is, however, a claim for the value of something that has been lost in circumstances rendering the appellants contractually responsible for its value, and this can be maintained. Though the judgment of McPhillips, J.A., in the Court of Appeal is not, as reported, quite clear on this matter, it appears that this was its true effect. He says:

> "As to the rent, it cannot be allowed for a longer period than up to the time of the commencement of action, the respondent then electing to have damages assessed as of that date (the action was brought before the expiry of the demise),"

and with this conclusion their Lordships agree. The judgment of Galliher, J.A., with which the chief justice agrees, is confined to the question of value and to the construction of the covenant to insure, and this can be better dealt with in considering the merits of the cross-appeal.

This cross-appeal challenges the judgment of the Appeal Court on two grounds: the one that the value of the docks, placed at 34,500 dollars, is insufficient; and the other that the covenant to insure was broken, and that its breach resulted in the loss of the total 75,000 dollars.

On the first point, all the judges in the Court of Appeal are in agreement as to the value. Their judgments depend on the fact that Mr. Paterson, on behalf of the appellants, on May 1, 1914, made for the purpose of customs an affidavit as to the value, stating that to the best of his knowledge and belief the value of the floating dry-dock was 34,500 dollars. Attempts were made to explain that this affidavit was given for the purpose of customs, so that the value would consequently be only modestly estimated. Such arguments naturally found no favour before the Court of Appeal, and cannot prevail before their Lordships.

There remains only the question raised by the respondents as to the breach of the covenant to insure. That it is broken is common ground. The respondents say, first, that it was impossible of performance, and secondly, that, had it been effected, it would not have covered the loss. With regard to the impossibility of its performance, few words need be said. There is no phrase more frequently misused than the statement that impossibility of performance excuses breach of contract. Without further qualification, such a statement is not accurate, and, indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule. But it is unnecessary to examine this matter, since no question of impossibility can arise in the present case. The appellants did indeed attempt to obtain a policy of insurance, and they failed to do so, largely owing to the fact that the additional structure which they added to the dock caused the insurance company to decline; but there is nothing to show that higher rates would not have effected the insurance, and the covenant contains no limitation to suggest that insurance is only to be effected at the current premium. It is then urged that the policy was only intended to cover the risks by voyage from Seattle to Victoria and any other journeys by sea which, in the course of their use of the dock, the appellants thought fit to make. Their Lordships do not accept this view of the covenant. It must be read in connection with the subject-matter of the lease and the terms in which it is framed. The subject-

matter of the lease was undoubtedly a dock, which it was contemplated by both parties was to be used in the Victoria harbour, and, though it might have been possible that it could have been taken elsewhere, yet the terms of the covenant, which provide that the insurance shall be kept on foot throughout the whole period of the lease, and not merely effected from voyage to voyage, in their Lordships' opinion negative the view that it was only against risk in its journeyings by sea that the insurance was to be taken out. There is no statement in the covenant as to the form of policy that is to be used; it must, therefore, be assumed to be an ordinary policy applicable to such a structure both in course of transit and in course of use. It was to insure against "marine risks," which cannot be better described than as against "the hazards of the sea." If, while in dock, either while the caissons were being built or while the dock was being submerged, owing to any marine risk the dock had been lost, this loss the policy would have covered; but in truth no such risk or peril caused its destruction. The harbour was peculiarly quiet, and it is plain that it was no conditions of wind or wave that caused the dock to capsize. It was destroyed because of its own inherent unfitness for the use to which it was put—an unfitness which the appellants have prevented themselves from raising by reason of their own covenant.

It is not desirable to attempt to define too exactly a "marine risk" or a "peril of the sea," but it can at least be said that it is some conditions of sea or weather or accident of navigation producing a result which, but for these conditions, would not have occurred. To use the words of LORD HERSCHELL in *Wilson, Sons & Co.* v. *Xantho* (*Cargo-Owners*) (1) (12 App. Cas. at p. 509):

> "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. . . . There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure."

The words there occurred in a bill of lading, and the claim arose with regard to the loss of goods covered by the document. But LORD HERSCHELL points out (ibid. at p. 510) that the phrase has no different meaning whether it occurs in the insurance of the ship or of the goods. In *E. D. Sassoon & Co.* v. *Western Assurance Co.* (2), a store of opium was lost in a hulk moored in a river by the percolation of water through a leak caused by the rotten condition of the boat. The decay was so covered by copper sheathing that, although the vessel was properly inspected, it was not and it could not be detected. It was held by this Board that the loss was not a loss within the phrase "perils of the sea and all other perils," and LORD MERSEY, in delivering the opinion of the Board, states ([1912] A.C. at p. 563):

> "There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to the perils of the sea."

Their Lordships can see no difference between the circumstances of this case and the principle there enunciated. It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water. In such a case, recovery under the ordinary policy of insurance would be impossible. An insurance against "the perils of the sea or other perils" is not a guarantee that a ship will float, and in the same way in the present case had such a policy been effected it would not have covered a loss inevitable in the circumstances due to the unfitness of the structure, and entirely dissociated from any peril by wind or water. The measure of the damage for breach of the covenant, therefore, is purely nominal and the cross-appeal must fail.

As, therefore, both the appellants and the respondents have failed in their independent appeals, their Lordships will humbly advise His Majesty that both should be dismissed, and that no costs should be granted in either case.

Solicitors: *Blake & Redden*; *Armitage, Chapple & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

Re BARKER. KNOCKER *v.* VERNON JONES

[Chancery Division (Sargant, J.), December 11, 12, 19, 1919]

[Reported [1920] 1 Ch. 527; 89 L.J.Ch. 209; 123 L.T. 41]

Power of Appointment—General power—Power to revoke trusts by deed or will "expressly referring" to power—Testatrix possessing no other power of appointment—"I give, devise, bequeath and appoint" all estate not otherwise disposed of—Revocation of trusts.

By her will a testatrix provided: "I give, devise, and bequeath [certain articles]. . . . I give, devise, bequeath, and appoint to my said trustees all my estate . . . not hereby otherwise disposed of." The testatrix's only power of appointment was one over a fund settled on her for life, with remainders over, "at any time or times . . . with the consent in writing of the [settlement] trustees . . . by any deed or deeds revocable or irrevocable or by will or codicil expressly referring to this power wholly or partially to revoke the trusts powers and provisions therein declared . . . and to declare such new or other trusts of and concerning the same or any parts thereof . . . as she may think fit."

The testatrix had in her lifetime, by two deeds executed at different times, with the consent of the trustees revoked the trusts as to parts of the settled fund and appointed such parts in her own favour.

Held: the will operated as a revocation of the trusts of the residue of the settled fund, and a new appointment thereof to the testatrix's trustees, because (i) on the true construction of the power of appointment a revocation and re-appointment by will did not require the consent of the settlement trustees; (ii) the language of the will, and especially the contrast between "give, devise, and bequeath" and "give, devise, bequeath, and appoint," clearly showed an intention to appoint, and so, as there was no other property which the testatrix could appoint, sufficed to effect a revocation and re-appointment: *Pomfret* v. *Perring* (1) (1854), 5 De G.M. & G. 775, applied; and (iii) the words "and appoint" were expressed in the will, not implied, and so were "expressly referring to this power" within the meaning of the settlement.

Notes. As to exercise of power of appointment by will, see 30 Halsbury's Laws (3rd Edn.) 245–262, and 34 Halsbury's Laws (2nd Edn.) 148–158; as to revocation of appointments, see 30 Halsbury's Laws (3rd Edn.) 266–269; and for cases see 40 Digest (Repl.) 592–594. For the Wills Act, 1837, see 26 Halsbury's Statutes (2nd Edn.) 1326.

Cases referred to:

(1) *Pomfret* v. *Perring* (1854), 5 De G.M. & G. 775; 3 Eq. Rep. 145; 24 L.J.Ch. 187; 24 L.T.O.S. 123; 1 Jur.N.S. 173; 3 W.R. 81; 43 E.R. 1071, L.JJ.; 37 Digest 482, *787*.

(2) *Re Mayhew*, *Spencer* v. *Cutbush*, [1901] 1 Ch. 677; 70 L.J.Ch. 428; 84 L.T. 761; 49 W.R. 330; 45 Sol. Jo. 326; 37 Digest 452, *542*.

(3) *Re Wells' Trusts, Hardisty* v. *Wells* (1889), 42 Ch.D. 646; 58 L.J.Ch. 835; 61 L.T. 588; 38 W.R. 229; 37 Digest 438, *432*.

(4) *Re Waterhouse, Waterhouse* v. *Ryley* (1907), 77 L.J.Ch. 30; 98 L.T. 30, C.A.; 37 Digest 445, *488*.

(5) *Charitable Donations and Bequest Comrs.* v. *Wybrants* (1845), 2 Jo. & Lat. 182; 7 I.Eq.R. 580; 43 Digest 578, *d*.

(6) *Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425; 50 L.J.Q.B. 14; 43 L.T. 130; 44 J.P. 716; 28 W.R. 617, H.L.; 11 Digest (Repl.) 220, *858*.

(7) *Denney, Gasquet and Metcalfe* v. *Conklin*, [1913] 3 K.B. 177; 82 L.J.K.B. 953; 109 L.T. 444; 29 T.L.R. 598; 8 Digest (Repl.) 598, *420*.

Also referred to in argument:

Re Mackenzie, Thornton v. *Huddleston*, [1917] 2 Ch. 58; 86 L.J.Ch. 543; 117 L.T. 114; 37 Digest 447, *514*.

Re Lane, Belli v. *Lane*, [1908] 2 Ch. 581; 77 L.J.Ch. 774; 99 L.T. 693; 37 Digest 445, *490*.

Phillips v. *Cayley* (1889), 43 Ch.D. 222; 59 L.J.Ch. 177; 62 L.T. 86; 38 W.R. 241; 6 T.L.R. 128, C.A.; 37 Digest 445, *487*.

Deg v. *Deg* (1727), 2 P.Wms. 412; 24 E.R. 791; sub nom. *Degg* v. *Earl Macclesfield*, Cas. temp. King, 44, L.C.; 37 Digest 483, *789*.

Kent v. *Kent*, [1902] P. 108; 71 L.J.P. 50; 86 L.T. 536; 18 T.L.R. 293; 46 Sol. Jo. 247; 37 Digest 435, *405*.

Re Rolt, Rolt v. *Burdett*, [1908] W.N. 76; 37 Digest 445, *489*.

Re Weston's Settlement, Neeves v. *Weston*, [1906] 2 Ch. 620; 76 L.J.Ch. 54; 95 L.T. 581; 37 Digest 451, *540*.

Originating Summons to determine whether a will operated as a revocation of the trusts of the residue of a certain settlement fund, and a new appointment of such fund, or whether the fund was distributable in accordance with the trusts of the settlement.

By a voluntary settlement dated Dec. 7, 1881, and made between Arabella Maria Barker of the one part and trustees of the other part, after a recital that the testatrix had transferred a sum of £3,000 India £4 per cent. stock into the names of the trustees, it was declared that the trustees should stand possessed of that sum and the investments (thereinafter called "the trust fund") upon trust to pay the income thereof to Arabella Maria Barker for her life and after her death to pay the income to any husband whom she might marry for his life, with remainder in trust for her children as therein mentioned, and in default of children (which event happened) it was declared that the trustees should stand possessed of the trust fund upon trust to divide the same into two equal parts and to pay one of such parts to Frances Payne and to hold the other upon trust (after raising and paying thereout a sum of £200) to pay the income thereof to Emma Barker for her life, and after her decease upon trust for her children as therein mentioned. The settlement then contained the following proviso:

> "Provided always and it is hereby agreed and declared that it shall be lawful for the said Arabella Maria Barker at any time or times thereafter with the consent in writing of the trustees or trustee (which consent they or he shall have an absolute discretion to give or withhold without incurring any responsibility in that behalf) by any deed or deeds revocable or irrevocable or by will or codicil expressly referring to his power wholly or partially to revoke the trusts powers and provisions therein declared and contained of and concerning the premises hereby settled and the income thereof and to declare such new or other trusts of and concerning the same and any parts thereof for the benefit of herself the said Arabella Maria Barker her executors and administrators or any other person or persons as she may think fit."

By two separate deeds, dated respectively Aug. 29, 1906, and May 5, 1909, and made between Arabella Maria Barker (hereinafter called the testatrix) of the one

part and the trustees of the other part, the testatrix in exercise of the power for that purpose given to her by the settlement, and with the consent of the trustees thereby testified, revoked the trusts of the settlement declared concerning the sums of £1,034 and £800 respectively parts of the settled trust fund, and with the like consents appointed that the trustees should stand possessed of the said sums of £1,034 and £800 upon trust to purchase in the name and for the life of the testatrix certain annuities therein mentioned and to hold the residue of those sums in trust for the testatrix absolutely discharged from the trusts of the settlement. The settled trust fund was by the appointments aforesaid reduced to the sum of £1,200. The testatrix made her will, dated Aug. 6, 1914, whereby after appointing executors and trustees she gave, devised, and bequeathed certain articles of personal use or ornament and all the residue of her jewellery, silver and plated goods, and household furniture and effects, amongst various relations and connections. The will proceeded as follows:

> "I give, devise, bequeath, and appoint to my said trustees all my estate both real and personal whatsoever and wheresoever not hereby otherwise disposed of upon trust as soon as conveniently may be after my decease to sell, call in, and convert the same into money and after payment of my just debts and funeral and testamentary expenses to pay the net proceeds of such sale as to three hundred pounds to my nephew Charles Frederic Barker, of the Marine Hotel, Walton-on-the-Naze, in the county of Essex, hotel keeper, and as to all the residue thereof to pay the same to my nephew, Edward Dudley Cobham Payne."

The testatrix died a spinster on Oct. 12, 1918. She had no other power of appointment than that reserved by the settlement and her property, apart from the settled trust fund, was of inconsiderable value. On Sept. 18, 1919, administration with the will annexed was granted to Charles Frederic Barker, the executors named in the will having renounced probate. Frances Payne died on Feb. 17, 1909. Gertrude C. Vernon Jones was now her legal personal representative. Emma Barker died on Dec. 31, 1914, leaving children.

S. Leeke for the trustees of the settlement.

Alexander Grant, K.C., and *Harman* for the legal personal representative of the settlor.

H. S. Howard for the beneficiaries under the settlement.

SARGANT, J.—The question here is whether the will of the testatrix operated to exercise a power of revocation and new appointment contained in a previous settlement. The material facts are stated in an affidavit of the plaintiff trustee and may be summarised as follows. By a voluntary indenture dated Dec. 9, 1881, the testatrix settled a sum of £3,000 India Four per Cent. stock upon trust to pay the income to herself for life, and after her death upon trust to pay the income to any husband during his life. She never married; and then there were trusts for children which, of course, did not take effect, and a gift over in default. And the settlement contains a power of revocation and new appointment in these words. [His Lordship read it and continued:] On two occasions—namely, in the year 1906, and again in the year 1909—the testatrix with the consent of the trustees effected revocations and new appointments of parts of the trust funds, the object on each occasion being apparently to increase her income by the purchase of annuities on her own life. On the death of the testatrix, which occurred on Oct. 12, 1918, there remained subject to the trusts of the settlement the sum of £1,200 only which was invested on mortgage and is probably not recoverable in full. By her will dated Aug. 6, 1914, the testatrix, after appointing executors and trustees, made a series of specific bequests to various relations and connections, the words of bequest being these—namely, "I give, devise, and bequeath," and the testatrix then proceeded as follows. [His Lordship read the residuary gift and continued:] The determination of the question in issue depends upon whether

the employment by the testatrix in the gift I have just read of the additional words "and appoint" she has effectually exercised her power of revocation and new appointment as to the funds remaining subject to the voluntary settlement.

In the first place, it has to be considered whether on the true construction of the power itself the consent of the trustee is necessary to a revocation or new appointment, not only when it purports to be effected by a deed but also when it purports to be effected by will. On the first reading of the power the words "with the consent of the trustees" would seem to attach themselves more naturally to both branches of the power than to the first branch only, but the words can quite easily be read the other way and when the substance of the provision is considered, it is fairly obvious that it is in this latter way that the words should be read. The object of the restrictions on the exercise of the power is clear—namely, that the lady should be protected against an ill-considered revocation which might stultify the protection otherwise given to her by the settlement; and this protection is not required in the case of a document such as a wish which operates only on her death; and further, while it is quite common in practice that the efficacy of a deed should depend on the consent in writing of persons other than an actual party to the deed, such a requirement is most unusual in the case of a will (except under the law as it stood at the date of the settlement in the case of the consent of a husband to the will of his wife) and would be a very awkward requirement to comply with. I hold that under this clause a revocation and new appointment by will did not require for its effective operation any consent on the part of the trustees.

I have next to decide whether the words of gift in the will are sufficient to execute a power of revocation and new appointment. This is what is sometimes known as a one power case—this is a case where the testatrix had only one power of appointment—and it is clear, and indeed is conceded, that the words of the will would be sufficient in such a case to exercise a general power of appointment, even apart from s. 27 of the Wills Act, 1837, or to exercise a special power of appointment: *Re Mayhew, Spencer* v. *Cutbush* (2). But it has been strongly contended that they are not sufficient to exercise a power the exercise whereof requires in strictness a double process—namely, first revocation and next new appointment. In my opinion, however, this is not so. The words here are made singularly emphatic by the repetition of the word "and" instead of its mere transposition; the previous words of gift "I give, devise, and bequeath" are repeated in full, and then the words "and appoint" are added; the phraseology is almost as marked as if the added words had been "and I appoint." The language indicates clearly an intention to add to a gift of property belonging in full to the testatrix a gift of property over which she had a power of appointment. And there being no property of this kind except property over which she had a power of revocation and new appointment (a distinction fine in itself and hardly appreciable by a layman), she must have been referring to this property and this power. And this being established the words are sufficient to effectuate her double process of revocation and new appointment. My conclusion in this particular case has the great advantage of being in accordance with the general view expressed by TURNER, L.J., in *Pomfret* v. *Perring* (1).

The last and most difficult question is whether the words of the will "expressly refer" to the power within the language of the settlement. In general no doubt the words are primarily intended to exclude the operation of s. 27 of the Wills Act, 1837, and this is probably their main meaning here, though they are really unnecessary in the case of a power of revocation and new appointment: *Re Wells' Trusts, Hardisty* v. *Wells* (3). But the effect of the words may go beyond their main object, and their precise meaning must therefore be carefully examined. In the first place it has been held that such words do not require a specific reference to the particular power since they can be satisfied by words showing intention to exercise any or every power: *Re Waterhouse, Waterhouse* v. *Ryley* (4). And I do not think they can be read as meaning "accurately" refer, or "definitely"

or "generally" refer. The word "expressly" seems to me in such a phrase to be contrasted as usual with "impliedly," and to mean that the reference has to be an expressed reference, that is a reference appearing from the expressions used in the subsequent instrument. Here the additional words "and appoint" are part of the expressions or express words used in the will; and if I am correct in my previous view that they are sufficient to point to and exercise this power of revocation and new appointment, apart from the special requirement of an express reference thereto, it seems to me to follow almost necessarily that they do also satisfy this special requirement. A similar construction has been placed by LORD ST. LEONARDS on what constitutes an "express trust" for the purposes of the Statute of Limitations: *Charitable Donations and Bequest Comrs.* v. *Wybrants* (5). Again the question of what is an "express" variation of a general statute by an incorporating Act has been similarly dealt with in *Metropolitan District Rail. Co.* v. *Sharpe* (6). Reference may also be made to *Denney, Gasquet and Metcalfe* v. *Conklin* (7) as to what constitutes "express notice in writing" within s. 25 (6) of the Judicature Act, 1873. In the result the question raised by the summons must be answered in the affirmative.

Solicitors: *Trotter & Patteson*, for *Stenning, Knocker & Thompson*, Tonbridge; *Torr & Co.*, for *Wilson & Nicholson*, Walton-on-the-Naze.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re JARRETT. Re VRENEGROOR. BIRD *v.* GREEN

[CHANCERY DIVISION (Sargant, J.), February 14, 1919]

[Reported [1919] 1 Ch. 366; 88 L.J.Ch. 150; 121 L.T. 119; 63 Sol. Jo. 353]

Power of Appointment—General power—Exercise—Residuary bequest by appointor—Previous express appointment revoked—"Contrary intention"—Wills Act, 1837 (1 *Vict.*, *c.* 26), *s.* 27.

The failure of an express appointment of property subject to a general power of appointment does not show an intention on the part of the appointor to prevent a gift of residue in the appointor's will from operating, under the Wills Act, 1837, s. 27, as an effective appointment of the property, even where such failure is due to revocation of the express appointment by the appointor.

Notes. Considered: *Re Thirlwell's Will Trusts, Evans* v. *Thirlwell*, [1957] 3 All E.R. 465.

As to a contrary intention which will oust s. 27 of the Wills Act, 1837, see 30 HALSBURY'S LAWS (3rd Edn.) 252, 253; and for cases see 37 DIGEST 436, 437, 441–443; and for the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

Cases referred to in argument:

Re Spooner's Trust (1851), 2 Sim.N.S. 129; 21 L.J.Ch. 151; 18 L.T.O.S. 269; 61 E.R. 289; 37 Digest 440, *447*.

Bernard v. *Minshull* (1859), John. 276; 28 L.J.Ch. 649; 5 Jur.N.S. 931; 70 E.R. 427; 37 Digest 437, *418*.

Re Clark's Estate, Maddick v. *Marks* (1880), 14 Ch.D. 422; 49 L.J.Ch. 586; 43 L.T. 40; 28 W.R. 753, C.A.; 37 Digest 442, *467*.

Re Guyton and Rosenberg's Contract, [1901] 2 Ch. 591; 70 L.J.Ch. 751; 85 L.T. 66; 50 W.R. 38; 44 Digest 661, *5004*.

Re Elen, Thomas v. *McKechnie* (1893), 68 L.T. 816; 37 Digest 466, *660*.

Originating Summons taken out by the trustees of the will of the testatrix for the determination of the question whether her will and codicil passed with her residuary estate investments representing the sum of £10,000 over which she had a testamentary power of appointment under the will of W. J. Jarrett.

W. J. Jarrett died in 1906. By his will his trustees were to set apart and invest a sum of £10,000 on trust to pay the income thereof to J. M. Green ("the testatrix") during her life, and after her death to hold the fund upon such trusts as she should appoint by will or codicil, and in default of such appointment and so far as such appointment should not extend upon trust for such persons as would at the death of J. M. Green be her statutory next-of-kin in case she were to die intestate domiciled in England and a widow. The testatrix married J. L. Vrenegroor, and by her will recited the power of appointment and exercised it by appointing that the trustees of W. J. Jarrett should on her decease hold the fund on trust for her husband absolutely, and as to the residue of her personal estate not otherwise disposed of the testatrix conveyed that to her trustees on trust to sell and hold the proceeds on trust for four named persons. By a codicil the testatrix revoked her former bequests to her husband and bequeathed to him £2 a week instead. The testatrix died, and her husband disputed the validity of the codicil and commenced an action in the Probate Division. A settlement was arrived at in the action that, subject to the residuary bequest forming the £10,000 fund, the testatrix's husband was to be paid £1,000 thereout as well as the £2 per week, and the Probate Court pronounced for the will and codicil.

Edward Beaumont for the trustees of the testatrix's will.

P. F. S. Stokes for the testatrix's father, the person entitled in default of appointment.

Alexander Grant, K.C., and *P. B. Lambert* (for *J. Beaumont*) for some of the residuary legatees under the testatrix's will.

A. E. Woodgate for the other residuary legatees.

G. M. T. Hildyard for the testatrix's husband.

F. E. Farrer for the trustees of W. J. Jarrett's will.

SARGANT, J.—With all due respect to the argument which has been addressed to me by counsel for the person entitled in default of appointment, I confess that I feel no doubt about the present case. The question is whether the gift of residue contained in the will of the testatrix carries with it the sum of £10,000. Primâ facie the residuary bequest is effectual to dispose of the property subject to the testatrix's general power of appointment together with her own property under s. 27 of the Wills Act, 1837, "unless a contrary intention shall appear by the will," and it is clear that the onus lies on those who assert that the property subject to the general power does not pass under the residuary bequest to prove the contrary intention. It is admitted by counsel for the person entitled in default of appointment that if the husband had predeceased the testatrix the fund would have fallen into residue and have passed under the residuary bequest contained in her will. It is also admitted by counsel that if the fund had belonged to the testatrix in the ordinary way, then, notwithstanding the fact that the gift failed by revocation and not by lapse, the same result would have followed. That last admission seems to me to be fatal to his case, for, if that be the result where the property is the absolute property of the testatrix, I can see no sufficient ground for drawing any distinction between failure by lapse and failure by revocation in the case of property which is subject to a general power.

In my judgment, the failure of an express appointment of property subject to a general power shows no intention on the part of the appointor to prevent a gift of residue from operating on the property subject to the power for whatever reasons the failure takes place, whether by the death of the appointee in the testatrix's lifetime or by revocation of the appointment by a subsequent testamentary disposition. To introduce any such distinction would, in my judgment, be to nibble at the general principle laid down in s. 27 of the Wills Act, the intention of which

was to assimilate the testamentary rules as to general powers of appointment to those which govern the disposition of a testator's own property. I decide, therefore, that the will and codicil in the present case had the effect of passing the fund in question, and that it goes to the residuary legatees named in the testatrix's will.

Solicitors: *Church, Rendell, Bird & Co.*, for *Bird & Lovibond*, Uxbridge; *Robinson & Co.; Woodbridge & Sons*; *J. S. Phillips & Son*; *Farrer & Co.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

Re PEARSON. SMITH AND ANOTHER *v.* PEARSON AND ANOTHER

[Chancery Division (Sargant, J.), October 23, 1919]

[Reported [1920] 1 Ch. 247; 89 L.J.Ch. 123; 122 L.T. 515; 64 Sol. Jo. 83; [1920] B. & C.R. 38]

Bankruptcy—Property available for distribution—Gift to bankrupt in father's will—Death of bankrupt, undischarged, leaving issue—Subsequent death of father—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 38.

A testator left a share of residue to his son who died in the testator's lifetime leaving issue surviving the testator. The son had been adjudicated bankrupt, but had not obtained his order of discharge at the date of his death.

Held: the trustee in bankruptcy was entitled to the son's share of residue.

Dictum in *Re Scott* (1), [1901] 1 K.B. at p. 240, applied.

Notes. As to the creditors' right to property devolving on a bankrupt during the bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 429; for cases see 5 Digest (Repl.) 779–794; and for the Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321. As to gifts by will to a deceased child of the testator, see 34 Halsbury's Laws (2nd Edn.) 138–140; for cases see 44 Digest 502–506; and for the Wills Act, 1837, see 26 Halsbury's Statutes (2nd Edn.) 1326.

Case referred to:

(1) *Re Scott*, [1901] 1 K.B. 228; 70 L.J.Q.B. 66; 83 L.T. 613; 65 J.P. 84; 49 W.R. 178; 17 T.L.R. 148, C.A.; 44 Digest 503, *3224*.

Originating Summons asking whether by reason of the death intestate of T. S. Pearson in the lifetime of his father, leaving issue at the time of his father's death, his legacy from his father went to his next-of-kin or to his trustee in bankruptcy, and whether the trustee of the will before paying over the share ought to deduct a sum of £350 or not.

Isaac Pearson by his will, after appointing the plaintiffs executors and trustees, gave his residuary real and personal estate to them upon trust for conversion thereof, and to hold the proceeds in trust for his children, naming them, in equal shares. The will contained a proviso that the trustees should deduct from and retain out of the share to which T. S. Pearson might become entitled the sum of £350 due from him to the testator. A receiving order was made against T. S. Pearson on his own petition, he was adjudicated bankrupt, and the official receiver became his trustee in bankruptcy. He never obtained his order of discharge, and died intestate in the lifetime of his father, leaving four children, one of whom was a defendant to the summons. The testator subsequently died.

C. P. Sanger for the plaintiffs, the father's executors.

R. H. Hodge for the defendants, the sons and next-of-kin of the deceased bankrupt.

G. T. Simonds (*W. R. Sheldon* with him) for the trustee in bankruptcy.

SARGANT, J.—I am surprised to find that the particular point raised by this summons has never been the subject of an actual decision. That question is as to the effect of s. 33 of the Wills Act, 1887, which provides that

> "where any person being a child or other issue of testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

In the present case the testator gave a third of his residuary estate to his son T. S. Pearson, who was adjudicated a bankrupt before his father's death. Before the date of that death, a trustee in the bankruptcy was appointed, and T. S. Pearson was at the time of his own death an undischarged bankrupt. He left four children surviving him. All the conditions mentioned in s. 33 of the Wills Act were satisfied in the present case. It is observable that there is no gift under that section in favour of the issue of the deceased child of the testator. The provision made by the section is in favour of the legatee himself. The property coming to him under the section may be disposed of by him either during his lifetime or by his will, and, if he dies intestate, it passes to the persons entitled by the intestacy, and it is subject to the payment of his debts. The section, in short, effects an artificial prolongation of the legatee's life beyond the death of the testator, and he takes his legacy subject to all the conditions affecting him at the time of his own death. Primâ facie then, the property passed at the time of the legatee's death as artificially ascertained by the section.

By s. 38 (a) of the Bankruptcy Act, 1914, it is provided that the property of the bankrupt divisible among his creditors shall comprise, amongst other things, all such property "as may devolve on him before his discharge" and counsel for the next-of-kin of the bankrupt argued that the death of the bankrupt operated as a discharge from his bankruptcy, and that the consequence must follow that the share of the bankrupt in the residue did not devolve on him until after the determination of his bankruptcy. However, s. 38 of the Bankruptcy Act, 1914, does not refer to property devolving during the continuance of the bankruptcy, but to property of the bankrupt devolving "before his discharge." As a matter of fact the bankrupt never did obtain his discharge. The effect of the artificial prolongation of his life by s. 33 of the Wills Act was to cause the property left to him to devolve on him before his discharge. Moreover, there is the important statement of STIRLING, L.J., in *Re Scott* (1), which to my mind seems to amount to something stronger than a mere dictum, as the whole of the judgment is based on the principle involved in that statement. The learned judge said ([1901] 1 K.B. at p. 239):

> "If the child, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement) by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law as upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trustee in bankruptcy, and so on."

In my judgment, the trustee in bankruptcy of the child taking under his father's will, who is the general assignee of the bankrupt under the Act, is in quite as good a position as a special assignee, or devisee, or legatee of the child, or anyone else claiming under him. I may add that the language of s. 38 of the Bankruptcy Act, 1914, is exactly the same as that in the corresponding s. 44 of the Bankruptcy

Act, 1883. This seems to me to be some additional reason for the decision at which I have arrived. For the dictum of STIRLING, L.J., in *Re Scott* (1), gave a judicial interpretation of s. 44 of the Act of 1883; and afterwards this section was re-enacted verbatim in s. 33 of the Act of 1914.

It must, therefore, be declared that the share of residue by the will of Isaac Pearson given to his son T. S. Pearson passed to the son's trustee in bankruptcy, subject to deduction of the sum, £350, referred to in the will.

Solicitors: *R. H. Bentley*, for *T. B. Baynes*, Dartford; *Bentley & Jenkins*; *Tarry, Sherlock & King*.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law*.]

Re MACDONALD. Ex parte McCULLUM

[KING'S BENCH DIVISION (Horridge, J.), June 17, July 14, 15, 1919]

[Reported [1920] 1 K.B. 205; 88 L.J.K.B. 1226; 122 L.T. 316; [1918–19] B. & C.R. 240]

Bankruptcy—Property available for distribution—Life interest in fund settled on wife—Surrender by husband of life interest in ante-nuptial settlement—No consideration given by wife—Bankruptcy Act, 1914 (4 *& 5 Geo. 5, c.* 59), *s.* 42 (1).

In 1900 a husband, by ante-nuptial settlement, settled funds upon trust for himself for life. In 1913, in pursuance of an arrangement made between the husband and the wife's trustees, the income from the settled funds was paid thenceforward to the wife. In 1915, the husband and the wife having agreed to separate, the husband executed a post-nuptial deed under which his life interest under the marriage settlement was surrendered to the wife, and she was given a power of appointment which might act in derogation of the ultimate reversion of the property to the husband. The wife gave no undertaking that she would not take any proceedings against her husband for maintenance. In 1917 the husband committed an act of bankruptcy, and in July, 1918, more than two years but less than ten after the date of the post-nuptial settlement, an order of adjudication was made against him. It was not proved that when he executed the post-nuptial settlement the husband was able to pay all his debts without the aid of the property comprised therein. The husband's trustee in bankruptcy claimed that the deed of 1915 was void under s. 42 (1) of the Bankruptcy Act, 1914, so far as was necessary for payment of the husband's debts and the costs of the bankruptcy.

Held: the wife had given no consideration for the deed and the husband had merely substituted a voluntary settlement on her for a voluntary allowance to her, and, therefore, the wife was not "a purchaser for valuable consideration" within the meaning of s. 42 (1), and the deed was void.

Re Pope, Ex parte Dicksee (1), [1908] 2 K.B. 169, distinguished, and definition there stated by COZENS-HARDY, M.R., applied.

Notes. As to avoidance of fraudulent and voluntary settlements of a bankrupt, see 2 HALSBURY'S LAWS (3rd Edn.) 548–553; and for cases see 5 DIGEST (Repl.) 899–916. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to:

(1) *Re Pope, Ex parte Dicksee*, [1908] 2 K.B. 169; 77 L.J.K.B. 767; 98 L.T. 775; 24 T.L.R. 556; 52 Sol. Jo. 458; 15 Mans. 201, C.A.; 5 Digest (Repl.) 905, *7502*.

Also referred to in argument:

Hana v. *Harding* (1888), 20 Q.B.D. 732; 57 L.J.Q.B. 403; 59 L.T. 659; 36 W.R. 629; 4 T.L.R. 463, C.A.; 5 Digest (Repl.) 905, *7505*.

Re Collins (1914), 112 L.T. 87; 5 Digest (Repl.) 907, *7520*.

Motion by the trustee in bankruptcy of Sir A. J. Macdonald, Bart., for a declaration that an indenture dated Mar. 5, 1915, made between the bankrupt of the first part, the bankrupt's wife, Dame Constance Mary Macdonald, of the second part, and the respondents, J. W. Coulthurst and J. B. G. Tottie, and the Rev. J. Fowler, the trustees under the indenture, of the third part was void under s. 42 (1) of the Bankruptcy Act, 1914, so far as was necessary for payment of the debts owing by the bankrupt, and for an order directing the respondent trustees to pay to the applicant all income arising from the funds held subject to the trusts of the said indenture or of an indenture dated Jan. 9, 1900. On June 17, 1919, the bankrupt's wife was added as a party to the motion at her own request.

By the Bankruptcy Act, 1914, s. 42 (1):

> "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof."

By an ante-nuptial settlement dated Jan. 9, 1900, made between the bankrupt of the first part, Constance Mary Burgess of the second part, and John William Coulthurst, James Braithwaite Garforth Tottie, Ernest Richard Bradley Hall Watt and the Rev. John Fowler (therein called "the trustees") of the third part, being a settlement made in contemplation of the marriage of the bankrupt with the said Constance Mary Burgess, which was shortly afterwards solemnised, it was declared and agreed that the trustees should stand possessed of certain investments in stocks transferred into their joint names by the bankrupt upon trust from and after the solemnization of the marriage, to pay the annual income of the trust funds to the bankrupt during his life, and after his death to pay the same annual income to his wife during the residue of her life or until she should marry again, but so that during coverture she should not have power to alienate or charge her expectant life interest. There followed powers for the bankrupt and his widow to appoint amongst the children or remoter issue of the marriage, with the usual trust in default of appointment for the children who attained twenty-one years of age or being daughters married under that age; and it was provided that if there should not be any child of the intended marriage who should attain a vested interest under the trust in default of appointment, then, subject to the above trusts and powers, the trust funds and the income and statutory accumulations (if any) of the income thereof, or so much thereof as should not have become vested or been applied under any of the trusts or powers affecting the same should, after the death or re-marriage of the wife and such failure of children as aforesaid, be held in trust for the bankrupt, his executors, administrators, and assigns absolutely.

By an indenture dated Mar. 5, 1915 (which was endorsed "Deed of Variation Supplemental to Marriage Settlement dated Jan. 9, 1900"), made between the bankrupt of the first part, his wife of the second part, and the trustees of the marriage settlement of the third part, it was agreed and declared that during the joint lives of the bankrupt and his wife the income of the trust funds should, notwithstanding anything to the contrary contained in the settlement, be paid by the trustees for the time being of the settlement to the wife for her separate use without power of anticipation, that, if there should not be any child of the marriage who should attain a vested interest under the trusts declared by the settlement, and if the wife should not marry again, the trust funds and the income and statutory accumulations (if any) of the income thereof, or so much thereof as should not have become vested or been applied under any of the trusts or powers affecting the same, should be held in trust for such persons at such ages and times in such manner as the wife should by deed or will appoint, but so that no such appointment should be valid if the wife should marry again; and that in default of and subject to any such appointment the said premises should be held in trust for the bankrupt, his executors, administrators, and assigns absolutely. It was further provided that the settlement should be deemed to be varied so far as might be necessary to give effect to the above provisions, but that, except to that extent, nothing therein contained should accelerate any other charges, estates, or interests under the settlement limited to take effect in possession in or after the death of the bankrupt or his wife. The yearly income from the trust funds without deduction of income tax amounted to £175 13s. 8d. There had been no issue of the marriage and the spouses had lived apart since the year 1914. From the date of the indenture of Mar. 5, 1915, the trustees had paid the income of the trust funds to the wife. On July 18, 1915, the bankrupt committed an act of bankruptcy by failing to comply before that date with the requirements of a bankruptcy notice on which a petition was presented on Aug. 10, 1917; a receiving order was made thereunder on Nov. 7, 1917, and an adjudication order on Jan. 30, 1918. The total liabilities for which proofs had been admitted amounted to £1,180 18s. 2d. No assets had been recovered and no dividend had been paid to the creditors.

In opposition to the motion an affidavit was made by the bankrupt's wife which was in substance as follows:

"In the year 1913 I had a conversation with a cousin of mine who informed me that on the occasion of her marriage, provision had been made for an immediate income for her own absolute use. At that time I was living with the debtor in Bexhill, and I mentioned this to him, and pointed out that no similar provision had been made for me. He at once suggested that the income arising from the trust funds under our marriage settlement should be paid into an account at Lloyds Bank, Bexhill, to be opened in my name, and that I should have such income for my own absolute use. Arrangements were accordingly made by the debtor, which resulted in the income from that time being paid into my account at the Bexhill branch of Lloyds Bank, Ltd. The account was operated upon by me for my own benefit. From the date of my marriage down to this time I had always received from the debtor all monies which we required for housekeeping, &c., and after this date I continued to obtain from him as before, all monies which were required for that purpose. In March, 1914, the debtor and I agreed to separate, and the question arose as to my means of livelihood. The debtor agreed with me that for my maintenance in the future I should receive the income which he had previously placed at my disposal, as above mentioned. During the whole of our married life up to this time the debtor had spent money lavishly, but I never experienced any difficulty in obtaining all that I required from him. After March, 1914, I frequently met the debtor, and we were on friendly terms. On one of these occasions I pointed out to him that he should execute a document confirming the arrangement previously agreed upon, under which the

income of the trust funds was being paid to me. I desired this, as I felt my position was precarious owing to the debtor's mode of living, as I had no other income, and was in a state of health which prevented me from being able to work. The debtor agreed to consult a solicitor, with a view to ascertaining what steps were necessary to insure to me the continued payment of the income, whatever happened to him, and he subsequently informed me that he had seen [a solicitor]. Later I saw [the solicitor], who informed me that he had advised that a deed should be entered into between us, varying the terms of the marriage settlement whereby the income from the trust funds, which under the marriage settlement was payable to the debtor for life, should be made over absolutely to me. Later I attended at [the solicitor's] office and executed the indenture [of Mar. 5, 1915]. At that time I had absolutely no reason to doubt that the debtor was absolutely solvent. . . . Immediately I mentioned the matter to the debtor, he seemed most anxious to do all that was necessary on my behalf. From March, 1914, down to the present time, I have never received any money from the debtor other than the income arising from the said trust funds."

The learned judge found, after hearing the evidence of the trustee in bankruptcy, that it had not been proved that the debtor was at the time of executing the indenture of Mar. 5, 1915, able to pay all his debts without the aid of the property comprised in that indenture.

E. W. Hansell for the trustee in bankruptcy.
Tindale Davis for the bankrupt's wife.
Maddocks for the trustees of the indenture of Mar. 5, 1915.

HORRIDGE, J.—This is an application under s. 42 of the Bankruptcy Act, 1914. That section is as follows: [HIS LORDSHIP read the section, and continued:] The document which is attacked in this case is a document dated Mar. 5, 1915, which is described on the back as "Deed of Variation Supplemental to Marriage Settlement dated Jan. 9, 1900." Under the marriage settlement a life interest in the property was reserved to the bankrupt, and by the deed of variation that life interest was surrendered by his wife. It provided that

> "during the joint lives of the settlor and the wife the income of the said trust funds shall, notwithstanding anything to the contrary contained in the settlement, be paid by the trustees or trustee for the time being of the settlement to the wife for her separate use without power of anticipation."

Under the marriage settlement there was a power of appointment reserved first to the husband and then to the wife, in the case of children, and in default of children the property reverted to the settlor. Under the new deed there was a provision that

> "if there shall not be any child of the said marriage who shall then attain a vested interest under the trust declared by the settlement, and if the wife shall not marry again, the trust funds and the income and statutory accumulations (if any) of the income thereof, or so much thereof as shall not have become vested or been applied under any of the trusts or powers affecting the same, shall be held in trust for such persons at such ages and times, and in such manner, as the wife shall by any deed or deeds, or by her last will or any codicil or codicils thereto appoint, but so that no such appointment shall be valid if the wife shall marry again, and in default of any such appointment and in so far as any such appointment shall not extend, the said premises shall be held in trust for the settlor, his executors, administrators, and assigns absolutely."

Therefore, that deed not only did away with the bankrupt's life interest, but gave an extra power of appointment to Lady Macdonald which might act in derogation of his ultimate reversion to the property. That was therefore a settlement made within ten years of the bankruptcy.

I will deal first with the portions of s. 42 which do not apply to this case. This was not a settlement made in consideration of marriage, nor a settlement made of property which had accrued to the settlor in right of his wife. Further, this is not a case where the bankrupt has become bankrupt within two years of the settlement, but one where he has become bankrupt within ten years of the settlement; and therefore, unless the person taking the benefit under the settlement can prove that it was made in favour of a purchaser or an incumbrancer in good faith and for valuable consideration, or that the settlor was able to pay his debts without the aid of the property comprised in the settlement, that settlement becomes void by reason of the provisions of s. 42. I have heard the evidence of the trustee; and on his evidence it is quite impossible to say that it has been made out that the settlor was able to pay all his debts without the aid of the property comprised in the settlement.

The only remaining question, therefore, is whether the settlement was made in good faith and for valuable consideration in favour of a purchaser or incumbrancer. On behalf of the wife it is contended that the settlement was so made. I must take the definition of "purchaser or incumbrancer in good faith and for valuable consideration" from the language of COZENS-HARDY, M.R., in *Re Pope, Ex parte Dicksee* (1). He said ([1908] 2 K.B. at p. 172):

> "I think it means a person who has given something in consideration of the settlement, or, to use the language of SIR JAMES HANNEN, a quid pro quo."

In *Re Pope* (1) the wife had bargained that she would not commence proceedings in the Divorce Court, the costs in which proceedings would have been payable by the husband, whatever the result of the proceedings might have been. She had, in agreeing not to take those proceedings, also in effect bargained that she would not apply for alimony to the Divorce Court. Further, of course, the bargain that she would not take proceedings was an inducement to the husband, in that he would not have the exposure of the case being tried in the courts. In this case it is suggested that the matters set out in the wife's affidavit show a consideration. [HIS LORDSHIP read the affidavit.]

What is the true inference to draw from those paragraphs? The inference which I draw from them is that instead of a voluntary allowance to his wife for maintenance, the bankrupt gave her a voluntary settlement; that is the whole meaning of the paragraphs. Under those circumstances there was no consideration by the wife. She did not even bargain that she would not take proceedings before the magistrates for maintenance. There was no consideration whatever for this settlement, and I must, therefore, make a declaration in the terms of the notice of motion.

Solicitors: *Charles Humphries*; *Bircham & Co.*; *Amery Parkes & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

Re A DEBTOR (No. 446 of 1918). Ex parte THE DEBTOR *v.* THE PETITIONING CREDITORS AND THE OFFICIAL RECEIVER

B [Court of Appeal (Lord Sterndale, M.R., Atkin and Younger, L.JJ.), November 21, 1919]

[Reported [1920] 1 K.B. 461; 89 L.J.K.B. 113; 122 L.T. 354; 64 Sol. Jo. 147; [1920] B. & C.R. 31]

Bankruptcy—Receiving order—Rescission—Discretion of registrar—Power to defer until after examination of debtor—Weight to be given to opinion of C *official receiver—Bankruptcy Act*, 1914 (*4 & 5 Geo. 5, c. 59*), *ss.* 29 (1), 108 (1).

Under s. 29 (1) and s. 108 (1) of the Bankruptcy Act, 1914, it is entirely within the discretion of the registrar in bankruptcy to determine whether or not a receiving order which has been made against a debtor shall be rescinded. He is at liberty to order it to be rescinded without any further proceedings, or D not until an examination of the debtor—public or private as the registrar may deem expedient—has taken place, and he is not bound by the opinion on the subject expressed by the official receiver, who is charged with the investigation of the conduct of the debtor.

Re Izod, Ex parte Official Receiver (1), [1898] 1 Q.B. 241, *Re Leslie, Ex parte Leslie* (2) (1887), 18 Q.B.D. 619, and *Re Wemyss, Ex parte Wemyss* (3) E (1884), 13 Q.B.D. 244, explained.

Notes. As to a bankruptcy court's power to review its orders in bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 589; as to public examination in bankruptcy, see ibid. 331–334; as to rescission of receiving order, see ibid. 338–341; and for cases see 4 Digest (Repl.) 179–185, and 5 ibid. 657–662. For the Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

F Cases referred to:

(1) *Re Izod, Ex parte Official Receiver*, [1898] 1 Q.B. 241; 67 L.J.Q.B. 111; 77 L.T. 640; 46 W.R. 304; 14 T.L.R. 115; 42 Sol. Jo. 117; 4 Mans. 343, C.A.; 4 Digest (Repl.) 180, *1638*.

(2) *Re Leslie, Ex parte Leslie* (1887), 18 Q.B.D. 619; 56 L.T. 569; 35 W.R. 395; 4 Morr. 75, D.C.; 4 Digest (Repl.) 180, *1641*.

G (3) *Re Wemyss, Ex parte Wemyss* (1884), 13 Q.B.D. 244; 53 L.J.Q.B. 496; 32 W.R. 1002; 1 Morr. 157, D.C.; 4 Digest (Repl.) 180, *1634*.

Appeal by a debtor from an order of the registrar in bankruptcy, dated Oct. 20, 1919, refusing to proceed, without holding a public examination of the debtor, with an application to rescind the receiving order against him.

H Although the debtor had had the receiving order in question made against him, the advertisement thereof had been stayed from April to October, 1919, by certain orders which had been made between these dates. The debtor applied that the receiving order might be rescinded on the ground that all his debts had been discharged in full. The official receiver required that the debtor should submit to a public examination. On Oct. 20, 1919, the adjourned application to rescind the I receiving order came on to be heard before the registrar, who, after hearing a full argument and discussion of the authorities, came to the conclusion that he must abide by what the official receiver required. Accordingly the registrar refused to proceed with the application to rescind the receiving order until a public examination had been held, and he refused to grant any further stay of advertisement in the meanwhile. He directed a stay of this order for seven days, and if notice of appeal were lodged within seven days then a stay of this order until the appeal had been heard. The registrar refused the debtor's application for rescission of the receiving order because he deemed himself bound by *Re Izod, Ex parte Official*

Receiver (1) and similar authorities to do so until a public examination of the debtor had taken place as required by the official receiver. The debtor appealed on the ground that the registrar had a discretion in the matter, which had been improperly exercised by him.

Clayton, *K.C.*, and *Tindale Davis* for the debtor.

The Attorney-General (*Sir Gordon Hewart*, *K.C.*) and *E. W. Hansell* for the official receiver.

Cannot for the petitioning creditors.

LORD STERNDALE, M.R.—I am sorry to say that I think that this case must go back to the registrar. I know that that course may cause some expense and delay; but I think that the registrar in exercising his discretion has, by a misapprehension of some authorities which were cited to him, and with which he was no doubt familiar, acted on a wrong principle.

The present case arises out of financial difficulties of the debtor, who had a receiving order made against him. He says that he has paid or provided for payment of all the creditors in full, and he asks rescission of the receiving order. There is no question that under s. 29 (1) of the Bankruptcy Act, 1914, the court has jurisdiction to rescind that receiving order. It seems to have been said from time to time that, although not proceeding exactly upon the same grounds, the exercise of that jurisdiction should be guided broadly by the same principles which apply to the annulment of an adjudication. I do not mean to say that they are absolutely the same. The learned registrar on this application said:

> "The difficulty which I feel in this case is that I have to exercise judicial discretion, and in that I must be guided by the previous decisions of the courts upon this point. In *Re Leslie* (2) the official receiver stated he required a public examination, apparently without giving any grounds."

Counsel for the debtor thereupon pointed out that that case was under a different section, and the registrar went on to say:

> "I appreciate that. But in *Leslie's Case* (2) the official receiver stated that he was not satisfied with the debtor's conduct; he gave no grounds apparently, but the Divisional Court (MATTHEW and CAVE, JJ.) decided, when the official receiver stated he was not satisfied with the debtor's conduct, that there must be a public examination. Then in *Re Izod* (1) the court seemed to lay stress on the fact that the official receiver was not able to inform the court of any ground upon which further inquiry was requisite."

Then the learned registrar quoted a passage from A. L. SMITH, L.J.'s judgment and went on thus:

> "I read this case as practically deciding that in a case where the official receiver, whose duty it is to investigate the debtor's conduct, suggests any misconduct on his part and asks for a public examination, then the receiving order should not be rescinded, until the public examination has been held. Then as this application is also based on s. 29, I think *Re Wemyss* (3) is to the same effect."

The learned registrar continued his observations. I read only what seems to me to be material:

> "Therefore, whether you take this case as under s. 108, or, as in *Wemyss's Case* (3), under s. 29, if the official receiver, a high official of the court, comes before me and tells me that he is not satisfied that all the debts have been paid in full, I feel I am bound by all the decisions to grant his applications, and there must be a public examination in this case before the application to rescind can succeed. . . . The official receiver is a person of considerable responsibility and, when he states that he does not believe all the debts will be discovered unless there is publicity, I think I am bound by the decision or dicta in *Re Leslie* (2) and *Re Izod* (1), and there must be a public examination.

So that the result of my decision to-day is that there will be no longer a stay, but, if you desire to go to the Court of Appeal, I will give you a stay of, say, seven days to lodge notice of appeal, and then I will stay it until it is heard. I should be glad to have the view of the Court of Appeal, because I feel that the dicta in *Re Izod* (1) in the Court of Appeal intimated that in every case where the official receiver says that there must be publicity the registrar in his discretion ought to grant the official receiver's application, and not rescind the receiving order until there has been that publicity which the official receiver thinks necessary, and the result will be that the application for a further stay be dismissed."

That was the form of the order on the application in the present case. It seems to me to show quite clearly what the learned registrar did in this case. He said that no doubt he had to exercise a discretion, but that the cases showed him that where the official receiver came and said, even without showing any grounds at all, as appeared after referring to *Re Leslie* (2), that there ought to be a public examination before the rescission, the registrar could not make the order for rescission without a public examination, and that he is bound in fact by that opinion of the official receiver. The learned Attorney-General contended that although the registrar said that, and said that he wished for the decision of the Court of Appeal, there was enough on the note of his observations to show that he had in fact exercised his own discretion. I am sorry to say that I do not take that view; he began at the very outset by pointing out that the cases showed that if the official receiver said that there ought to be a public examination he must so order. That was wrong, and indeed it was not argued that it was right. It is within the registrar's discretion to determine whether a receiving order shall be rescinded or not. He can say, "I will rescind it now without any further proceedings at all." He can say, "I will not rescind it until after there has been a public examination." It is within his power to say, if he thinks fit, that he will order that there should be a private examination before rescission. He may do any one of those three things, but it is for him to decide the matter. Although the opinion of the official receiver, who has entire knowledge of the whole matter, is an element which would very often go pretty nearly all the way to deciding the registrar's discretion, still the registrar must exercise his discretion, and he must not say, as I think he said here: "The official receiver says there must be a public examination; therefore, there must be one." That is putting the discretion into the hands of the official receiver instead of those of the registrar.

For that reason I think that the learned registrar was wrong in taking that view. The case must go back to him in order that he may exercise his own discretion whether the rescinding order should be granted at once or whether there should be an examination; and he will consider whether it shall be public or private. He will consider the comparative merits of publicity or privacy and, having exercised his own discretion, he will then make the order. I do not think it right to indicate any opinion at all as to what sort of order he ought to make; that is for him. With regard to the costs of the application, I think that the costs of this appeal should be costs in the application to rescind and should follow the result of the decision on the order to rescind.

ATKIN, L.J.—I agree. I do not think it necessary to repeat what has been said by the Master of the Rolls in reference to the grounds of the learned registrar's decision in the present case. It appears to me plain, on a perusal of the decision which he gave, and the grounds for deciding it, that he unfortunately did misdirect himself as to the law; the result is that he has not yet exercised his discretion as he should exercise it, untrammelled by a mistake as to the law. The case must go back to him to reconsider the matter. Nothing that we are saying is an intimation to the registrar that he has not to give weight, and full weight, to the opinion expressed before him by the official receiver, who is the person who is charged to a large extent with the investigation as to the conduct of the debtor.

The registrar has to exercise a judicial discretion; therefore he has to consider the rights of the debtor as well as the rights of the creditors and the rights of the public. In exercising his discretion the registrar probably would not attach so very much weight to the desire of the official receiver on a matter of this kind for further publicity unless the official receiver lays before him some kind of reasonable grounds for his belief. In other words, I doubt whether the learned registrar in exercising his discretion wisely would be likely to act on the mere ipse dixit of the official receiver. In the present case the official receiver has given, as one would have expected from him, a number of grounds for his belief, which the learned registrar will no doubt weigh in coming to a conclusion, and in coming to this conclusion it may be that he will consider that that which has been put before him by the official receiver still requires some further elucidation, some further inquiry, which may possibly be short of a public examination. But if he is satisfied with the grounds which are put before him as they stand he then would have to make up his mind whether or not those grounds do or do not lead him to the conclusion that there ought to be further publicity in this matter, and further examination. All these matters are open to him, and all that we decide at the present moment is that the registrar, in coming to the conclusion which he did, acted on a wrong view of the law, and the case must go back. I agree with what has been said by the Master of the Rolls as to the costs.

YOUNGER, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors: *E. A. Fuller*; *Solicitor to the Board of Trade*; *Woolfe & Woolfe.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re BRITISH SALICYLATES, LTD.

[Chancery Division (Astbury, J.), April 8, 1919]

[Reported [1919] 2 Ch. 155; 88 L.J.Ch. 258; 121 L.T. 77; 63 Sol. Jo. 517; [1919] B. & C.R. 160]

Company—Winding-up—Execution—Execution not completed until after presentation of winding-up petition—Execution allowed to proceed—Landlord's claim to arrears of rent—Duty of sheriff to pay landlord—Landlord and Tenant Act, 1709 (8 *Anne*, *c.* 18), *s.* 1—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 211.

Where, before presentation of a winding-up petition, a sheriff has seized in execution goods of a company on premises of which the company was tenant, and after presentation of the petition the execution is allowed to proceed, the duty of the sheriff under the Landlord and Tenant Act, 1709, s. 1, to pay to the company's landlord arrears of rent not exceeding one year and the right of the landlord under that Act to receive such arrears are not affected by the restrictions on execution and distress contained in the Companies (Consolidation) Act, 1908, s. 211 [now the Companies Act, 1948, s. 228 (1)].

Notes. The Companies (Consolidation) Act, 1908, has been repealed; but the restrictions on execution or distress after commencement of a winding-up and the provisions as to leave to proceed formerly contained in s. 142 and s. 211 of the 1908 Act are now made by s. 228 and s. 231 of the Companies Act, 1948. Additional provisions restricting the rights of execution creditors in a winding-up are now

contained in s. 325 and s. 326 of the 1948 Act, but these do not affect the validity of the proposition stated in the headnote.

As to provision for rent when the sheriff seizes a tenant's goods on the demised premises, see 16 HALSBURY'S LAWS (3rd Edn.) 53, 54, and ibid., vol. 12, pp. 137–141; and for cases see 21 DIGEST 521–524. As to the position where the tenant is a company in liquidation, see 6 HALSBURY'S LAWS (3rd Edn.) 690–696; and for cases see 10 DIGEST (Repl.) 1022–1024. For the Landlord and Tenant Act, 1709, and the Companies Act, 1948, see 13 and 3 HALSBURY'S STATUTES (2nd Edn.), pp. 846 and 452 respectively.

Cases referred to:

(1) *Lewis* v. *Davies*, [1914] 2 K.B. 469; 83 L.J.K.B. 598; 110 L.T. 461; 30 T.L.R. 301, C.A.; 18 Digest (Repl.) 335, *812*.

(2) *Re Forster, Forster* v. *Forster* (1919), March 26, 27, unreported.

(3) *Re Moss, Ex parte Hallet*, [1905] 2 K.B. 307; 74 L.J.K.B. 764; 92 L.T. 777; 53 W.R. 558; 49 Sol. Jo. 538; 12 Mans. 227, D.C.; 4 Digest (Repl.) 299, *2717*.

(4) *Re Mackenzie, Ex parte Sheriff of Hertfordshire*, [1899] 2 Q.B. 566; 68 L.J.Q.B. 1003; 81 L.T. 214; 15 T.L.R. 526; 43 Sol. Jo. 704; 6 Mans. 413, C.A.; 21 Digest 534, *1085*.

Summons by the Official Receiver as liquidator of the company for an order that the sheriff for the county of London should pay to the liquidator the sum of £62 10s., being the amount of rent paid by the sheriff to the landlord of certain premises of which the company was lessee.

The facts as stated in his Lordship's judgment were as follows: On July 10, 1908, an execution creditor of the company issued a writ of fieri facias for £109 8s. 6d. and £1 19s. costs, and on the same day the sheriff seized the goods of the company on the demised premises. On July 15, 1918, a winding-up petition was presented, and on the following day, July 16, a summons was taken out to stay the execution, but three days later that summons was dismissed on the ground that the execution was put in force prior to the presentation of the petition. On July 22 the sheriff received notice of a claim for £62 10s. for a quarter's rent due from the company to the landlord. On July 23 notice was given by the sheriff to the execution creditors of the claim made for rent, and on July 25 the execution creditors sent to the sheriff £62 10s., the amount owing for rent, which the sheriff on July 30 paid to the landlord's agents, who held a distress warrant for the rent, and on the same day the sheriff sold sufficient to pay the judgment debt and costs and the £62 10s. for rent. On that day—July 30—a winding-up order on the petition was made against the company.

The Landlord and Tenant Act, 1709, s. 1, enacts that no goods shall be liable to be taken by virtue of any execution, unless the execution creditor shall before the removal of the goods pay to the landlord

> "all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent . . . and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

By s. 211 of the Companies (Consolidation) Act, 1908:

> "Where any company . . . is being wound-up by or subject to the supervision of the court, any . . . execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents."

F. K. Archer for the liquidator of the company.
J. H. Stamp for the sheriff.

ASTBURY, J.—It is contended on the part of the liquidator that the rent was not due to the landlord within the meaning of the Landlord and Tenant Act, 1709; and that the sheriff had oversold and was therefore liable to compensate by repaying the amount of the oversale—namely, £62 10s. The point is a short but important one, and I am indebted to counsel on both sides for their able arguments. By the Landlord and Tenant Act, 1709, s. 1, no goods being on any premises in lease shall be liable to be taken by way of execution unless the party shall pay to the landlord all such sums as shall be due for rent at the time of the taking of such goods, and the sheriff is required to levy and pay to the plaintiff as well the money paid for rent as the execution money. That is the section reading it shortly.

It is contended by counsel for the liquidator first that the word "due" means legally recoverable and that the rent was not so legally recoverable by the landlord by reason of the restrictions on his right of distress contained in the Companies (Consolidation) Act, 1908, and, secondly, that the statute only applies by way of substitution for the landlord's right of distress, and that as the landlord had no such right available at the time of the sale by the sheriff the statute has therefore no application. In support of this argument the following passage from the judgment of BUCKLEY, L.J., in *Lewis* v. *Davies* (1) was relied on ([1914] 2 K.B. at p. 475): "Section 1 of the statute of Anne is a section which restricts and affects a legal right to distrain." It is argued that by reason of the restrictions contained in the Companies (Consolidation) Act, 1908, there is no present right in the landlord to distrain without leave. I have also been referred to an unreported case, *Re Forster, Forster* v. *Forster* (2), in the Court of Appeal, in which the majority, affirming the decision of SARGANT, J. (SCRUTTON, L.J., dissenting), held that a similar meaning, that is to say a debt legally recoverable, should be given to the word "due" in a will and that a debt extinguished by a previous bankruptcy was not a debt due. The Court of Appeal adopted the statement of DARLING, J., in *Re Moss, Ex parte Hallet* (3) ([1905] 2 K.B. at p. 314):

> "In my opinion, money can only be said to be due in a legal sense when it can be recovered in an action, and it is impossible to say that there can be anything due under this security when no money can be recovered by any legal process."

In my view, however, it is not necessary for me to discuss the facts in *Re Moss, Ex parte Hallet* (3), which I have consulted, or in *Re Forster, Forster* v. *Forster* (2), which I have had no opportunity of consulting, because, to my mind, the matter in the present case turns on quite a different point. Here the sheriff had been in possession of these goods from July 10, that is, five days before the presentation on July 15 of the petition to wind-up, and on July 19, that is, four days after the presentation of the petition, the court refused to interfere with the sheriff in the carrying out of that execution. The effect of that refusal was that the sheriff was to be entitled to proceed with the execution according to law—the law applicable is the first section of the Landlord and Tenant Act, 1709, which enacts that no goods shall be liable to execution unless all moneys due for rents at the time of the seizing of the goods up to one year shall be paid. It is not contested that on July 10, when the sheriff seized the goods, there was due to and recoverable by the landlord the sum of £62 10s. for rent. It is true that if there had been no execution and if the landlord had done nothing further he would after the winding-up have been in a position of some difficulty, and after the date of the winding-up would have been prevented from distraining without leave of the court; but that is immaterial, for, as matters were, the sheriff was authorised to proceed with the execution, and he could not proceed with the execution according to law without paying the rent due to the landlord, and could only thereby fulfil the obligations imposed on him by the statute. See *Re Mackenzie, Ex parte Sheriff of Hertfordshire* (4), where LINDLEY, L.J., said ([1899] 2 Q.B. at p. 574):

> "But if the sheriff had notice before the goods were removed that rent was due to the landlord, and the sheriff, nevertheless, did not keep the goods on

A the premises, but sold them without paying the landlord, the sheriff was liable to an action by the landlord for the wrongful removal,"

and he cites a number of authorities in support of that proposition. In my opinion, the liberty to proceed with the execution was a liberty to proceed with the execution according to law so as to avoid the consequences pointed out by LINDLEY, L.J., and the sum of £62 10s. was, therefore, rightly paid by the sheriff to the B landlord. This summons, therefore, fails, and the costs of both parties must come out of the assets in the liquidation.

Solicitors: *Peter Thomas & Clark*; *Wm. & T. Burchell.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

C

D

Re LOVELESS. FARRER *v.* LOVELESS

[COURT OF APPEAL (Swinfen Eady, Bankes, L.JJ., and Neville, J.), April 12, 1918]

[Reported [1918] 2 Ch. 1; 87 L.J.Ch. 461; 119 L.T. 24; 34 T.L.R. 356; 62 Sol. Jo. 470]

E *Income Tax—Annuity—"Clear annuity"—Liability to tax.*

A testator bequeathed his residuary real and personal estate on trust and directed his trustees out of the income of part of it to pay to his wife "a clear annuity of £2,000 during her widowhood" and in the event of her re-marrying, then, during the remainder of her life a clear reduced annuity F of £1,000.

Held: where there was a gift of "a clear annuity," the annuity was not given free of income tax.

Decision of EVE, J., [1918] 1 Ch. 223, affirmed.

Notes. Distinguished: *Re Shrewsbury Estate Acts, Shrewsbury* v. *Shrewsbury*, [1923] All E.R.Rep. 666. Considered: *Re Cowlishaw, Cowlishaw* v. *Cowlishaw*, G [1939] Ch. 654. Applied: *Re Wright, Barclays Bank, Ltd.* v. *Wright*, [1952] 2 All E.R. 698. Referred to: *Re Cain's Settlement, Cain* v. *Cain*, [1919] 2 Ch. 364; *Re Wells' Will Trusts, Public Trustee* v. *Wells*, [1940] 2 All E.R. 68; *Re Hirst, Public Trustee* v. *Hirst*, [1941] 3 All E.R. 466; *Re Best, Belk* v. *Best*, [1942] Ch. 77; *Re Skinner, Milbourne* v. *Skinner*, [1942] 1 All E.R. 32; *Re Batley, Public Trustee* v. *Hert*, [1951] Ch. 558.

H As to income tax on annuities, see 32 HALSBURY'S LAWS (3rd Edn.) 573 et seq.; and for cases see DIGEST 165 et seq.

Cases referred to:

(1) *Re Saillard, Pratt* v. *Gamble*, [1917] 2 Ch. 401; 86 L.J.Ch. 749; 117 L.T. 545, C.A.; 39 Digest 167, *584.*

I (2) *Peareth* v. *Marriott* (1882), 22 Ch.D. 182; 52 L.J.Ch. 221; 48 L.T. 170; 31 W.R. 68, C.A.; 39 Digest 166, *577.*

(3) *Gleadow* v. *Leatham* (1882), 22 Ch.D. 269; 52 L.J.Ch. 102; 48 L.T. 264; 31 W.R. 269; 39 Digest 167, *581.*

Also referred to in argument:

Re Bannerman's Estate, Bannerman v. *Young* (1882), 21 Ch.D. 105; 51 L.J.Ch. 449; 39 Digest 167, *583.*

Lord Lovat v. *Duchess of Leeds (No. 1)* (1862), 2 Drew. & Sm. 62; 31 L.J.Ch. 503; 6 L.T. 307; 10 W.R. 397; 62 E.R. 545; 28 Digest (Repl.) 198, *829.*

Appeal from a judgment of EVE, J.

Thomas Henry Loveless by his will, dated July 18, 1902, appointed executors and trustees, and, after making certain specific bequests, including legacies to his wife, Edith Jane Loveless, and a devise of his freehold house, bequeathed certain annuities and legacies. The testator directed (by cl. 12) that all the legacies, pecuniary or otherwise, and the annuities thereinbefore bequeathed were to be paid and enjoyed free of estate, settlement estate, legacy, or succession duty becoming payable thereon by reason of his death, but that direction was not to extend to the devise of the freehold house. He then devised and bequeathed his residuary real and personal estate not otherwise disposed of to his trustees on trust for sale and conversion, with power to postpone such sale and conversion, and on trust out of the proceeds of such sale and conversion to pay his funeral and testamentary expenses and debts and the legacy and succession duties, and to pay and provide for the legacies and annuities and to invest the residue of such money as therein mentioned. The testator then directed (by cl. 15) that his trustees should stand possessed of two equal third parts of the trust fund (thereinafter called "my children's fund")

> "upon trust out of the income of my children's fund to pay to my wife a clear annuity of £2,000 during her widowhood, commencing from my death, and, in the event of her marrying again, then during the remainder of her life a clear reduced annuity of £1,000 for her separate estate without power of anticipation, such respective annuities to be payable by equal quarterly payments."

And he authorised his trustees to appropriate and retain out of his children's fund a sufficient portion for answering by the annual income thereof the annuity payable to his wife, but without prejudice to the power of sale and investment and transposing of investments thereinbefore contained, with power to resort to capital. And he declared that, in case the annual income of the appropriated fund should, at the time of appropriation, be sufficient to satisfy the annuity notwithstanding that the appropriated fund might in whole or in part consist of Two and Three-quarter per Cent. Consolidated Stock or other investments, the income whereof would in time become reduced, such appropriation should completely discharge from the annuity payable to his wife the income of such part of his children's fund as should not be so appropriated. He then directed that the appropriated fund should ultimately revert to his children's fund, and, subject as above, directed that his children's fund should be held in trust for his children. The testator died on Nov. 12, 1916, childless. His "children's fund" accordingly passed under his will in trust for the testator's sister and brother, the brother's widow, and the sister and brother's issue.

An originating summons was taken out on behalf of the plaintiff, one of the trustees, raising (inter alia) the following question: Whether the respective annuities bequeathed to the testator's widow were given to her free of income tax, or whether she had to bear the income tax in respect thereof. The respondents to the summons were the widow, two servants claiming to be legatees, other parties interested in the residuary estate, and the remaining trustee and executor. EVE, J., held that the annuities were not given free of income tax. The widow appealed.

Romer, K.C., and *C. P. Sanger* for the appellant, the testator's widow.

Hewitt, K.C., and *F. E. Farrer* for the respondents, parties interested in the testator's residuary estate.

J. M. Patterson for the respondents, the trustees.

SWINFEN EADY, L.J., stated the facts, and continued: The question raised by this appeal is whether, under these circumstances, the gift to the wife of a clear annuity of £2,000 amounted to a gift to her of that sum free of income tax. In other words, whether, in addition to the annuity of £2,000, the will is to be treated as containing an additional bequest of the income tax payable in respect of the

A annuity. It was contended by the appellant that, by the use of the words "a clear annuity," there is meant an annuity not only clear of all death duties, but also clear of income tax. It was argued that unless in addition to the annuity the income tax is paid, it cannot be said that the widow does receive "a clear annuity." It is obvious from cl. 12 of the will that the testator had in his mind that annuities bequeathed by the will might be subject to duty. Clause 12 expressly directs that B the legacies, pecuniary or otherwise, "are to be paid and enjoyed free of estate, settlement estate, legacy, or succession duty." That direction is applicable to the legacies and the annuities previously given; it is not applicable to the wife's annuity in terms. There comes in a subsequent part of the will the direction to pay to the wife "a clear annuity of £2,000." In administering the estate, that has been held to give, and, in my opinion, does give, the wife an annuity clear of C the deductions that would otherwise be made from it. It would give it clear of the legacy duty which is now payable by the wife, and it would also give it free from that part of the estate duty which would be payable out of the real estate, and I understand that, in the administration, that course has been followed. But the further question is whether it is also given free of income tax. The learned judge has held that it is not. In my opinion, he was right in so holding in dealing with D what is given—that is to say, "a clear annuity."

Under the provisions of the Income Tax Acts, an annuity is chargeable with income tax. It is charged under the Income Tax Act, 1842, which provides, by s. 102:

> "Upon all annuities, yearly interest of money, or other annual payments, E whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will [this is an annuity given by will] or otherwise . . . or as a personal debt [and so on], there shall be charged for every 20s. of the annual amount thereof the sum of,"

and then the duty is charged. Then the section contains a direction, inserted by F means of a proviso, that, in every case where it is payable out of profits or gains brought into charge by virtue of the Act, no assessment shall be made on the person entitled to the annuity, interest, or other annual payment,

> "but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, . . . and the person so liable to make such annual payment, whether out of G the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorised to deduct out of such annual payment"

the duty. By s. 40 of the Income Tax Act, 1853, the provision is extended, for that section provides:

> H "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorised, on making such payment, to deduct and retain thereout [the amount of the duty; and I then it contains this provision] and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable."

By s. 24 (3) of the Customs and Inland Revenue Act, 1888, there is a direction in the events provided for by that subsection that the person paying an annuity shall deduct the rate of income tax.

In my opinion, having regard to the true construction of the Income Tax Acts, "a clear annuity" is paid to an annuitant where there is paid thereout first the

income tax and then the balance to the annuitant, making up the full sum given to the annuitant. In the present case, if the income tax be first paid on the £2,000 and then the balance of that £2,000 be paid to the annuitant, there is paid to the annuitant "a clear annuity" of £2,000. She has it clear of all estate duty, all legacy duty, and all duties payable under the will. She has, therefore, "a clear annuity" and the income tax is paid out of the annuity—out of money that would otherwise be payable in cash to the annuitant. The income tax is paid to the tax collector out of the annuity, and it is as much paid to the annuitant as if it had actually been paid to the person to whom the payment should have been due and payable—that is to say, to the widow. In my view, where there is a gift of either an annuity, or a clear annual annuity, or an annuity free from deduction or an annuity free from deduction or abatement, in all those cases the annuitant has to bear the income tax and the annuity is not given free of income tax. In other words, the will is not to be read and construed as if it contained a gift to the annuitant of the annuity and of an additional sum equivalent to the income tax payable on it. In my opinion, it is accurate to say—repeating words that I used in *Re Saillard, Pratt* v. *Gamble* (1) ([1917] 2 Ch. at p. 403)—that:

> "If the annuity is directed to be paid without any deduction whatsoever, or if the words are a clear yearly sum free from all deductions and abatements whatsoever, such a gift in those terms is not sufficient to give to the legatee the income tax in addition, but he must bear his own income tax."

For these reasons, I am of opinion that the judgment of the court below was quite right and that the widow must bear the income tax payable in respect of the annuity and that the will cannot be read and construed as if the annuity were given free of tax. I think that *Peareth* v. *Marriott* (2), before Bacon, V.-C., and *Gleadow* v. *Leetham* (3), before Kay, J., are sound decisions and that the rule there laid down is the rule that must prevail. The appeal fails and must be dismissed.

BANKES, L.J.—I agree. The question which we have to decide is as to the construction of the language used by the testator. Indeed, in the very words in the will which he made, the two words which are really before us for construction are the words "clear annuity." We are asked to decide this matter as turning on the construction of the will alone, and it is said that the question before the court is not one as to the construction of the Income Tax Acts but merely as to the construction of the will. With that view I do not quite agree. It is a question as to the construction of the will, but it is a question as to the construction of the language of the will, having regard to the provisions of the Income Tax Acts and having regard to the nature of the incidence of income tax on an annuity.

This seems to me to have been decided in the cases to which we have been referred apart from the exact language of the statutes. Where an annuity is paid out of profits or gains which are brought into charge, although the statutes use the word "deduction" in reference to the obligation of the person who has to make the payment of the annuity, yet, when you are considering what the effect of the provisions of the Acts really are in reference to the annuitant, the position is that the payment of income tax is really a payment by the annuitant. It is a payment made for the protection of the revenue by the person paying income tax payable on behalf of the annuitant. That is so, whether you take the language of s. 40 of the Income Tax Act, 1853, which provides that

> "the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable,"

as in substance providing that the annuitant shall have been deemed to have made the payment, or whether you treat the matter as it was treated by Bacon, V.-C., in *Peareth* v. *Marriott* (2). There he said this (22 Ch.D. at p. 188):

"Any person who has to pay the income (and the legislature takes this sort of collateral security for the payment), is bound, before he pays, to make a deduction consistent with the law on the subject."

The Vice-Chancellor was there treating the payment by the person who has to pay the income as a sort of collateral security provided by the legislature for the payment of the amount which is an amount really payable by the annuitant. Then there is the view taken by KAY, J., in *Gleadow* v. *Leetham* (3), where he said this (22 Ch.D. at p. 273):

"If, however, income tax be not a deduction, but a payment which she has to make herself, not out of the annuity, but because she receives the annuity, I do not consider that the word 'clear' carries the matter any further."

Whether you look at it from any one of these three points of view, it seems to me that the result must be the same, namely, that the deduction—and I am using the word "deduction" because that is the word used in the Income Tax Acts—is made by the person liable to make the payment for the security of the legislature, and, as I may perhaps call it, as statutory agent for the annuitant; but the amount which the annuitant receives, though less by the amount of the income tax, is none the less a payment by the person liable to pay a clear annuity of the full amount. On those grounds, I think that the learned judge in the court below was right.

NEVILLE, J.—I agree.

Appeal dismissed.

Solicitors: *Young, Jackson, Beard & King; Farrer & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

J. LIONEL BARBER & CO., LTD. *v.* DEUTSCHE BANK (BERLIN) LONDON AGENCY, ET E CONTRA

[HOUSE OF LORDS (Lord Finlay, L.C., Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Phillimore), October 28, 29, 30, 31, December 2, 1918]

[Reported [1919] A.C. 304; 88 L.J.K.B. 194; 120 L.T. 289; 35 T.L.R. 120]

Damages—Review by appellate court—Misdirection of jury at trial—Effect an ascertainable sum—Reduction of amount awarded—Consent of plaintiff.

If at a trial the judge has misdirected the jury on the question of damages and it appears to an appellate tribunal that the effect of the misdirection would not extend beyond a particular amount of the damages awarded by the jury, the defendant is not entitled to insist on a new trial where the plaintiff offers to redress any injustice which may have resulted from the misdirection by reducing the amount of the verdict.

Where a jury returned a verdict for the plaintiffs for £3,000 damages and the judge had misdirected them by stating that the plaintiffs had proved a sum of £460 special damage which, in fact, related to a matter of which the plaintiffs had given no proof,

Held by LORD FINLAY, L.C., VISCOUNT HALDANE and LORD SHAW, LORD ATKINSON and LORD PHILLIMORE dissenting: the plaintiffs consenting to a reduction of the damages by £460, they were entitled to judgment for £2,540, and the defendants were not entitled to a new trial.

Watt v. *Watt* (1), [1905] A.C. 115, distinguished.

Libel—Malice—Evidence—Knowledge by defendant that matter defamatory—Failure to fulfil undertaking to put things right—Repetition of libel.

The defendants published on a privileged occasion matter which they should have known was defamatory of the plaintiffs, and on this being brought to their attention failed to fulfil an undertaking which they had given to put things right, but in effect repeated the libel.

Held: on these facts there was evidence of express malice.

Notes. Referred to: *Wing Lee* v. *Yick Pang Lew* (1925), 94 L.J.P.C. 161; *Farmer* v. *Hyde*, [1937] 1 All E.R. 773.

As to review of damages by an appellate court, see 11 HALSBURY'S LAWS (3rd Edn.) 310–312; and as to express malice, see ibid., vol. 24, pp. 78–82. For cases see 17 DIGEST (Repl.) 177 et seq., 32 DIGEST 154 et seq.

Cases referred to:

(1) *Watt* v. *Watt*, [1905] A.C. 115; 74 L.J.K.B. 438; 92 L.T. 480; 69 J.P. 249; 53 W.R. 547; 21 T.L.R. 386; 49 Sol. Jo. 400, H.L.; 17 Digest (Repl.) 177, *721*.

(2) *Belt* v. *Lawes* (1884), 12 Q.B.D. 356; 53 L.J.Q.B. 249; 50 L.T. 441; 32 W.R. 607, C.A.; 17 Digest (Repl.) 181, *769*.

(3) *Bray* v. *Ford*, [1896] A.C. 44; 65 L.J.Q.B. 213; 73 L.T. 609; 12 T.L.R. 119, H.L.; 17 Digest (Repl.) 185, *811*.

(4) *Moore* v. *Tuckwell* (1845), 1 C.B. 607; 15 L.J.C.P. 153; 135 E.R. 679; 17 Digest (Repl.) 181, *766*.

Appeal by the plaintiffs and **Cross-appeal** by the defendants from an order of the Court of Appeal whereby a verdict and judgment obtained by the plaintiffs against the defendants for £3,000 damages and costs in an action of libel which was tried before SANKEY, J., and a special jury were set aside and judgment was entered for the respondents with costs.

The facts appear in the opinion of the Lord Chancellor.

Rigby Swift, *K.C.*, and *Keogh* for the appellants.

Sir John Simon, *K.C.*, *Schiller*, *K.C.*, and *Sir Hugh Fraser* for the respondents.

Their Lordships took time for consideration.

Dec. 2, 1918. The following opinions were read.

LORD FINLAY, L.C.—This appeal and the cross-appeal arise out of an action for libel brought by Lionel Barber & Co., Ltd., against the Deutsche Bank (Berlin) London Agency. The case was tried by SANKEY, J., and a special jury of the City of London, and resulted in a verdict for the plaintiffs for £3,000 damages. The defendants appealed to the Court of Appeal, which, by a majority, directed that the verdict and judgment should be set aside, and that judgment should be entered for the defendants. The plaintiffs have appealed to this House, asking that the verdict and judgment for £3,000 damages should be restored. The defendants brought a cross-appeal asking that, if the judgment entered in their favour by the Court of Appeal should be set aside, a new trial should be directed.

The appellants are merchants. Their head office is in Liverpool, and they do a large business with South America. The libels proved were two. The first was a message by cable sent by the respondents on Oct. 14, 1914, to a bank carrying on business in South America called the Banco Aleman Transatlantico, in the following terms: "No. 19317 unpaid." The second of the libels was contained in a diary letter sent by the respondents to the same Banco Aleman Transatlantico on or about Oct. 21, in which the following passage occurs:

"Banco Aleman Transatlantico Lima in account with the Deutsche Bank (Berlin), London Agency, London. 5.10.1914.—Your unpaid remittance No. 19317 on J. Lionel Barber & Co., London, as per our cable of Oct. 14.—We have taken divers steps in order to obtain settlement, but so far our efforts

have been without result; the matter still occupies our attention, and we hold bill here at present. Debit value £1,000 9s. 10d."

The bill No. 19317 mentioned in the cable and in the letter had been drawn upon the appellants by a South American correspondent and negotiated by the drawer with the Banco Aleman Transatlantico, and afterwards transmitted by them to the respondents in London to be presented to the appellants for acceptance and payment. In ordinary course that bill would have been payable on Oct. 9, 1914, but, owing to the moratorium instituted on occasion of the war, its due date became Nov. 9. It was presented for payment to the appellants' bank on Oct. 9 and was returned noted "Refer to acceptor under terms of proclamation of Aug. 2." Libels on the appellants were also alleged to have been published by the respondents with reference to several other bills in similar circumstances, but no evidence was given of these alleged libels. The case, therefore, depends upon the cabled message of Oct. 14, and the letter sent on or about Oct. 21. The statement of claim alleged by the second paragraph that by the said documents the defendants meant and were understood to mean that the bill to which they related had been dishonoured by the plaintiffs. It was contended for the defendants that the words were not capable of bearing a defamatory meaning, and that, the occasion being admittedly privileged, there was no evidence of express malice. SANKEY, J., left three questions to the jury: (i) "Were the words complained of defamatory? (ii) Were the defendants actuated by express malice? and (iii) If you are in favour of the plaintiffs, what damages?" The jury answered the first and second questions in the affirmative and assessed the damages at £3,000. The case was afterwards heard before SANKEY, J., on further consideration, and he gave judgment to the effect that the words were capable of a defamatory meaning, and that there was evidence of express malice, and entered judgment for the plaintiffs for the amount found by the jury—£3,000.

In the Court of Appeal the defendants again argued that the words were not capable of a defamatory meaning. All the members of the Court of Appeal—LORD READING, C.J., PICKFORD and SCRUTTON, L.JJ.—agreed with SANKEY, J., in holding that the words were capable of a defamatory meaning. This appears to me to be obviously right, and I think it unnecessary to add anything to what was said on this point in the courts below. On the second question as to express malice, the Court of Appeal was divided in opinion. The Lord Chief Justice was of opinion that there was evidence of express malice, while the other two members of the court held that there was none. On this point I agree with the Lord Chief Justice. The officials of the Deutsche Bank, who were responsible for the publication of these libels, must have known that they were calculated to convey the impression that the draft had been dishonoured by Messrs. Barber, and that such an imputation was likely to damage their credit. The statement in the second of the two libels, to the effect that the Deutsche Bank had taken divers steps to obtain a settlement, but so far without result, was calculated to suggest that the firm was in pecuniary difficulties. All the facts were within the knowledge of the officials of the Deutsche Bank, and it is quite impossible to suppose that they believed that any inference unfavourable to the financial position of Messrs. Barber could properly be drawn from the fact that the bill, which was subject to the moratorium, had not been paid on the date on which, but for the moratorium it would have been due. When the attention of the Deutsche Bank was called to the matter, it would have been quite easy to send a cable stating in plain terms that there was no ground for any imputation, and that the non-payment of the bill on Oct. 9 was explained by the moratorium. The manager of the Deutsche Bank stated that he would set things right, but all that was done was to cable that the bill had been re-accepted. This was manifestly not enough to undo any mischief that had been done by the libels. These two circumstances—that the Deutsche Bank knew that the communications were calculated to convey a false impression, and that nothing effectual was done to carry out their promise to set things right—are, in my opinion,

evidence of express malice which could not properly be withdrawn from the jury. It follows that the direction given by the majority of the Court of Appeal that judgment should be entered for the Deutsche Bank, is erroneous, and must be set aside.

There remains only the question of damages which has been the subject of prolonged argument before your Lordships. It has been contended on behalf of the Deutsche Bank that there was misdirection in the summing-up of the learned judge on the question of damages which entitles them to a new trial. As I have already stated, there were, in addition to the bills to which the libels proved had relation, seven other bills, in respect of which it was alleged, in the statement of claim, that the Deutsche Bank had libelled Messrs. Barber. In anticipation of being able to prove these other libels, possibly on the cross-examination of the defendants' witnesses, evidence had been given of special damage to the amount of £460 which was said to have resulted from such libels. The Deutsche Bank, however, called no witnesses and there was no evidence forthcoming to prove these other libels. It is pressed on behalf of the Deutsche Bank that they are entitled to a new trial, on the ground that SANKEY, J., improperly directed the jury that they might take into account in assessing the damages for the libels in respect of bill No. 19317 special damage which must have resulted from the unproved libels, if it was traceable to the Deutsche Bank at all.

SANKEY, J., in the course of his summing-up stated to the jury at length the facts with reference to the two libels which had been proved. He then proceeded to refer to the other seven bills, libels with regard to which, though alleged, had not been proved. He said:

> "Now, gentlemen, I have nearly finished the facts of the case, but I must say a word or two about the other seven bills, because you know there are eight bills which are made the subject of this inquiry, though counsel for the plaintiffs very frankly admitted with regard to seven of them he was not in a position to give conclusive proof. I do not think that is a matter that you need trouble very much about. He claims to have discovered this morning, or rather last night, by a telegram of Nov. 14, some evidence in the letter which was referred to in that telegram with regard to the second of the two bills, but if I might again advise you, it really does not make very much difference, because one libel of this sort is a serious thing, if it were a libel, and if the defendants are liable for it, and, therefore, if I may advise you, I do not think I should pay very much attention to the other seven bills which are the subject-matter of this action."

It is obvious that the learned judge directed the attention of the jury to the libels which *were* proved, and I cannot read anything in the summing-up so far to justify the contention that he invited the jury to give damages in respect of the unproved libels. The passage which was really complained of in the summing-up occurs near the end, where the learned judge is dealing with the question of damages, and it runs as follows:

> "I now turn to the damages. I am not going to delay about damages. Everyone of you gentlemen knows more about damages than I do; certainly twelve heads are better than one. They have proved special damage about £460. If you find they are entitled to damages—of course it is a serious thing to injure a man in his trade—Mr. Barber gave several instances. There was the instance of the cables, the Corocoro company, the Banco Mercantil and Valenzuela. Those make the £460, and then he said, well, it is a very unfortunate thing for me, because at this time there was a lot of new business to be got in South America, and I was not, so to speak, in 'on the ground floor.' There was a lot to be done there, and just at the time I could have picked up a lot of things, there came this unfortunate suspension of my credit, and people got to know of it and I must have lost a lot of money and a lot of custom. That is a matter entirely for you."

The statement by the learned judge that the plaintiffs had proved special damage —about £460—was obviously erroneous. It must have been the result of a slip and I think it unfortunate that the attention of the learned judge was not directed to it at the time, in which case it would at once have been set right. The items making up the £460, namely, the cable, the Corocoro company, the Banco Mercantil and Valenzuela, were not proved to have any connection with any defamatory statement made by the Deutsche Bank. The £3,000 damages given by the jury might well have been given as damages in respect of the two libels which were proved at the trial, and considering the serious effect which imputations on the financial credit of a mercantile house may have, they could not, in my opinion, have been said to be in any way excessive. I agree with the respondents' contention that there was misdirection in this passage of SANKEY, J.'s judgment. It must remain doubtful, however, whether it had any effect at all upon the damages. But it is possible that it may have had the effect of leading the jury to give £460 more than they otherwise would have given, and the counsel for Messrs. Barber & Co., therefore, consents to reduce the verdict by £460.

Counsel for the Deutsche Bank objected to this course on two grounds. In the first place they alleged that it is not competent to any court to reduce the damages, and that the case must be sent down for a new trial, even if your Lordships should be of opinion that the misdirection could not have affected the damages beyond £460. In support of this contention they relied upon the decision of this House in *Watt* v. *Watt* (1), overruling the decision of the Court of Appeal in *Belt* v. *Lawes* (2). In the latter case it was held by BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ., in an action for libel in which £5,000 damages had been given, that the court was entitled to refuse a new trial on the consent of the plaintiff that the damages should be reduced to £500. BRETT, M.R., said, in the course of his judgment (12 Q.B.D. at p. 357):

> "Where the complaint is only that the damages are excessive and the verdict cannot be otherwise impeached and it is a case where the plaintiff is entitled to substantial damages, the court has power to refuse a new trial, without the consent of the defendants, on the plaintiff's consenting to the amount of damages being reduced to such an amount as, if it had been given by the jury, the court would not have considered excessive."

With this the other members of the Court of Appeal agreed. But in *Watt* v. *Watt* (1) it was decided by this House that the course taken by the Court of Appeal in *Belt* v. *Lawes* (2) was erroneous, and that the defendant was entitled to insist on his right to have the case re-heard by another jury, the constitutional tribunal for assessing damages.

Does the present case fall within the decision given in this House in *Watt* v. *Watt* (1)? In other words, does it result from *Watt* v. *Watt* (1) that, if there has been any misdirection on the question of damages, even if it appears to the Court of Appeal or to this House that the effect of the misdirection (if it had any effect at all) would not extend beyond a particular amount, the defendant is entitled to insist on a new trial of the action although the plaintiff offers to redress any injustice which may have resulted from the misdirection by reducing the amount of the verdict? I do not think that the decision in *Watt* v. *Watt* (1) carries this consequence with it. In that case £5,000 had been given as damages in an action for libel. The Court of Appeal made an order that there should be a new trial unless the plaintiff consented to the damages being reduced to £1,500. The plaintiff consented and the judgment was amended accordingly. That is a very different case from the present. The reduction made in *Watt* v. *Watt* (1) must have proceeded on the assumption that the Court of Appeal had the right to assess what would be reasonable damages for the libel, and their assessment was at £1,500. In the opinion of the House of Lords this involved an invasion by the court of the province of the jury as to the assessment of damages. In the present case, if the fair conclusion is that the misdirection cannot have increased the damages beyond

the amount of £460, it is, in my opinion, open to this House, as it would be to the Court of Appeal, with the consent of the plaintiffs, to reduce the damages by that amount so as to prevent the possibility of any injustice to the defendants. This would not involve any assessment of damages for libel by a tribunal other than a jury, but only the deduction of the sum which might possibly have been added to the amount of the verdict owing to the misdirection of the learned judge at the trial.

The decision of this House in another case was cited to us: *Bray* v. *Ford* (3). That was a case of damages for a libel by the appellant on the respondent in respect of his conduct in the fiduciary position of chairman of the Yorkshire College. The judge at the trial directed the jury (wrongly in the opinion of the Court of Appeal and of this House) that the respondent under a certain clause in the memorandum of association was entitled to receive remuneration for his services as a solicitor. The jury gave a verdict for £600 damages. The Court of Appeal refused a new trial, being of opinion that no substantial wrong or miscarriage had been occasioned by the misdirection, as the jury might properly and would probably have given the same verdict, even if they had been rightly directed, and that, therefore, there had been no substantial wrong or miscarriage under Order 39, r. 6. The House of Lords reversed this decision and ordered a new trial, on the ground that the assessment of damages in an action for libel is peculiarly within the province of the jury, as they might have been influenced in their assessment by the misdirection, there had been a substantial wrong or miscarriage within the meaning of the rule. *Bray* v. *Ford* (3) is in the same category with *Watt* v. *Watt* (1) and is distinguishable from the present case on the same grounds.

Upon the whole I do not think that the respondents have made good their contention that the judge allowed the jury to think that they could give damages in respect of the bills not the subject of the libel proved. It appears to me on the contrary that the reasonable inference is that the misdirection did not influence the verdict, except possibly to the extent of £460. In my opinion, the judgment should stand for the amount given by the jury, minus £460, the appellants consenting to this reduction. The appellants should have their costs here and below.

VISCOUNT HALDANE.—I will not recapitulate the facts. I agree that on the question whether the words complained of ought to be understood in a defamatory sense and whether there was evidence of malice the appellants are entitled to succeed, and I have nothing to add to what has already been said about these points. But on the question whether the damages were excessive in consequence of misdirection by the learned judge who tried the case I have more difficulty. If he really directed the jury that the appellants had proved a special damage to the extent of £460, which they were entitled to recover in respect of libels in reference to bills as to which libels no case against the respondents was established, then it is clear that there must be a new trial, because not only was there no right to the £460, but part at least of the general damages included in the verdict may then be attributable to these unproved libels. But did the learned judge in reality give the jury a direction to this effect on which he invited them to act? As to the supposed libels relative to the seven bills other than number 19317, that of Venn Vargas & Co., it is beyond doubt that he told the jury clearly in the course of the trial that the statements in which the libels were contained were not statements of which the respondents were the authors, or for which they were responsible, that at interviews which Mr. Barber had with Mr. Pannenborg, on and after Dec. 8, 1914, the former had showed the latter the documents he had received from South America indicating that the Banco Aleman Transatlantico had made statements relative to the seven bills. These statements Mr. Barber complained of as damaging to his company, inasmuch as they imputed that his acceptances had been dishonoured. Now there is no doubt that the documents were not evidence of the statements contained in them. But as they were shown to Mr. Pannenborg that fact of their existence was in evidence, and the jury were at liberty to infer

that there were documents which indicated that the libel which was actually proved, that as to the failure to meet the bill of Venn Vargas & Co., was one which had produced a serious impression in South America tending to the discredit of the appellant's position. This inference was the more reliable because of its non-contradiction by Mr. Pannenborg, who was not put into the witness-box to rebut it.

I am not satisfied that the special jury disregarded the direction of the learned judge that the allegations contained in these documents, as distinguished from the existence of the documents themselves, were not proved. It is, no doubt, true that at the end of his summing-up he told the jury that the appellants had proved special damage amounting to £460. This language was unfortunate, and was not warranted. But I am not at all sure that the special jury were actually affected by it. They found a verdict for £3,000, and it is not suggested that this was an unreasonable amount to award as general damages for the single particular trade libel actually established. There is nothing to connect this amount with the £460 or any other specific loss. It appears to have been given as general damages for the libel relative to the Venn Vargas bill. There is no evidence of specific items making up the balance of the £3,000, and I have seen nothing that satisfies me that the jury took the reference to the other seven libels and the documents which were produced by Mr. Barber to Mr. Pannenborg to afford instances of the injury his company was suffering as more than a few instances, among what was probably a number of others, illustrating the consequences of the libel established as to the Venn Vargas bill. Taking this view, I do not feel bound to hold that the action must go down for a new trial in respect of damages which, as given by the special jury, appear to me neither unwarranted by the circumstances nor unreasonable in amount. Whatever might have been the case under the old practice, the terms of R.S.C., Ord. 39, r. 6, leave me free to avoid the conclusion that there must be a new trial. The rule says that a new trial is not to be granted on the ground of misdirection or the improper admission or rejection of evidence, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned, and if it appears to the Court of Appeal that such wrong or miscarriage affects part only of the matter in controversy, the Court of Appeal may give judgment only as to part thereof. If the question really were whether the £460 could be deducted in this case, and the verdict treated as one for the balance only, I should feel much difficulty in view of the decision by this House in *Watt* v. *Watt* (1) that the court has no jurisdiction to assume the function of the jury by reducing the damages and so giving a verdict itself, even with the consent of the plaintiff, if the defendant has not consented. But here it is not necessary to give a new verdict. The appellants, who were plaintiffs, are willing to forego judgment of £460 of the amount the verdict awarded, without prejudice to their contention that the verdict was one for general damages rightly arrived at and not admitted to be excessive or to include wrong items. I think the case comes near the line, but I am content not to differ from those of your Lordships who think that the deduction may be made in the judgment because of the assent given at the Bar by the appellants.

LORD ATKINSON agreed that there was evidence to go before the jury upon which reasonable men possessed of the knowledge which was possessed by those to whom the libels complained of were published could properly have found that the respondents in writing and publishing them were actuated by malice in fact, and that those publications were reasonably capable of a defamatory meaning. He then referred to the evidence and the direction given by SANKEY, J., to the jury and said that documents containing matter defamatory of the plaintiffs, but relative to the bills other than No. 19317 were introduced in the case by counsel for the appellants, as he frankly admitted, because he hoped to prove that the respondents were responsible for their publication. HIS LORDSHIP continued: He failed to do that, but had he succeeded the jury would have been as well entitled to award general damages in respect of them as they were in the case of the libels actually

published by the respondents. As soon, however, as he had absolutely so failed, the contents of these letters became matters wholly foreign to the subject of the guilt or innocence of the respondents for the libels published by them, and for which alone they were responsible. From these matters the jury ought to have turned away their attention and no longer heeded them. The learned judge should, I think, have directed them in clear, distinct, and unambiguous language so to do. In my view, he has, in a moment of forgetfulness, I think, and through a mistake possibly quite pardonable, not only entirely failed to do this, but, as I shall show presently, has turned the jury's attention to these very letters in language which left them to deal at large with any damages, general or special, arising from them. If it were quite clear that the jury intended to give a verdict for £2,540 in respect of the libel for which the respondents were responsible, and only added the sum of £460 due to publications for which they were not responsible, there might be some ground for letting the verdict, at the appellants' request, stand for the former sum. But this is, in my view, the very fact which there is nothing to establish. On the contrary, I think, having regard to the direction given to the jury, the natural and most probable result was that if they meant by the sum of £3,000 to cover any damages caused by these extraneous matters they included both the general and special damages resulting from them, and not the latter alone. . . . I confess it appears to me, as it did to each of the lords justices in the Court of Appeal, that the jury were told to take into consideration both special and general damages resulting from statements which were not made by the defendants or for which they could be held responsible. It has been urged that the judge's attention should have been called to the mistake he was making in thus directing the jury, when he would have probably corrected the error. No doubt, it would have been better had that been done; but the respondents cannot, I think, be held to be so bound by the course of the trial that they should be precluded, by reason of their omission to object to the judge's summing up, from raising the point they now raise on the award of the damages. They ought not to be shut out, I think, from raising it in this House and contending as they have done, I think successfully, that the jury have been gravely misdirected and misled, and that it is impossible to say how much of the sum of £3,000 awarded was given by the jury to cover damages, general and special, arising from a tort for which the defendants in the suit were not responsible. Nothing has occurred in the conduct of the case to bind the respondents to submit, against their consent, to a verdict for £2,540 which in fact the jury never found: *Watt* v. *Watt* (1). I am accordingly of opinion that the order appealed from was wrong, and that a new trial should be directed.

LORD SHAW.—The appellants and the respondents had numerous business relations with each other. A part of their arrangements was as follows. Goods bought and shipped by the appellants in South America were paid for by the negotiation of drafts drawn by the Banco Aleman Transatlantico. These drafts were forwarded by that bank to the respondents their London agents, and the latter presented the drafts to the appellants who accepted them, and when they fell due, paid the contents to the respondents. The course of business was entirely regular until the European war broke out. In October thereafter, the respondents and appellants differed—the appellants wishing to have the transactions continue on both sides and to get their payments from as well as to make their payments to the respondents, and claiming that at least when the latter payments were made the securities in respondents' hands should be pro tanto released. The respondents declined both proposals, and were determined to insist on the appellants making acceptances and payments, without the appellants receiving any counter payments or any release of securities. Among the bills drawn upon the appellants and held by the respondents was one by Venn Vargas & Co. for £1,000 [No. 19317]. It fell due on Oct. 9, but by the moratorium that date was carried forward to Nov. 9, 1914. On Oct. 14 the respondents telegraphed to the Banco Aleman Transatlantico, Lima (Peru), as follows: "Number 19317 unpaid, Deutsche Bank." The bill referred

to was in fact a current bill, and the sending of that telegram was therefore an extraordinary, an indefensible, and likely to prove a most damaging, act. It produced instant commotion; a wire was sent by Mr. Venn to this country and a meeting took place with Mr. Pannenborg, the respondents' manager, who disclaimed personal knowledge of the sending off of the offensive telegram and promised to put the matter right. In my opinion, one course and one only was open to him in these circumstances and that was to transmit instantly a telegram to the Banco Aleman Transatlantico, a correction in these or similar terms, namely: "Telegram of the 14th misunderstood. No. 19317 still current." He did not do so. Although he had been by this time expressly informed of the fact, which indeed as a commercial man, he must be taken to have known very well, namely, that his firm were the authors of a misleading and improper telegram plainly suggesting that a bill due by the appellants had been dishonoured and therefore seriously injurious to their reputation, he showed himself to be callous to and quite reckless of the grave consequences to the appellants, and the firm then proceeded to take their second extraordinary step. A letter was on Oct. 21 posted to the Banco Aleman Transatlantico, saying:

> "Your unpaid remittance No. 19317 on J. Lionel Barber & Co., London, as per our cable of Oct. 14—We have taken divers steps in order to obtain settlement, but so far our efforts have been without result; the matter still occupies our attention and we hold the bill here at present."

I do not characterise this. It was, instead of being the promised retraction or rectification, simply an indefensible repetition of the libellous attack. I feel no surprise that a jury of the City of London found express malice and assessed damages for the plaintiffs at the sum of £3,000. Another circumstance which may justly have weighed with them is that Mr. Pannenborg did not think it right to enter the witness-box to give any explanation of his conduct. Further facts were elicited; but what has been stated is, in my opinion, perfectly sufficient to justify the verdict in its entirety.

The case was summed up to the jury by Sankey, J., in a charge which showed the most scrupulous anxiety for complete fairness being done, with full avoidance of all prejudice against the respondents. Unfortunately, in his charge a slip was made. In an early portion of the charge the learned judge had properly instructed the jury that the plaintiffs had not been able to give conclusive proof on the subject of seven bills other than the one to which I have adverted and that the jury need not be troubled about those. Whereas in the latter portion of the charge he stated that special damage amounting to £460 had been proved, the fact being that that special damage was not connected with the single bill transaction which was the only remaining subject of the inquiry. I am clearly of opinion that this made no difference to the jury's mind and that they dealt with the broad question of libel uninfluenced by this irrelevant matter, and upon that footing they assessed damages at £3,000. Upon this subject I am happy to be in entire concurrence with the Lord Chief Justice and Pickford, L.J., in their opinion that the sum of £3,000 awarded on the single broad issue would not have warranted the conclusion that the verdict was either excessive, unreasonable, or perverse. Personally, I go further and say that, in my view, it would have been clearly a proper verdict.

The question, accordingly, is whether this proper verdict should not be allowed to stand, because in one part of the judge's charge an irrelevant element of special damage was stated to be before the jury. As I say, the jury may quite well have themselves discarded that element in view of the judge's earlier remarks. But there remains the possibility that they did not do so. The question is: Shall that possibility avoid the verdict and compel a fresh trial of the whole case? In my opinion, this is a question of circumstance and of degree. One circumstance which I own weighs very largely with me is this, that when the error was made in the judge's concluding sentences to the jury, a single word of the counsel representing the respondents would have sufficed to correct the error. That word was not

uttered. If it had been, the verdict, I feel almost certain, would have been for the same amount. In such a situation, a party so standing by may have the advantage of a right to subsequent challenge for misdirection; but it first lies upon him to show clearly that the element improperly submitted for consideration did, in fact, and according to the reasonable probabilities of the case inflate the verdict. I am clearly of opinion that this has not been shown. On the contrary, my view is that had the special damage been proved and then eliminated, the verdict would have been for the same sum—namely £3,000. This is not a case in which a different verdict, namely for £3,000 less £460, that is to say for £2,540, is asked to be pronounced by the court, as if that verdict had been pronounced by the jury. Had that been so the decision of *Watt* v. *Watt* (1) would probably have been in point. The parallel with *Watt* v. *Watt* (1) fails. The essential element is lacking —namely, that in *Watt's Case* (1) the verdict in the language of LORD HALSBURY "cannot be allowed to stand because it is unreasonable and excessive," whereas the same cannot be affirmed in the present case. I am not prepared to say that the law as laid down by TINDAL, C.J., in *Moore* v. *Tuckwell* (4) has ever been overruled or is not still sound. The learned judge thus expressed it (1 C.B. at p. 609):

> "It is not the practice, as stated at the Bar, that in all cases where there has been a misdirection a new trial must be granted de jure, because a bill of exceptions might have been tendered, for where the court can see clearly that real and substantial justice has been done or may be done without a new trial the rule has been refused."

Further and distinctly to the same effect is R.S.C., Ord. 39, r. 6—namely, that

> "a new trial shall not be granted on the ground of misdirection . . . unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned."

I am of opinion that this case is plainly one in which the rule can be applied properly and with salutary effect, and further that the Court of Appeal should so have applied it. In the result, accordingly, I should have been prepared to affirm the verdict as it stands. As, however, the appellants offered a deduction of £460, I see no objection in respect of that offer to reducing the amount to £2,540 and permitting judgment to issue for that sum, the appellants to have the costs of the proceedings throughout.

LORD PHILLIMORE.—The two principal questions in this appeal, whether it was open to the jury to say that the language of the two alleged libels, or, at any rate, of one of them, was defamatory, and whether, if so, the communications being on privileged occasions, there were materials from which the jury could infer express malice, are so closely intertwined, that I am somewhat surprised that different results in respect of them should have been arrived at in the Court of Appeal. It is to be remembered that if the statements were to any extent defamatory, they are to that extent not justified, and that all the facts were in the knowledge of the employees of the bank, and, therefore, that, so far as the statements were calculated to convey what was untrue, they were untrue to the knowledge of those who made them. It should be conceded that when the occasion is privileged we ought not to criticise too closely the expressions which one who has a duty to another uses in describing the actual conduct of a third. But the matter is so eminently one for a jury that it must be rarely that the court can say: "True it is that the defamatory expressions are not correct, that they describe the conduct of the third person in blacker and stronger terms than those in which they should have been described, but still they were not so much blacker or stronger as to warrant the jury in concluding that the composer of the libel was actuated by malice, either because he had some ulterior purpose to serve, or because he was recklessly careless in making the communication."

That the words were capable of a defamatory meaning, and that the answer of the jury that they were defamatory could not be interfered with, was the unanimous

A view of the judges in the Court of Appeal, and none of your Lordships who have spoken has seen any reason, and I see no reason, to differ from that opinion. The instructions which the Banco Aleman Transatlantico put upon the green slips which they attached to all their bills, the telegram "No. 19317 unpaid" sent without any qualification, might, it seems to me, well lead the South American recipient, particularly in the strain of all commercial credit which the outbreak of war B had produced, to believe that the plaintiff company was unable to meet its obligations. So much for the first libel. As to the second, the matter is so plain that I do not think it worth discussing. So much as to the first question put to the jury and the answer which the jury returned. As to the question and answer as to express malice. The words were, it must be taken, defamatory. They were needlessly defamatory. The kernel or nucleus of truth contained in the communi- C cation could have been, by a little more care in the language of the telegram, possibly by the addition of two or three more words at no very great cost, have been conveyed without danger of any improper inference. The second libel was in a letter, and it is idle to say that there was any difficulty or that there would have been any extra expense, in stating the correct facts, and so guarding and limiting them as to prevent any improper inference. I think that upon these D materials alone the jury under a proper and careful direction, such as they received from the learned judge who tried the case, might find malice. But the matter does not rest here; the conduct of those in charge of the defendant company after the publication of the two libels, and indeed before the publication of the second, was properly laid before the jury. The attempt by the telegram of Oct. 22 to clear the mischief of the telegram of Oct. 14 after the injury which it E had done had been pointed out, and was lame and late; and the mischief was repeated and indeed increased, or, at any rate, the jury might well think so, by the telegram of Nov. 12. For these reasons, I agree with this part of the judgment of the Lord Chief Justice, and I disagree with the judgments of the lords justices, who formed the majority of the Court of Appeal, and I do not think that judgment should have been entered for the defendant company.

F There remains a third question, which is the only one which has given any trouble to your Lordships' House, and as to which there is a difference of opinion among your Lordships, namely, whether there ought to be a new trial by reason of the jury having been wrongly directed by the learned judge as to the subjects in respect of which they might award damages. There is, I think, now no doubt, indeed it was I thought admitted by counsel for the plaintiff company, that the G learned judge told the jury by some mistake such as might not unnaturally be fallen into at the conclusion of a long and complicated trial, that in addition to general damages they might give special damages up to the sum of £460 by reason of the injury which the plaintiff company had suffered from the action of three firms in South America. The plaintiff company when it launched its suit complained not only of the two libels in respect of bill No. 19317, but also of libels in H respect of three other bills as to which it is alleged that the defendant bank had on Nov. 19 cabled to the B.A.T. the words "draft unpaid." It was not surprising that the plaintiff company made this complaint, because the B.A.T. did on Nov. 19 and subsequent days write to the three South American firms that they had received a cable from the defendant bank to that effect. But when the case came to be thrashed out at the trial, it turned out that this was a mare's nest. I The B.A.T. had received no such cable; why it wrote as it did was not ascertained and is not material. The B.A.T. may have drawn the inference that the bills of the three South American firms had not been honoured from the information which it had received as to bill No. 19317 which had been drawn by a fourth South American firm, but if the B.A.T. drew this inference, it was a wholly unwarranted one, as indeed counsel admitted. It may have been a mere blunder on the part of those in charge of the B.A.T. It might possibly be, seeing that the B.A.T. was in German hands, an act of pure mischief done in order to damage English credit. At any rate, by the end of the case there was no proof that any such cable as that

which the plaintiff company charged to have been despatched on or about Nov. 19 had been sent, and the case made as to a libel in respect of the other seven bills broke down. But the advisers of the plaintiff company, having these letters of the B.A.T. under their eyes, naturally persisted in the belief to the last moment that there was such a cable, and that before the trial was over they would get proof of it. They thought that if the defendant bank called witnesses they would be able to extract some admission from them, and they, therefore, produced evidence to show the special damage which they had incurred by reason of the communications made by the B.A.T. to the three South American firms, which damage could be traced back to the defendant bank if it had sent the alleged cable on Nov. 19, but could not otherwise be laid to the charge of the defendant bank. As they could not prove this cable, these items of special damage disappeared. But unfortunately SANKEY, J., told the jury that they had proved special damage—about £460. It is conceded that this was wrong, and that the matter must be put right either by reducing the verdict for £3,000 by the sum of £460 or by ordering a new trial. I have said, reducing the verdict by £460, because though the jury may not have built up the sum of £3,000 by adding £460, or even a part of it to the general damage, it is quite possible that it may have done so, and we have nothing to guide us. Counsel for the plaintiff's firm felt this and stated to your Lordships' House that he was willing if he could hold verdict for the balance to have the sum of £3,000 reduced by £460. To this suggestion two answers were made by counsel for the defendant bank. One which I will take first is founded upon the decision of this House in *Watt* v. *Watt* (1). That decision which I may perhaps be allowed to say is one of inconvenient rigour is nevertheless one which is unimpeachable, being founded on logic and binding by way of authority. The principle of it as I understand is this. Where damages are at large and the Court of Appeal is of opinion that the sum awarded is so unreasonable as to show that the jury has not approached the subject in a proper judicial temper, has admitted considerations which it ought not to have admitted, or rejected or neglected considerations which it ought to have applied, it is the right of the party aggrieved to have a new trial. He is not to be put off by the court saying that it will form its opinion as to the proper sum to be awarded, and reduce or enlarge the damages accordingly. He is entitled to an assessment by a jury which acts properly. He is not to be put off by a composite decision, or I might describe it as a resultant of two imperfect forces—an assessment partly made by a jury which has acted improperly and partly by a tribunal which has no power to assess. This principle does not apply where the assessment of any head of damage is to remain untouched, and the only interference with the verdict is the elimination of a head of damage.

Therefore, if your Lordships should be of opinion that the whole extent of the mischief that can have been done by the unfortunate slip of SANKEY, J., will be remedied by the reduction of this verdict to the sum of £2,540, I see no difficulty in the way of your Lordships doing it, and I urge that it should be done. But I confess that I think that the mischief is more deeply seated, and cannot be eradicated by such a superficial operation. I think that the judges on the Court of Appeal, who were on this head unanimous, were right in saying that there must be a new trial. I fear that the jury may have thought that the three items of special damage flowed from the libels uttered in respect of bill No. 19317, and that, if you started by such a plain and easily ascertained direct and immediate damage as £460 there was no limit to the expanding rings of commotion that a stone which had made such a splash as this first incident may have created. For these reasons and for those also which have been given by my noble and learned friend LORD ATKINSON, I am of opinion that there ought to be a new trial.

Solicitors: *Rawle, Johnston & Co.*, for *Laces & Co.*, Liverpool; *Rehder & Higgs.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

Re LYNE'S SETTLEMENT TRUSTS. Re GIBBS, LYNE *v.* GIBBS

[Court of Appeal (Swinfen Eady, M.R., Duke, L.J., and Eve, J.), October 25, 28, 29, 1918]

[Reported [1919] 1 Ch. 80; 88 L.J.Ch. 1; 120 L.T. 81; 35 T.L.R. 44; 63 Sol. Jo. 53]

Will—Will validly made under foreign law—"Personal estate"—Interest in proceeds of realty held on unexecuted trust for sale—Wills Act, 1861 (24 & 25 *Vict., c.* 114), *s.* 1.

In 1904 the testatrix, who was a British subject resident in France, made a holograph will, valid according to French law, in which she purported to leave all she possessed and all to come to her on the death of her father to the defendant F. The testatrix died in 1907 and her father died in 1917. At the time of her death the testatrix was entitled expectant on the death of her father to a share of his marriage settlement trust funds. These funds were, both at the time of the testatrix's death and at the time of her father's death, invested under a power in the marriage settlement in freehold hereditaments and held by the trustees during the father's lifetime with his consent upon trust for sale, and after his death, at the discretion of the trustees, in trust for the six children of his marriage equally. By the Wills Act, 1861, s. 1, the holograph will made by the testatrix in 1904 was valid to pass personal estate, but not realty. The question was whether the freehold hereditaments ought to be treated as realty or personalty for the purposes of the Act.

Held: an interest in the proceeds of sale of realty held upon a trust for sale which had not been executed was personal estate within s. 1 of the Wills Act, 1861, and, therefore, was capable of being disposed of by a will admitted to probate under that Act.

Notes. Considered: *Re Cartwright, Cartwright* v. *Smith*, [1938] 4 All E.R. 209. Referred to: *Re Berchtold, Berchtold* v. *Capron*, [1923] Ch. 192.

As to Lord Kingsdown's Act, see 7 Halsbury's Laws (3rd Edn.) 27, 59; and for cases see 11 Digest (Repl.) 401, 402. For the Wills Act, 1861, see 26 Halsbury's Statutes (2nd Edn.) 1356.

Cases referred to:

(1) *Chandler* v. *Pocock* (1881), 16 Ch.D. 648; 50 L.J.Ch. 380; 44 L.T. 115; 29 W.R. 877; 37 Digest 444, *481.*

(2) *Freke* v. *Lord Carbery* (1873), L.R. 16 Eq. 461; 21 W.R. 835; 11 Digest (Repl.) 385, *457.*

(3) *Du Hourmelin* v. *Sheldon* (1839), 4 My. & Cr. 525; 9 L.J.Ch. 25; 4 Jur. 116; 41 E.R. 203; 2 Digest (Repl.) 176, *66.*

(4) *A.-G.* v. *Brunning* (1860), 8 H.L.Cas. 243; 30 L.J.Ex. 379; 3 L.T. 36; 6 Jur.N.S. 1083; 8 W.R. 362; 11 E.R. 421, H.L.; 23 Digest (Repl.) 335, *4004.*

Also referred to in argument:

Re Grassi, Stubberfield v. *Grassi*, [1905] 1 Ch. 584; 74 L.J.Ch. 341; 92 L.T. 455; 53 W.R. 396; 21 T.L.R. 343; 49 Sol. Jo. 366; 11 Digest (Repl.) 393, *501.*

Miller v. *Collins*, [1896] 1 Ch. 573; 65 L.J.Ch. 353; 74 L.T. 122; 12 T.L.R. 228; 44 W.R. 466, C.A.

Re Watts, Cornford v. *Elliott* (1885), 29 Ch.D. 947; 55 L.J.Ch. 332; 53 L.T. 426; 33 W.R. 885, C.A.; 8 Digest (Repl.) 362, *420.*

Murray v. *Champernowne*, [1901] 2 I.R. 232; 35 I.L.T. 68; 11 Digest (Repl.) 413, **328.*

Appeal from an order of Peterson, J.

By a marriage settlement, dated Oct. 20, 1857, reversionary interest in certain

stocks, shares, and securities, amounting in value to £8,000, to which the husband was entitled, and reversionary interests amounting in value to £8,000, to which the wife was entitled, and also the sum of £750 to which she was absolutely entitled, were assigned to trustees upon trust to pay the annual income derived from the husband's fund to him during his life and to pay the annual income derived from the wife's fund to her during her life, and on the death of one of them to pay the whole income to the survivor during his or her life, and after the death of the survivor of them upon trust to hold the whole funds in trust for the issue of the marriage in such parts, shares, and proportions as the husband and wife should jointly appoint, and it was declared that the trustees might invest all principal moneys which should be paid to them in public stocks or funds of Great Britain or in mortgage of freehold or copyhold hereditaments in England or Wales, subject to the consent of the husband and wife or the survivor of them, and that it should be lawful for the trustees, at the request of the husband and wife during their joint lives and of the survivor of them during his or her life after the respective trust funds or either of them should have fallen into possession, to call in and convert into money the trust funds or either of them or any part thereof respectively, and to invest the same in the purchase of any messuages, tenements, or hereditaments situate in England or Wales which should be of the tenure of freehold or copyhold of inheritance or held for any term not having less than seventy years to run, with power to the trustees with the like consent, and, after the decease of the survivor of the husband and wife, at the discretion of the trustees to re-sell such messuages, tenements, and hereditaments, and it was provided that the trustees should stand possessed of the moneys arising from such sale upon and for the same trusts, interests, and purposes, and with and subject to the same powers and provisions, including the power of purchasing hereditaments, as would be then subsisting and capable of taking effect if the trust moneys had not been called in and converted into money and invested in the purchases thereinbefore mentioned, and that the hereditaments so to be purchased should in the meantime be considered as personal estate, and the rents and profits thereof paid to the persons and applied in the manner to whom and in which the annual income of the trust funds would have been payable and applicable, if no conversion of the same into real property had taken place. There was issue of the marriage six children. By a deed poll, dated Mar. 8, 1888, the husband and wife jointly appointed that after the death of the survivor of them the trustees of the settlement should stand possessed of the trust funds in trust for such six children equally. By the year 1892 the reversionary interests had fallen into possession, and become vested in the trustees of the settlement. The wife died in 1900, and the husband on April 21, 1917. One of the children of the marriage was Harriett Agnes Gibbs, who married on July 16, 1884. On June 8, 1895, she made a will in English form by which she gave the residue of her estate in trust for her two children, the defendants N. E. I. Gibbs and C. A. I. Gibbs. In the year 1895 she separated from her husband, and went to reside in France, where she continued to reside, except for short visits to England, until her death on Dec. 16, 1907. On June 21, 1904, she made an unattested holograph will in France by which she purported to leave all she possessed and all to come to her on the death of her father to the defendant Louis Gustave de la Ferté for his life, and to will as he pleased. This will was admitted to probate in England under Lord Kingsdown's Act, 1861, but, as it only operated under that Act in respect of personal estate, her will of 1895 had also been admitted to probate as operating to pass property which did not pass by the will of 1904 under the Act of 1861. At the date of the death of her father in 1917 part of the trust funds were invested in a freehold farm and some ground rents. In these circumstances the trustees of the settlement took out this summons asking (i) whether, according to the true construction of the settlement, the freehold farm and ground rents ought to be treated as personal estate, and, if so, whether the same were personal estate within the meaning of Lord Kingsdown's Act; and (ii) whether, according to the true construction of the above-mentioned

wills of 1895 and 1904, the beneficial interest in the freehold farm and ground rents was disposed of by either and, if so, which of such wills.

By s. 1 of the Wills Act, 1861 (Lord Kingsdown's Act):

> "Every will and other testamentary instrument made out of the United Kingdom . . . shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England to probate . . . if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made."

The summons was adjourned into court and came on to be heard before PETERSON, J., on June 5, 1918. On June 12, 1918, it was decided by PETERSON, J., that the freehold farm was not "personal estate" within the meaning of Lord Kingsdown's Act, and was disposed of by the will of 1895. From that decision the defendant L. G. de la Ferté now appealed.

Maugham, K.C., and *Pawley Bate* for the defendant L. G. de la Ferté.
Tomlin, K.C., and *Nesbitt* for the defendant children.
Owen Thompson for the husband of the testatrix.
Lavington for the trustees of the settlement.

SWINFEN EADY, M.R.—[HIS LORDSHIP stated the facts, and continued:] It is not disputed that Mrs. Gibbs' will of 1904 was valid as regards its execution, having regard to the provisions of Lord Kingsdown's Act. Mrs. Gibbs was a British subject, and she made her will according to the form required by the law of the place where it was made. The question which arises is: Was it effective to dispose of her interest under her father's and mother's marriage settlement? It was admitted to probate with the earlier will by the judgment of the Probate Court in England on Feb. 7, 1910, but that only establishes its validity as a will, and the question still remains whether the testatrix's interest under the settlement was effectively disposed of by it. It is not disputed that the language of the will was sufficient to dispose of the testatrix's interest as a matter of construction. The testatrix purported to dispose of it, and it was only not disposed of if it was property that was not within Lord Kingsdown's Act. Lord Kingsdown's Act applies only to personal estate. Section 1 provides as follows:

> "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate and in Scotland to confirmation, if the same be made according to the forms required . . . by the law of the place where the same was made. . . ."

The question arising on this appeal is whether the interest under the marriage settlement was "personal estate" within the meaning of Lord Kingsdown's Act. What was the interest? It was a one-sixth share of the proceeds of sale of property which at that time was land. Under the settlement money had been brought into settlement, and there was a power in the settlement to invest in land, with a trust for reconversion. Part of the settled funds was invested in a freehold farm and freehold ground rents, but it was all subject to the trust for reconversion.

What, then, was Mrs. Gibbs' interest? It was a right to have the trusts of the settlement carried out and a right therefore to receive a sixth part of the net proceeds of sale as money. It was urged that no reconversion had yet taken place, and that Mrs. Gibbs and the other children or their representatives could together have agreed that the freehold property should not be re-sold and have elected to take it as land. They never did so, however, and, when no election has in fact been made, it might just as well be argued that money ought to be treated as land because the persons entitled to it could have invested it in land. A test that might be applied is this: If the property had been owned by someone

who died intestate, to whom would it have passed? Clearly it would have passed to the personal representative. Indeed, so clear was this that it was not disputed that in ordinary language Mrs. Gibbs' interest was personal estate—viz., money to arise from the sale of real estate. That, however, does not entirely dispose of the case, because the question is whether Mrs. Gibbs' interest was "personal estate" within the meaning of Lord Kingsdown's Act, and it is said that, although in ordinary parlance it was personal estate, regard must be had to the definition of that expression in the Wills Act. It is said that Lord Kingsdown's Act was an Act to amend the Wills Act, or was at any rate in pari materia with it, and that the expression "personal estate" in Lord Kingsdown's Act must be interpreted by the canon of interpretation in the Wills Act, and by reference to the definition of personal and real estate in the Wills Act.

Section 1 of the Wills Act says

> "that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or different meaning, shall in this Act, except where the nature of the provisions or the context of the Act shall exclude such construction, be interpreted as follows:"

Then follow the definitions of "real estate" and "personal estate" which have been used more than once in the course of the argument. There is no question that, if one takes the definition of "personal estate," the interest in question here is personal estate within that definition, which provides that personal estate shall extend to

> "leasehold estates and the chattels real and also to moneys, shares of Government or other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator."

There can be no doubt that by law the property devolves upon the executor. In *Chandler* v. *Pocock* (1) COTTON, L.J., said (16 Ch.D. at p. 653):

> "When I look at the words of the Act of Parliament alone, I find it impossible to say that there has not been an exercise of the power as regards this fund, for it is personal estate—that is to say, it is property, which, but for the will, would pass by law to and devolve upon executors and administrators."

So here this interest by law would pass to and devolve upon the executors or administrators. Then it is said that this interest is an interest "other than a chattel interest in real estate," and so comes within the definition of real estate in the Wills Act. In my opinion, assuming for the moment that regard has to be had to the Wills Act in the construction of Lord Kingsdown's Act, the two expressions "real estate" and "personal estate" as defined in the Wills Act are mutually exclusive. An interest cannot at the same time be both real and personal estate within the Wills Act, and in my opinion, this is clearly "personal estate" within the meaning of that Act.

We have heard a good deal of argument as to the meaning of "personal estate" in Lord Kingsdown's Act on the assumption that the language was different from what it is, and that a distinction was drawn by it between movables and immovables. But that is not the language of the Act. The distinction drawn is between real estate and personal estate, and not between movables and immovables. There has also been a good deal of argument as to the difference between pure and impure personalty, and it is said that the proceeds of sale of real estate savour of realty within the cases under the Mortmain Acts. But, again, what have we to do with that? It may be said that, having regard to the fact that interests in land are governed by the lex situs, the curious result would follow, if the proceeds of sale of land held upon trust for sale were not to be regarded as land, that the validity of the will would be governed by one law and the validity of the disposition by another, and yet it is conceded that such is the case. Leaseholds are personal estate within Lord Kingsdown's Act—it has been so decided—and they are

obviously so within the Wills Act, and yet in *Freke* v. *Lord Carbery* (2) it was decided that the validity of a bequest of leaseholds is governed by the lex situs.

In my opinion, some assistance is derived from the law formerly applicable to gifts of the proceeds of sale of realty to aliens. In *Du Hourmelin* v. *Sheldon* (3) it was decided that, when land was given in trust for sale and the proceeds were to be divided between the members of a class some of whom were aliens, the alien could take, although the law then was that an alien could not take a devise of land. And it was pointed out that the incapacity of aliens to take land was founded on reasons connected with the feudal system and not applicable to money, and that the proceeds of sale of land were money. In my opinion, an interest in the proceeds of sale of realty held upon trust for sale is "personal estate" within the Wills Act and Lord Kingsdown's Act; and, that being so, the will of 1904 was effective to dispose of Mrs. Gibbs' interest under the settlement. I am of opinion that the judgment below ought to be reversed and that it ought to be declared that the interest in question is personal estate within Lord Kingsdown's Act.

DUKE, L.J.—I am of the same opinion. If Lord Kingsdown's Act had stood alone, the learned argument with which the court has been occupied could not have been justified for ten minutes. It could not be disputed on the language of that Act alone that the interest of the testatrix was personal estate. I see no ground either in law or common sense for doing anything to limit the beneficial operation of Lord Kingsdown's Act. The object of the Act is this. It was passed at a time when difficulties had arisen owing to extended facilities for travelling in cases where travellers with property in England could not obtain advice from persons familiar with the intricacies of English law, and it was passed to alleviate those difficulties. It is said that the operation of the Act must be limited by giving effect to the complex definitions of "personal estate" and "real estate" in the Wills Act on the ground that Lord Kingsdown's Act amended the Wills Act or, at any rate, was in pari materia. In a sense this is true. The Wills Act was an Act to amend the law with regard to wills and so, too, was Lord Kingsdown's Act. It is necessary, however, in considering the question, to bear in mind the exceptional character of the interpretation section in the Wills Act. It was framed with remarkable care, and did not lay down that "personal estate" and "real estate" were thereafter to have the meaning attributed to them there. It provided that:

> "In the Act, except where the nature of the provision of the context of the Act shall exclude such construction, be interpreted as follows: . . ."

And then it went on to say that "real estate" was to extend to certain property, and that "personal estate" was to extend to certain other forms of property, in each case making the definition as comprehensive as possible. I agree with the Master of the Rolls in thinking that it is incontestable that the definition of "personal estate" and "real estate" are mutually exclusive, and in the definition of "personal estate" the governing words are the concluding words of the definition,

> "all other property whatsoever which by law devolves upon the executor or administrator and to any share or interest therein."

In my judgment the property here in question was not an interest in real estate. It would not have passed to the heir, but to the personal representative, and was, to quote from the judgment of COTTON, L.J., in *Chandler* v. *Pocock* (1), "property which but for the will would pass by law to and devolve upon executors and administrators." The court was pressed with the Mortmain Act, but it had no bearing on this will. It was said also that there was a period when the Probate Court would not have admitted to probate a will dealing only with real estate directed to be sold. So be it. But if reference be made to *A.-G.* v. *Brunning* (4) it becomes perfectly obvious that that did not depend on its devolution as real estate or personal estate, but was a mere question of administration, and that, notwithstanding the view taken in that case, the executor of a deceased testator

was entitled to the assistance of the court of equity to get in these assets. I have added these few words to the judgment of the Master of the Rolls because we are differing from the learned judge in the court below, and because we have heard serious argument on these points.

EVE, J.—I have arrived at the same conclusion. The property of which the testator died possessed was admittedly "personal estate" within the ordinary meaning of that expression. If, therefore, the same meaning is to be attached to it in Lord Kingsdown's Act, the judgment below cannot be supported. But it is argued that it must have a restricted meaning imposed on it in that Act by reason of the interpretation clause in the Wills Act, 1837, and it is said that such an interest as we have to deal with does not come within the meaning of that expression. This contention is answered in two ways: First, there is nothing in express terms or arising by necessary implication to warrant us in imposing on this expression in the later Act the statutory meaning impressed upon it by the earlier Act; and, secondly, the property here in question is "personal estate" within the definition in the Wills Act, 1837, in that it is property devolving upon the executor. It follows that the judgment below was erroneous.

Appeal allowed.

Solicitors: *Dixon, Ward & Dixon*, for *Sweet & Maugham*, Paris; *Parkers & Hammond*; *Dunn & Wilson*.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

SAGE *v.* EICHHOLZ

[King's Bench Division (Bray, A. T. Lawrence and Shearman, JJ.), April 2, 1919]

[Reported [1919] 2 K.B. 171; 88 L.J.K.B. 816; 121 L.T. 151; 83 J.P. 170; 35 T.L.R. 382; 26 Cox, C.C. 432; 17 L.G.R. 354]

Criminal Law—Corruption—"Knowingly" giving false document to an agent to mislead principal—Need to prove intention to corrupt agent—Prevention of Corruption Act, 1906 (6 *Edw.* 7, *c.* 34) *s.* 1 (1), *third paragraph.*

By the Prevention of Corruption Act, 1906, s. 1 (1), para. 3: "If any person knowingly gives to any agent . . . any . . . document in respect of which the principal is interested, and which contains any statement which is false . . . in any material particular and which to his knowledge is intended to mislead the principal, he shall be guilty of a misdemeanour." In the first two paragraphs of s. 1 (1) the word "corruptly" is used in defining the offences created by those paragraphs. The title of the Act of 1906 was "An Act for the better prevention of corruption."

The respondent was the owner of certain property in London for which he paid water rates. It was the practice of the Metropolitan Water Board to allow a deduction from water rate payable by an owner in respect of any portion of the property which had been empty during the quarter for which the rate was payable, provided that a document called a "claim for empties" was sent in by the owner to the Board. On July 18, 1918, the respondent handed in at one of the Board's offices, to the Board's receiving officer there, a "claim for empties" which he had signed and which contained a false statement regarding the period for which portions of the property had been empty. The receiving officer forwarded the document to the appropriate office of the

Board where the appellant, the Board's registration officer, believing the claim to be true, allowed a deduction from the rate. Neither the appellant nor the receiving officer knew that the claim contained a false statement. The appellant laid an information charging the respondent with unlawfully and knowingly giving to an agent (the receiving officer) a document which contained a false statement and was intended to mislead the principal (the Board) contrary to s. 1 (1), para. 3, of the Act of 1906. The magistrate dismissed the information on the ground that an offence under the third paragraph was not established unless corruption of the agent or an intention to corrupt him were proved as the operation of the Act, having regard to its title, was confined to preventing the corruption of agents. On appeal,

Held: the corruption or intended corruption of an agent by the person giving the false document were not ingredients of the offence created by the third paragraph of s. 1 (1) since in that paragraph the word "knowingly" was deliberately used instead of the word "corruptly" in the earlier paragraphs of s. 1 (1); the meaning of "knowingly" was clear and unambiguous and did not imply corruption; and, therefore, the decision of the magistrate was wrong.

Statute—Construction—Title—Long title—Reference to long title—Section clear and unambiguous.

Per **Curiam:** Where the words of a section are clear and unambiguous their meaning cannot be restricted by reference to the title to the Act.

Notes. As to corrupt transactions with agents, see 10 HALSBURY'S LAWS (3rd Edn.) 835, 836; and for cases see 15 DIGEST (Repl.) 119. For the Prevention of Corruption Act, 1906, s. 1 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 924. As to the heading or title to an Act, see 31 HALSBURY'S LAWS (2nd Edn.) 460, 461. For cases on the construction of a statute with reference to its title, see 42 DIGEST 647 et seq.

Cases referred to:

(1) *Vacher & Sons, Ltd.* v. *London Society of Compositors*, [1913] A.C. 107; 82 L.J.K.B. 232; 107 L.T. 722; 29 T.L.R. 73; 42 Digest 605, *54*.

(2) *R.* v. *Stoddart*, [1901] 1 K.B. 177; 70 L.J.Q.B. 189; 83 L.T. 538; 64 J.P. 774; 49 W.R. 173; 17 T.L.R. 55; 45 Sol. Jo. 61; 19 Cox, C.C. 587, C.C.R.; 25 Digest 463, *498*.

Also referred to in argument:

Fletcher v. *Lord Sondes* (1827), 3 Bing. 501; 1 Bli.N.S. 144; 130 E.R. 606, H.L.; 42 Digest 672, *836*.

Fielding v. *Morley Corpn.*, [1899] 1 Ch. 1; 67 L.J.Ch. 611; 79 L.T. 231; 47 W.R. 295, C.A.; 42 Digest 604, *52*.

Case Stated by a metropolitan magistrate sitting at Bow Street.

An information was preferred by the appellant, an officer of the Metropolitan Water Board, against the respondent, the owner of property in London, charging that the respondent, on July 3, 1918, at Shaftesbury Avenue, in the metropolitan police district, contrary to s. 1 (1) of the Prevention of Corruption Act, 1906, unlawfully and knowingly gave a document, namely a "claim for empties" (i.e., a claim for deduction from water rates in respect of those portions of the property which were empty during the quarter for which the rates were payable), to an agent of the Metropolitan Water Board, the document being one in respect of which the Board were interested and containing a statement which was false in a material particular, which, to the knowledge of the respondent, was intended to mislead the Board.

Upon the hearing of the information the following facts were proved or admitted: 1. The appellant was a local receiving officer of the Metropolitan Water Board, and the respondent was the owner of a block of buildings known as St. Mary's Chambers, Strand, in the county of London, and paid the water rates thereon. 2. Under the terms of a resolution dated July 19, 1908, it was the practice of the Board in

cases in which water rates were payable by owners to make a certain allowance in respect of any portion of the property which had been empty during any part of the quarter in respect of which the rate was being paid, provided that a form of "claim for empties," furnished for the purpose, was sent in respect of which the allowance was claimed. Such claims were made half-yearly for the periods ending June 30 and Dec. 31 respectively. 3. On July 8, 1918, the respondent called at the office of the Board at No. 166, West End Lane, Hampstead, and handed to one Horace George Fitt, the receiving officer there, a document which was a "claim for empties" for the half-year from Jan. 1 to June 30, 1918, duly filled up and signed by the respondent, and dated July 3, 1918. It was not part of the duty of the said Fitt to read the said document, but in accordance with his duty he forwarded the same to the office responsible for the water rates of the district in which St. Mary's Chambers were situated, and this was his only duty in connection with the document. The responsible office was situated in Shaftesbury Avenue, and the registration officer there was the appellant. Acting upon the assumption that the number of weeks during which the property was said to have been empty was accurately stated, the appellant calculated that the proper allowance for entries to be made was £1 10s. 10d., and the final notice for water rate was consequently reduced from £25 18s. to £24 7s. 2d., which latter amount was duly paid by the respondent, who received an official receipt. 4. Of the six separately assessed tenements referred to in the claim form, the complaint of 19s. affected five cases in these buildings. Out of the sum of £1 10s. 10d. allowed to the respondent on the faith of the "claim for empties," the sum of 19s. was attributable to portions of the property which were improperly claimed as being empty. It was not suggested on behalf of the prosecution, which was at the instance of the Metropolitan Water Board acting through their servant, the appellant, that either the appellant or any other servant or agent of the Board was aware of the falsity of the statements in the claim form.

Upon the above facts it was contended on behalf of the respondent that no offence against the Prevention of Corruption Act, 1906, was disclosed on the grounds (i) that the corruption of the agent was an essential part of the offence with which the respondent was charged; (ii) that there was no evidence of intention to mislead the Metropolitan Water Board; and (iii) that the servant to whom the account was handed was not an agent within the meaning of the statute. On behalf of the appellant it was contended that the offence created by para. 3 of s. 1 of the Act of 1906 might be complete without any knowledge on the part of the agent of the falsity of the statements therein referred to, and without any intention on the part of such agent to mislead his principal, and that the words "to his knowledge" at the end of para. 3 of the subsection referred to the knowledge of the accused person, and not of the agent where the person accused was not an agent.

The learned magistrate held that the servant to whom the document was handed over was an agent of the Board, and that no attempt had been made to corrupt him or any other servant of the Board. He was further of opinion that the operation of the Act was limited to the prevention of the corruption of agents, and he stated that in his opinion he was guided by the title and the general phraseology of the Act. The learned magistrate considered that as the agent in this case was a mere channel of communication and entirely without power to influence his principal in the matter, he could not possibly have been corrupted, and that the Act did not apply at all. He was further of opinion that the word "his" in the phrase "which to his knowledge is intended to mislead the principal" had reference to the agent and not to the giver of the document with reference to whom the word "knowingly" was already used in the first words of the paragraph. In accordance with the view which he took the learned magistrate dismissed the information.

The form of the "claim for empties in respect of water rates payable by owners" was annexed to the Case Stated, and in it there were columns in which the situation of the property and the actual periods of non-occupation were set out. The following notice was included in the form:

A "Owners of property are hereby warned that any person making a false declaration of claim is upon conviction by a court of summary jurisdiction liable under the Prevention of Corruption Act, 1906, to a fine not exceeding £50 or four months' imprisonment,"

and at the foot of the form was the following: "I declare that the above statement is true," signed by the respondent. The document was dated July 3, 1918.

B By s. 1 (1) of the Prevention of Corruption Act, 1906, it is provided:

"If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation C to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or if any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing D to show favour or disfavour to any person in relation to his principal's affairs or business; or if any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal; he shall E be guilty of a misdemeanour."

Travers Humphreys for the appellant.
McCall, K.C., and *Clements* for the respondent.

BRAY, J.—In this case evidence was given which showed that the respondent had called at the office of the Metropolitan Water Board and had handed to a man F named Fitt, the receiving officer there, a document which is called a "claim for empties." Then there was evidence from which the learned magistrate would be entitled to infer that the document contained a statement which was to the knowledge of the respondent false and was intended to mislead the Board. The prosecution claim that the evidence showed an offence under the third part of s. 1 (1) of the Prevention of Corruption Act, 1906—"an Act for the Better Preven- G tion of Corruption." Without calling, as I understand it, upon the respondent to state his defence, the learned magistrate ruled that the offence did not fall within the section. He says:

"I held that the servant to whom the document was handed was an agent of the Board, but that no attempt was made to corrupt him or any other H servant of the Board. I am of opinion that the operation of the Act was limited to the prevention of the corruption of agents, and in this opinion I was guided by the title and the general phraseology of the Act. I considered that as the agent in this case was a mere channel of communication and entirely without power to influence his principal in the matter, he could not possibly have been corrupted, and the Act did not apply at all."

I Then he has stated in the latter part of that paragraph a further ground for dismissing the information with which I will deal presently. In substance, the learned magistrate's decision that this case did not fall within the section was founded on the fact that there was no corruption or intended corruption. The question that we have to decide is whether or not that decision was right.

Our first duty is to look at the words of the section. If they are quite clear and unambiguous it would not be right for us to alter the construction by reason of the preamble or the title of the Act. There is no doubt that they did create a new offence, and therefore, according to the rules that are laid down, the language

must be clear and unambiguous; and I certainly do not want to depart in any way from the rule which was read to us by counsel for the respondent from LORD HALSBURY'S LAWS OF ENGLAND. Let us look at the section. I will begin at the beginning of it. The first paragraph says: "If any agent corruptly accepts or obtains" —that is quite clear, because the word "corruptly" is there. Then the second paragraph says: "If any person corruptly gives or agrees to give"—again there is the word "corruptly" there. Then the third paragraph says: "If any person knowingly gives to any agent." Thus in the third paragraph the word "corruptly," which is deliberately used in the first two paragraphs, is deliberately omitted. The learned magistrate has found that Fitt was an agent, and that this account, the claim for empties or whatever it was, was given to him knowingly. Now let us see how the third paragraph of the section proceeds after the few introductory words which I have read: "Or if any agent knowingly uses with intent to deceive his principal" (that is not the offence which is complained of here, because the offence complained of here is an offence committed by the "person"—that is, the outsider) "any receipt, account, or other document in respect of which the principal is interested" (I do not think that it can be denied that this claim for empties is a document in respect of which the principal is interested) "and which contains any statement which is false or erroneous or defective in any material particular" (there is no doubt that this document did contain a statement which was false in a material particular) "and which to his knowledge is intended to mislead the principal," he shall be guilty of a misdemeanour.

Admittedly, this is a document calculated to mislead the principal. The learned magistrate then says: "I was of opinion that the word 'his' in the phrase 'which to his knowledge is intended to mislead the principal' has reference to the agent, and not to the giver of the document, with reference to whom the word 'knowingly' is already used in the first words of the paragraph." Now, I think that there was evidence on which the learned magistrate could have found, after he had heard all the evidence, that that word "his" did not refer to the agent alone, but to the other person as well, and in my opinion he is clearly wrong. The words of the Act, as it seems to me, are perfectly clear and unambiguous. The word "knowingly" is deliberately used in the third paragraph of the subsection, instead of the word "corruptly," which is used in the first and second paragraphs of it. The word "knowingly" does not involve "corruptly" at all. Have we any right to say when the statute uses the word "knowingly" deliberately, instead of "corruptly," because this Act is an Act for the better prevention of corruption, that that word "knowingly" must be read as "corruptly"? In my opinion the word "knowingly" is perfectly clear and unambiguous. It does not imply any corruption, and I have no doubt that the word "corruptly" was deliberately omitted or altered there because of the great difficulty in a case of this kind in proving corruption, and probably because it was the intention to make it an offence, whether it was done corruptly or not. I do not think that there is any room for doubt as to the meaning of these words, and therefore we have no right to restrict them merely because this is a penal Act, or merely because it is an Act stated to be for "the better prevention of corruption."

In the course of the hearing before us *Vacher & Sons* v. *London Society of Compositors* (1) was referred to. This is a House of Lords case, but I certainly do not think that it advances counsel for the respondent's argument. In that case LORD MOULTON says ([1913] A.C. at p. 128):

> "The title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope. This is not the case with the short title, which in this instance is 'The Trades Disputes Act, 1906.' That is a title given to the Act solely for the purpose of facility of reference. If I may use the phrase, it is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title. It is not legitimate, in my opinion, to use it for

A the purpose of ascertaining the scope of the Act. Its object is identification and not description."

For the reasons which I have stated I think that the learned magistrate was wrong in law and came to an erroneous conclusion. The case must therefore be remitted to him.

B **A. T. LAWRENCE, J.**—I am of the same opinion. I entirely agree as to the importance of the title of an Act of Parliament, wherever the words of the section dealt with are ambiguous, but I do not think that the title can be used to control plain and unambiguous words—the words must have their ordinary and full meaning. I do not think that the argument presented by counsel for the respondent explains at all the absence of the word "corruptly" from the third paragraph of C s. 1 (1) of the Act. The word "corruptly" is used in the first and second paragraphs of this subsection, and then it appears, as my Lord has just said, to be deliberately omitted in the third paragraph. That omission is, to my mind, readily explained by the fact that it is frequently almost impossible to prove that an agent has been corrupted, and in many cases the agent may not be corrupted, but, in order to make an agent guilty of an offence, the subsection is careful to D say that if any agent "knowingly" uses, with intent to deceive his principal, such a document as this, then he shall be guilty of a misdemeanour, but to say that the third person is not guilty, unless he also corrupts the agent, seems to me to omit to recognise the plain fact that this is put in a disjunctive way. There are two possible offences—one in the person who gives the document, and the other in the agent who knowingly uses it. It seems to me, therefore, that this is a case in E which the learned magistrate ought to have heard the whole case, and ought to have found facts in accordance with the evidence. I do not agree with him in thinking that the word "his" in the last line but one of the third paragraph of sub-s. (1) of this section applies only to the agent. It probably applies to both the principal and the agent, but it clearly cannot apply to the agent alone. If it did it would be redundant, because the words with regard to the agent are "or if any F agent knowingly uses with intent to deceive his principal," and therefore there would be no use in having them repeated in the last lines of this paragraph, because to repeat them would be redundant. I am of opinion that the case has been wrongly decided, and that this appeal must be allowed.

SHEARMAN, J.—I agree. This is another of those cases in which an attempt is G being made to cut down the plain meaning of a criminal statute, by referring either to the preamble of the Act or to the title of the Act. It has happened more than once that a certain abuse has brought a new statute into existence, which has then proceeded to deal not only with that abuse, but also with kindred abuses. A case very much like the present is that of *R.* v. *Stoddart* (2), in which the court declined, because of the preamble of the statute, to cut down the plain words of H one of the sections. I think that the words of the statute are quite plain, and that the learned magistrate should have gone on to hear the case and see whether there should be a conviction. I agree with the judgments which have just been delivered by my learned brothers, and am of opinion that the appeal should be allowed.

Appeal allowed and case remitted.

Solicitors: *Walter Moon*; *John Hands.*

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

A

BALDOCK *v.* WESTMINSTER CITY COUNCIL

[Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), December 18, 1918]

[Reported 88 L.J.K.B. 502; 120 L.T. 470; 83 J.P. 98; 35 T.L.R. 188; 17 L.G.R. 190]

B

Highway—Obstruction—Street refuge—Duty to light—Metropolis Management Act, 1855 (18 & 19 *Vict.*, *c.* 120), *ss.* 108, 130.

Under s. 108 of the Metropolis Management Act, 1855, the defendants had power to erect street refuges, and under s. 130 they had a duty to light the streets within their district. On the night of Mar. 20, 1917, during the restriction of the street lighting system due to war conditions, it was difficult to maintain electric pressure and a light on a street refuge erected by the defendants became erratic, at some times burning and at others extinguished. At a time when it was extinguished the driver of the plaintiff's taxicab, without negligence, collided with the refuge and the cab sustained damage.

C

Held: the duty of the defendants generally was to provide sufficient light to indicate the position of refuges; even if, under the war-time lighting restrictions, they were relieved of that duty, they had chosen consistently to show some light on all the refuges in their streets; that indicated to the public that the refuges were still lighted, and, if a light went out, the defendants were in breach of their duty—possibly in the circumstances a self-imposed duty—to light that particular refuge; and, therefore, there was evidence of negligence on the part of the defendants which made them liable for the damage suffered by the plaintiff.

D

E

Notes. Considered: *Carpenter* v. *Finsbury B.C.*, [1920] 2 K.B. 195; *Wodehouse* v. *Levy*, [1940] 3 All E.R. 137; *Greenwood* v. *Central Service Co.*, [1940] 3 All E.R. 389; *Wodehouse* v. *Levy*, [1940] 4 All E.R. 14; *Lyus* v. *Stepney B.C.*, 4 All E.R. 463; *Knight* v. *Sheffield Corpn.*, [1942] 2 All E.R. 411. Distinguished: *Fisher* v. *Ruislip-Northwood U.D.C. and Middlesex County Council*, [1944] 2 All E.R. 149. Referred to: *Sheppard* v. *Glossop Corpn.*, [1921] All E.R.Rep. 61; *Fisher* v. *Ruislip-Northwood U.D.C.*, [1945] 2 All E.R. 458.

F

As to the provision of street refuges and the duty to warn of obstructions on the highway, see 19 Halsbury's Laws (3rd Edn.) 214, 316, 489; and for cases see 26 Digest (Repl.) 456 et seq.; 466 et seq. For Metropolis Management Act, 1855, see 15 Halsbury's Statutes (2nd Edn.) 535.

G

Case referred to:

(1) *Morrison* v. *Sheffield Corpn.*, [1917] 2 K.B. 866; 86 L.J.K.B. 1456; 117 L.T. 520; 81 J.P. 277; 33 T.L.R. 492; 61 Sol. Jo. 611; 15 L.G.R. 667, C.A.; 26 Digest (Repl.) 533, *2086*.

H

Appeal from an order of a Divisional Court (Lush and Bailhache, JJ.).

By his particulars of claim the plaintiff alleged that the defendants, their servants and agents, were guilty of negligence in the following respects. (i) They failed to light and keep lighted a street refuge situated in Cockspur Street within their district, or to take any steps or precautions to prevent persons driving vehicles along the highway colliding therewith, or to notify to them the existence or position of the said refuge on the highway. (ii) They failed to place a red lamp or other warning on the refuge, or to mark the same in any way with whitewash or otherwise. (iii) They neglected to light the lamp thereon, and keep it lighted, after they knew, or, but for their negligence, they would have known, that it was unlighted and dangerous, or to place a watchman thereon. The lamp upon the refuge was defective in that it was not properly lighted, or not at all, or, if it had been lighted, was liable to go out. (iv) They placed upon the highway a refuge or obstruction which was a nuisance to persons lawfully using the highway at night unless properly lighted. It was alleged that, in consequence of the aforesaid

J

defects and acts of ngeligence, the driver of a taxicab belonging to the plaintiff was unable to see the refuge while lawfully driving the cab on the highway with the result that he collided with the refuge and the cab was damaged. In the event of the plaintiff being held entitled to recover, the damages were agreed at £48 15s.

The case was heard at Westminster County Court when the learned deputy county court judge left the following questions to the jury, which, together with the answers, were as follows: (i) Was the accident due to inevitable accident in the reduced conditions of street lighting [owing to the war lighting restrictions]?—No. (ii) If not, was it due to any negligence on the part of the defendants?—Yes. (iii) What was the negligent act or omission causing the accident?—Omission to maintain a danger lamp on the refuge. (iv) Was the accident due to, or contributed to by, the plaintiff's own negligence?—No. (v) Was the lamp on the refuge alight at the time of the accident?—No. (vi) If it was out, what caused it to go out?—In our opinion, there is no conclusive evidence to show the cause. On these findings the learned judge said that he should enter judgment for the defendants. In stating his reasons for this conclusion he said:

> "I cannot find a scintilla of evidence that this particular lamp had gone out before the night of the accident, or that the defendants knew that it had gone out, or was likely to go out. Nor can I find any evidence that the defendants knew, or ought to have known, that it had gone out on the night of the accident before the accident occurred. In the circumstances I think it would be unreasonable to hold that the defendants were bound to provide against the contingency of a particular lamp going out; and I do not think there is any evidence upon which a jury can find that the defendants were gulity of negligence in the omission to maintain a danger lamp on the refuge in question."

The plaintiff appealed to the Divisional Court who allowed the appeal on the ground that

> "whether there was any danger of the lights going out under the circumstances, and whether, if such were the case, the defendants ought to have taken other precautions, were pure questions of fact for the jury,"

with whose conclusion the court was not entitled to interfere. The defendants appealed.

By the Metropolis Management Act, 1855:

> "Section 108. It shall be lawful for every vestry and district board from time to time . . . to place any posts or other erections in any carriageways so as to make the crossings thereof less dangerous for foot passengers, and also from time to time to repair and renew . . . any . . . obstruction or encroachment on any carriageway . . ."
>
> "Section 130. Every vestry and district board shall cause the several streets within their parish or district to be well and sufficiently lighted, and for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every such street, and shall cause the same to be lighted with gas or otherwise, and to continue lighted at and during such times as such vestry or board may think fit, necessary, or proper . . ."

Courthope-Munroe, K.C., and *Lort-Williams* for the defendants.
Thorn Drury, K.C., and *Harold Brandon* for the plaintiff.

BANKES, L.J.—This is an appeal from the Divisional Court raising two questions: (i) Whether the defendants, the mayor and councillors of the city of Westminster, were under any duty with regard to lighting this refuge into which the plaintiff's taxicab ran; and (ii) whether, assuming there was any such duty, there was any evidence upon which the jury could come to the conclusion at which they came, and which they expressed in the second and third answers to the questions put to them by the learned county court judge. The questions and answers were: "Was it due to any negligence on the part of the defendants?—

Answer: Yes. What was the negligent act or omission causing the accident? —Answer: Omission to maintain a danger lamp on the refuge."

With regard to the duty the position appears to be this. The defendants are, under s. 130 of the Metropolitan Management Act, 1855, under a duty with regard to lighting the streets, and by s. 108 they have the power conferred upon them of placing fences and posts and arches upon the footways, carriageways, and so forth, and of placing posts or other erections in any carriageway, so as to make the crossing thereof less dangerous. They have, therefore, under those two sections power and a duty imposed upon them. Under that power they had the right to erect this refuge; the statute imposes no special duty upon them to light it, but it does impose upon them the general duty to cause the streets within their district to be well and sufficiently lighted, and I should say primâ facie that that duty included a duty to provide sufficient light to indicate the position of any obstructions which they place in the street under the powers conferred upon them by s. 108. LUSH, J., in his judgment, seems to have doubted whether anybody could quarrel with the discretion of the local authority in reference to the amount of light necessary, and we have not heard that question argued; but for myself I desire to say that I should like to hear the matter fully argued before I assented to the proposition laid down by LUSH, J. It is, however, not necessary or material to come to any decision upon that matter for the purposes of this appeal. It is quite true that during the war under statutory power or its equivalent the authorities gave directions under which the amount of light in the street had to be very materially diminished, and to that extent the obligation upon local authorities to provide a sufficient light was reduced. It may well be that it was competent for the local authority to extinguish all the lights upon refuges in any part of their district without incurring liability to anybody. I am not prepared to express any opinion about that, because the regulations which were made have not been before us.

The fact is that, in spite of these regulations, the defendant local authority did continue to light all the refuges for which lights were provided, and that fact, in my opinion, imposes a duty upon them—it may be a self-imposed duty, but it is none the less a duty—and it becomes a duty, in my opinion, in this way. The local authority have no right to lay traps for people in their streets, and they would not contend for a moment that they had. If a local authority consistently lights all the shelters in its streets, it does publicly indicate to the persons who are in the habit of traversing those streets that the shelters are still lighted, and if it comes to the knowledge of the local authority that the lights which they so provide are untrustworthy or erratic, and are sometimes out and sometimes on, the local authority, as it seems to me, are providing something which is in the nature of a trap to the travelling public, because the public are allowed to believe that the shelters are lighted, and to the knowledge of the local authority they are sometimes lighted and sometimes not. Having taken upon themselves this self-imposed duty, what steps must they take in order to fulfil that duty reasonably and efficiently? They may take one of two courses, I think. Knowing the erratic character of these lamps, they may either provide a safety lamp upon each shelter or a sufficient watch either by their own men, or by the lighting company's men, or by the police, to secure efficient notice being given within some reasonable time after the fact has been ascertained that any particular lamp has become erratic. I am not for a moment suggesting that I should have come to the same conclusion, but, that evidence being before the jury, it was open to the jury to take the view that this local authority, not having provided these additional safety lamps, was bound to have a sufficient watch in the street to enable them to become aware of the fact that any particular lamp had become erratic. The jury may have taken the view, and they had a right to take the view, that, upon this evidence, the local authority were wanting in that part of their duty with regard to this particular lamp on this particular night. That case, as it seems to me, was obviously that put by counsel in the county court. He was not prepared to take the burden of suggesting that

every refuge must have a danger lamp in addition to its ordinary light, and it would have been very unwise of him to take upon himself a greater burden than was necessary. The judge's note says: "Mr. Newman, on behalf of the plaintiff, put the case in this way: He contended that a danger or red lamp ought to have been placed on the refuge to indicate to the public that the light which had previously existed was no longer there." That means that, it having been ascertained that this was an erratic light, at the moment it was ascertained steps ought to have been taken at once to place a danger lamp there.

In my opinion, there was a duty, it may be a self-imposed duty, but there was a duty on the local authority in regard to this particular lamp on this particular refuge, on this particular night, and there was evidence upon which the jury could come to the conclusion at which they came in regard to this particular lamp on this particular night. Counsel for the defendants argued that it is not possible to take that view of the jury's attitude because of the language they used, and that we must treat this case as though the jury had accepted the view that the duty of the local authority was to place a danger lamp upon every shelter, and that there was no evidence which justified them in coming to such an unreasonable conclusion. I do not so read their finding. It is quite true they use the word "maintain," but it does not at all necessarily mean or only bear the meaning that counsel puts upon it, and, having regard to the contention of the plaintiff's counsel, to which I have already referred, it does not seem to me there is any reasonable ground for attributing that meaning to the jury's verdict. Construing the verdict in the sense that I have indicated, there was, in my opinion, evidence on which the jury were entitled to come to that conclusion, and on those grounds I think the appeal ought to be dismissed.

WARRINGTON, L.J.—I agree.

SCRUTTON, L.J.—The question we have to decide is not whether we should have found the verdict which the jury has found in this case. They were a county court jury, and their finding is conclusive if there is sufficient evidence on which they could reasonably come to that conclusion. The case is very similar to the problem which the Court of Appeal had before them in *Morrison* v. *Sheffield Corpn.* (1). There the corporation had power to plant trees in the roadway, and they planted trees with a guard which was a proper and reasonable guard, and instituted the ordinary system of lighting. Then the Zeppelins came, all public lighting was suppressed, and an unfortunate man walked into the guard and tore his eye out. Speaking from recollection, I do not think any member of the Court of Appeal would have arrived at the verdict at which the jury arrived in that case, but the jury found that the defendants, if they had exercised reasonable foresight, could have neutralised the danger which resulted in the accident. In this case was there evidence on which the jury could come to their finding? I do not think it was necessary that specific evidence should be given to the jury that the road at Trafalgar Square was a dangerous road, and a road with a great deal of traffic. There was evidence before the jury that, owing to the restriction of the lighting system, some of the lights were erratic, because it was difficult to maintain pressure. There was evidence that, owing to the shortage of labour, it took some considerable time before the central authorities knew when the light was working erratically. Under those circumstances the jury found that on this refuge a red light should have been placed. I do not read that myself as a finding of such a character that the defendants need be afraid that on every refuge they should put a red light; it must depend on the circumstances, both of the particular refuge and of the lighting system and the inspection system at the time, but the jury found that, at that time, under that system of lighting, under that system of inspection, the corporation ought to have put a red light on their refuge. It is not a question whether I should have found that verdict. It is whether there was any

evidence on which the jury could find that verdict, and, considering the matter, to the best of my ability, I cannot say there was no evidence on which a reasonable jury could find as they found. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Allen & Son*; *Edmond O'Connor & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

COLDMAN *v.* HILL

[COURT OF APPEAL (Bankes, Warrington and Scrutton, L.JJ.), November 6, December 9, 1918]

[Reported [1919] 1 K.B. 443; 88 L.J.K.B. 491; 120 L.T. 412; 35 T.L.R. 146; 63 Sol. Jo. 166]

Bailee—Duty to care for goods bailed—Extent—Agister—Obligation to use ordinary diligence in care of cattle agisted—Liability if cattle stolen—Obligation to inform owner.

A bailee for reward is not an insurer of the goods bailed. His duty is to use towards the preservation from injury of the goods entrusted to him that degree of care which might reasonably be expected from a reasonable man in respect of his own goods, and that obligation includes not only the duty of taking all reasonable precautions to obviate risks of injury, but also the duty of taking all proper measures for the protection of the goods when such risks are imminent or have actually occurred, which may include warning the bailor of the danger or its occurrence.

If a bailee is sued in detinue only it is a good answer for him to say that the goods were stolen without any default on his part. But the remedy of a bailor is not confined to an action in detinue. He may found an action on negligence, and in such a case the bailee must show that the loss of the goods was not due to any fault of his own and were not recoverable by any reasonable act on his part. Care must be taken not to extend unduly the duty of a bailee by expecting him to take action which may involve him in unreasonable expense or trouble.

An agister does not, any more than any other bailee for reward, ensure the safety of the cattle agisted, but is bound only to use ordinary care and diligence in his care of them.

Accordingly, where the plaintiff sent some cattle to the defendant for agistment, and two cows were stolen without any default of the defendant, and the defendant, although he had been informed that two men had been seen driving two cows away, gave no notice of the theft to the police or to the plaintiff,

Held, in an action for detinue and negligence: (i) on the allegation of detinue, the defendant must succeed, for the plaintiff had not proved that the goods were stolen as the result of any default on his part, but (ii) on the allegation of negligence, there was a duty on the defendant to give the plaintiff notice of the theft of the cows; he was in breach of that duty; and, therefore, the onus was on him to prove that, if he had given notice of the theft, the cows would still not have been recovered; he had not discharged that onus; and so the plaintiff was entitled to succeed.

Notes. Considered: *Re S. Davis & Co.*, [1945] Ch. 402. Referred to: *Gutter* v. *Tait* (1947), 177 L.T. 1.

As to agistment, see 1 HALSBURY'S LAWS (3rd Edn.) 681, 682; as to the obligations of a bailee, see ibid., vol. 2, pp. 114–120. For cases see 2 DIGEST (Repl.) 338–341, 3 DIGEST (Repl.) 104 et seq.

Cases referred to:

(1) *Morison* v. *Walton* (May 10, 1909), unreported, H.L.

(2) *Joseph Travers & Sons, Ltd.* v. *Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp.M.L.C. 561; 20 Com. Cas. 44, C.A.; 3 Digest (Repl.) 79, *164.*

(3) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E.R. 107; 3 Digest (Repl.) 55, *1.*

(4) *Kettle* v. *Bromsall* (1738), Willes, 118; 125 E.R. 1087; 3 Digest (Repl.) 64, *58.*

(5) *Southcote's Case* (1601), 4 Co. Rep. 83 b; 76 E.R. 1061; sub nom. *Southcot* v. *Bennet*, Cro. Eliz. 815; 3 Digest (Repl.) 66, *78.*

(6) *Searle* v. *Laverick* (1874), L.R. 9 Q.B. 122; 43 L.J.Q.B. 43; 30 L.T. 89; 38 J.P. 278; 22 W.R. 367; 3 Digest (Repl.) 77, *152.*

(7) *Broadwater* v. *Blot* (1817), Holt, N.P. 547; 2 Digest (Repl.) 338, *271.*

(8) *Gledstane* v. *Hewitt* (1831), 1 Cr. & J. 565; 1 Tyr. 445; 9 L.J.O.S.Ex. 145; 148 E.R. 1548; 43 Digest 510, *488.*

(9) *Wilkinson* v. *Verity* (1871), L.R. 6 C.P. 206; 40 L.J.C.P. 141; 19 W.R. 604; sub nom. *Williamson* v. *Verity*, 24 L.T. 32; 3 Digest (Repl.) 63, *51.*

(10) *Ranson* v. *Platt*, [1911] 2 K.B. 291; 80 L.J.K.B. 1138; 104 L.T. 881, C.A.; 3 Digest (Repl.) 83, *186.*

(11) *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q.B. 11; 60 L.J.Q.B. 209; 64 L.T. 851; 55 J.P. 614; 7 T.L.R. 269, C.A.; 29 Digest 16, *201.*

(12) *Corbett* v. *Packington* (1827), 6 B. & C. 268; 9 Dow. & Ry.K.B. 258; 5 L.J.O.S.K.B. 142; 108 E.R. 451; 2 Digest (Repl.) 338, *270.*

(13) *Mackenzie* v. *Cox* (1840), 9 C. & P. 632; 3 Digest (Repl.) 78, *161.*

(14) *Brabant* v. *King*, [1895] A.C. 632; 64 L.J.P.C. 161; 72 L.T. 785; 44 W.R. 157; 11 T.L.R. 488; 11 R. 517, P.C.; 3 Digest (Repl.) 77, *153.*

(15) *Reeve* v. *Palmer* (1858), 5 C.B.N.S. 84; 28 L.J.C.P. 168; 5 Jur.N.S. 916; 141 E.R. 33, Ex. Ch.; 3 Digest (Repl.) 115, *358.*

(16) *Bullen* v. *Swan Electric Engraving Co.* (1907), 23 T.L.R. 258, C.A.; 3 Digest (Repl.) 66, *73.*

(17) *Powell* v. *Graves & Co.* (1886), 2 T.L.R. 663; 3 Digest (Repl.) 66, *70.*

(18) *Moore* v. *Evans*, [1917] 1 K.B. 458; 86 L.J.K.B. 495; 115 L.T. 892; 33 T.L.R. 125; affirmed, [1918] A.C. 185; 87 L.J.K.B. 207; 117 L.T. 761; 34 T.L.R. 51; 62 Sol. Jo. 69; 23 Com. Cas. 124, H.L.; 29 Digest 421, *3282.*

(19) *Notara* v. *Henderson* (1872), L.R. 7 Q.B. 225; 41 L.J.Q.B. 158; 26 L.T. 442; 20 W.R. 443; 1 Asp.M.L.C. 278, Ex. Ch.; 41 Digest 495, *3237.*

(20) *Great Northern Rail. Co.* v. *Swaffield* (1874), L.R. 9 Exch. 132; 43 L.J.Ex. 89; 30 L.T. 562; 2 Digest (Repl.) 366, *464.*

(21) *Sims & Co.* v. *Midland Rail. Co.*, [1913] 1 K.B. 103; 82 L.J.K.B. 67; 107 L.T. 700; 29 T.L.R. 81; 18 Com. Cas. 44, D.C.; 41 Digest (Repl.) 511, *3408.*

(22) *Armory* v. *Delamirie* (1722), 1 Stra. 505; 93 E.R. 664; 3 Digest (Repl.) 67, *83.*

(23) *Hammersmith and City Rail. Co.* v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 42 Digest 655, *638.*

Also referred to in argument:

Turner v. *Stallibrass*, [1898] 1 Q.B. 56; 67 L.J.Q.B. 52; 77 L.T. 482; 46 W.R. 81; 42 Sol. Jo. 65, C.A.; 2 Digest (Repl.) 338, *275.*

Appeal by the plaintiff from a judgment of the Divisional Court (ATKIN and SHEARMAN, JJ.) reversing a judgment of the learned judge of Portsmouth county court.

The defendant, a farmer, took in cattle for agistment. In the spring of 1917 the plaintiff sent seven cows to be agisted by the defendant. No special terms were arranged between the parties. It was the duty of the defendant's stockman to go round the defendant's marshes every day and count the cattle when grazing. On June 5 the plaintiff came and took away a cow that had calved, and he told the defendant's man that he would come again to take away two cows that were soon due to calve, and would bring two more in their place. On the same day two of the plaintiff's cows, without the defendant's default, were stolen from the defendant's land. On June 6, some sixteen hours after the theft, the stockman found that the cows were missing, and reported the fact to the defendant, who, in the mistaken and unwarranted belief that the plaintiff had himself taken the cows away, did nothing. On June 7 the stockman was told that two men had been seen driving two cows away at about midday on June 5. He reported this fact also to the defendant, who took no step to inform either the plaintiff or the police, and made no effort to trace the cows himself. Three weeks afterwards the plaintiff came to take away his two cows, and then learned for the first time that they were missing. Cattle had previously been stolen from the defendant's land, and he had then informed both the owners and the police. The plaintiff sued in the county court in detinue of the cows and in negligence on the part of the defendant as a bailee for reward whereby the cows were lost. The learned judge held that the defendant was under an obligation not only to use reasonable care and diligence in keeping the cows, but to take reasonable steps to recover them, and that if he had communicated with the police when the theft was known to him the cows would have been recovered. He, therefore, gave judgment for the plaintiff. On appeal, the Divisional Court held that, assuming that there was a duty on the part of the defendant to inform the plaintiff or the police that the cows were missing, there was no evidence that their non-recovery was due to the neglect of that duty. The court, therefore, directed judgment to be entered for the defendant. The plaintiff appealed.

Ashton, K.C., and *St. Gerrans* for the plaintiff.

du Parcq for the defendant.

Cur. adv. vult.

Dec. 9, 1918. The following judgments were read.

BANKES, L.J.—This is an appeal from a decision of the Divisional Court reversing a judgment of the judge of the county court holden at Portsmouth in favour of the plaintiff, the present appellant. The appeal raises the question where the onus of proof ultimately lies in a case where a bailee who has been deprived of the goods entrusted to him without any fault of his own is found to have been guilty of negligence in not taking some step which might have led to the recovery of the goods.

[His Lordship stated the facts and continued:] The cows were in fact stolen. The county court judge has held that they were stolen without any default on the part of the defendant. The time at which the fact that the cows were missing was first reported to the defendant is not stated, but it is clear that some fifteen or sixteen hours at least must have elapsed between the time when they were stolen and the time when the defendant was first told that they were missing. The thieves had consequently had plenty of time to get clear away with their booty. Whether they could, or could not, have been traced and followed, and the property recovered, is of course quite another matter, and it is in reference to this question that the point as to the onus of proof has arisen. The point was distinctly taken in the county court that if the judge found that the defendant had been guilty of negligence in not communicating with the owner, or with the police, when he found that the cows were missing, the onus lay upon him of satisfying the judge that, even if he had communicated with either the owner or the police, there was not, in the circumstances, any reasonable chance of recovering the cows themselves or their value from anyone who had dealt with them. On the other hand, it was contended for the defendant that if the plaintiff was making a case founded on any

negligence on the part of the defendant, the ordinary rule applied that the onus of proving, not only the negligence complained of, but that the loss complained of resulted from that negligence, lay upon the plaintiff. The judgment of the county court judge does not make it clear to me what view he took upon this point. In one part of his judgment, when dealing with the facts, he says:

> "It is not, of course, a matter of mathematical certainty, but, in my opinion, there is no reasonable doubt that if, when the cows were missing, the police had been communicated with, and prompt search made, the cows would have been recovered, and so far as it is a question of fact, I so find."

In the Divisional Court the question as to the onus of proof does not appear to have been mentioned or, if mentioned, pressed. Neither learned judge in his judgment makes any reference to the point. It appears to have been assumed that the onus lay upon the plaintiff, and the judgments deal only with the question whether the county court judge's finding which I have quoted above was justified either in fact or in law. If that was the question upon which this appeal depended, I should agree with the view taken by ATKIN, J., that there was no evidence to support any finding of fact on this point. The argument for the plaintiff in this court was practically confined to the question of the onus of proof, and was in substance the same as that addressed to the county court judge.

I have felt some difficulty in coming to a conclusion upon this question, and, as I read the authorities, I cannot find that this precise point has ever been raised or decided. The books contain decisions dating back to very early times which deal with the law of bailment and with the degree of care which is required of a voluntary bailee and of a bailee for reward, and with the duty of a bailee, when called upon to re-deliver the goods, to give satisfactory evidence, if the goods cannot be produced, that it is owing to no fault of his, and with the question upon whom the loss is to fall if the goods perish while in the bailee's custody from some unexplained cause, and in many instances with the precise duty under which the bailee rests in the particular circumstances of some particular bailment. All these cases, however, so far as I have been able to ascertain, relate to the period during which the goods are in the custody or control of the bailee. The general duty of the bailee for hire appears to be extremely well put by LORD HALSBURY in the unreported case of *Morison* v. *Walton* (1) in the House of Lords, which is quoted by BUCKLEY, L.J., in his judgment in *Joseph Travers & Sons* v. *Cooper* (2). He says ([1915] 1 K.B. at p. 88):

> "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."

In *Joseph Travers & Sons* v. *Cooper* (2) the question as to the onus of proof arose with reference to a barge which was under the custody and control of the bailee at the time of the loss.

The difficulty I have felt in the present case arises in consequence of the line of cases which from the earliest times have laid it down that a bailee is not responsible if the goods in his custody are stolen without any default on his part. In *Coggs* v. *Bernard* (3) LORD HOLT says (2 Ld. Raym. at p. 913):

> "He is not answerable if they are stolen without any fault in him."

In *Kettle* v. *Bromsall* (4) WILLES, C.J., after referring to *Southcote's Case* (5), stated the law thus (Willes, at p. 121):

> "But if the goods were delivered to the defendant to take care of them as his own proper goods, &c., if he be robbed of them that is a good plea."

In *Searle* v. *Laverick* (6) BLACKBURN, J., quoted, apparently with approval, the language of GIBBS, C.J., in *Broadwater* v. *Blot* (7). In that action, which was against an agister for losing a horse, the Chief Justice said (Holt, N.P. at p. 548):

"All the defendant is obliged to observe is reasonable care. He does not insure and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstances which occasioned it. If there were a want of due care and diligence generally the defendant will be liable."

I doubt whether the Chief Justice in the passage referring to particular negligence had in mind so much the question of the onus of proof in relation to the question of damage as the question of the onus of proof of negligence which must be connected with the loss. I think the law still is that, if a bailee is sued in detinue only, it is a good answer for him to say that the goods were stolen without any default on his part, as the general bailment laid in the declaration pledges the plaintiff to the proof of nothing except that the goods were in the defendant's hands and were wrongfully detained: *Gledstane* v. *Hewitt* (8) per LORD LYNDHURST, 1 Cr. & J. at p. 569. As has, however, often been pointed out, the remedy of a bailor is not confined to an action in detinue. In STEPHEN'S COMMENTARIES (7th Edn., 1874) vol. 3 at p. 432, he says:

"Where upon a contract of bailment the bailor complains of a failure to re-deliver the article, the remedy is (according to the circumstances) by action of detinue, trover, on promises, or on the case for negligence."

The distinction which may be drawn between these different forms of action where a question arises upon the Statutes of Limitation is pointed out by WILLES, J., in *Wilkinson* v. *Verity* (9), L.R. 6 C.P. 210.

In the present case the plaintiff brought his action on the case of negligence as well as in detinue. So far as the action was founded in detinue the defendant had, I think, on the findings of the county court judge, a complete defence. The plaintiff, however, relied upon a breach of the defendant's duty directly arising out of the contract of agistment—namely, the duty to give him notice if any of his cattle were found to be missing. The county court judge found that such a duty existed. I entirely agree with him. If the defendant recognised it as a duty, as he admitted that he did, to count the cattle every day, it must follow, I think, as a consequential duty that he must give notice to the owner if any be found missing. When, therefore the defendant established the fact that the cows were stolen without any default on his part, the onus of proof was shifted, and it rested with the plaintiff to prove some act of negligence connected with the loss of the cows in the sense that the loss may have been occasioned, or contributed to, by that act of negligence. That onus the county court judge finds that the plaintiff discharged. Does the onus again shift, as it undoubtedly would, if the act of negligence complained of had occurred while the cows were still in the defendant's custody and control, as, for instance, if the complaint was that no attempt had been made to rescue an animal which had got fast in a ditch; or if an animal had been injured by some unexplained cause; or if something had occurred while the animals were still in the defendant's possession, which rendered it reasonable that he should give the plaintiff notice of the facts, as in *Ranson* v. *Platt* (10)? I can see no sound reason why the rule should not be the same in the one case as in the other. In both cases the breach of duty arises directly out of the contract of bailment, and the case seems covered by the rule that the bailee must show that the loss of the goods was not due to any fault of his own. In such a case as the present it may be said that the goods are not lost, in the sense of being completely lost, so long as they are recoverable by any reasonable act on the part of the bailee; and it is, I think, in this sense only that a loss without default on his part can be relied on by a bailee as a complete defence to an action for damages for loss of the goods. Care must, of course, be taken not to extend unduly the duty of a bailee by expecting him to take action which may involve him in unreasonable expense or

trouble; but no such question arises in this case. As has often been pointed out, the onus of proof in the course of a case may be constantly shifting: see per BOWEN, L.J., in *Medawar* v. *Grand Hotel Co.* (11), [1891] 2 Q.B. at p. 23. In the present case I think it shifted more than once, but ultimately it rested on the defendant; and, as he did not attempt to discharge it, the plaintiff is entitled to succeed, the appeal must be allowed, and the judgment of the county court judge restored, with costs here and below.

WARRINGTON, L.J.—In this case the defendant took in certain cows belonging to the plaintiff for agistment in his field. Two of them were stolen, and have not been recovered. The question is whether under the circumstances the defendant is liable for their value.

The common law duty of the agister is, I think, to take care of the animals entrusted to him in order that the owner may come and take them away. This, then, was the duty so imposed upon the defendant: *Corbett* v. *Packington* (12). The agister does not, any more than any other bailee for reward, ensure the safety of the cattle entrusted to him, but is bound only to use ordinary care and diligence in his care of them—i.e., to act in the matter as a reasonably prudent man would act.

The material facts are that on June 5, 1917, somewhere about the middle of the day, two thieves drove the cows from the field, and they have never been recovered or heard of. The theft was in no way due to or made easier by any negligence on the defendant's part. So far, although, no doubt, the onus was on him to prove that the loss was not due to negligence on his part, he has discharged that onus, and, if there were nothing more, he would not be liable: *Mackenzie* v. *Cox* (13). The further facts upon which the plaintiff's case is based are that on June 6, early in the day, the defendant's stockman found that the cows were not in the field, and told the defendant so. The defendant, however, assuming, as he says, that the plaintiff had himself taken them away, made no communication to him. Next day, the 7th, the stockman received information that two men unknown had been seen driving the cows away, and he conveyed this information to the defendant. The defendant, however, neglected to inform the plaintiff or the police, and took no steps himself to trace the cows. The learned county court judge held that the defendant was under an obligation not only to use reasonable care and diligence in keeping the cows, but to take reasonable steps to recover them, and that, if he had communicated with the police when the loss was known to him, they would have been recovered, and he, accordingly, gave judgment for the plaintiff. The learned judges in the Divisional Court have come to the conclusion that, assuming a duty on the part of the defendant to communicate to the plaintiff or the police the fact that the cows were missing, there was no evidence that their loss was due to the neglect of that duty, and they directed judgment to be entered for the defendant.

The plaintiff contends before us that the onus of showing that the loss arose from no fault of the defendant is not discharged by merely proving that the removal of the cows was due to no fault of his own, but that he must go further and prove affirmatively that his failure to give information did not contribute to the result. Whether the plaintiff is right or not in this contention depends, to my mind, on the question whether, when the fact of the absence of the cows became known to the defendant, they were completely lost. It seems to me that the duty of the agister is to take reasonable care to prevent a loss. It may well be that, though the cattle are temporarily out of the custody of the agister, they are not completely lost, and he can, by taking some step which a reasonable man would take, restore them to his custody, and so prevent the completion of the loss. Such a step it would be his duty to take. But as soon as it is proved that the loss is complete, and it is a question, therefore, not of preventing the loss, but of recovering the goods, then I think the burden is cast on the plaintiff of showing that the step in question would have resulted in such recovery. In the present case I think the

true position is this. By proving that without fault of his the cattle were driven off on June 5, the defendant established a primâ facie case of complete loss, but then the further evidence, I think, showed that the defendant failed to take a step which a reasonable man would have taken, and one which, if it had been taken, might have prevented the apparent loss from becoming complete. Then, this being shown, the defendant, though he has primâ facie discharged the onus, has not in reality done so, and it would be on him to prove that, even if the step in question had been taken, the loss was complete. The matter being left in doubt, the onus is on the defendant to prove that the omission of the step in question would not have affected the apparent completeness of the loss: *Joseph Travers & Sons* v. *Cooper* (2). This onus the defendant failed to discharge, and the result is that the decision of the county court judge was right and must be restored, and that of the Divisional Court must be reversed.

SCRUTTON, L.J.—This is an appeal from the decision of a Divisional Court reversing the judgment of a county court judge. The defendant received for reward as agister two cows of the plaintiff. When the plaintiff demanded them they were not forthcoming. The plaintiff thereupon sued the defendant for refusal to deliver on demand, and for negligence as agister. The material negligence alleged was that the defendant did not take any or any sufficient steps, when the absence of the cows was discovered, to find and recover them for the plaintiff, and never reported the loss to the plaintiff or to the police. The county court judge held that the defendant's primâ facie obligation was to re-deliver on demand, and that he could only excuse his failure to do so by showing that he was prevented by some cause not due to the breach of his duty to take reasonable care. He further held that the failure to take any steps to inform the plaintiff or the police of the loss, or himself to inquire into it, was negligence, and he found, as a fact, that, if information had at once been given, the cows would not have been lost. He expresses his final conclusion thus:

> "His [the defendant's] primâ facie obligation was to re-deliver the goods on demand, and he could only excuse his failure so to do by showing that he was prevented by some cause not due to the breach of his duty to take reasonable care. This onus he has, in my opinion, not discharged."

The Divisional Court accepted the position that the defendant was guilty of a breach of duty in taking no steps to try to recover the cows, but they held that the loss could not reasonably be found to follow from this breach of duty—that such a finding was pure guessing. They, therefore, set aside the judgment for the plaintiff which the county court judge had directed, and entered judgment for the defendant. The plaintiff appeals. It must be remembered that, this being an appeal from a county court, it is not open to question the judge's findings of fact, whether we should have arrived at them or not, unless there was no evidence on which he could reasonably so find. If he must have left the question to the jury, if there had been one, we cannot interfere with his findings.

First, what was the defendant's duty? He was a bailee for hire, and it is clear that his duty was not that of an absolute insurer, but was to use towards the preservation of the goods entrusted to him from injury that degree of care which might reasonably be expected from a skilled agister or a reasonable man in respect of his own goods, and that obligation included not only the duty of taking all reasonable precautions to obviate risks of injury, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred: *Brabant* v. *King* (14), [1895] A.C. at p. 640. This might include notifying the owner of the thing bailed of the danger. Thus, in *Ranson* v. *Platt* (10) this court held that it was the duty of a bailee, when served with a summons to deliver up the goods, to give the owner notice of the claim, "to see that the bailor's property is properly defended, or, at any rate, give notice to him if possible of proceedings hostile to his title." It cannot be contended, and, indeed,

it was not argued, that a bailee seeing a thief leaving with the goods, or seeing bailed cattle straying on the road, or finding that cattle had recently strayed, is not bound to look for them or inform the owner. In this case the bailee, though he knew of the absence of the cattle within twenty-four hours of their departure, did nothing. He neither informed the police nor the owner, nor looked for them himself. His excuse has been already stated. It is enough to say that this evidence of negligence must have been left to the jury, and, therefore, we cannot, in my opinion, interfere with the finding of the judge that there was a breach of duty or negligence in not giving the owner or the police notice of the loss. Indeed, I should have made the same finding.

The Divisional Court have, however, held that the burden of proof that the negligence caused the loss is on the plaintiff, and that, as it is pure guesswork whether inquiries or search would have recovered the beasts or not, he fails to sustain the burden of proof he is under. I am satisfied that this view of the burden of proof is erroneous where a bailee is sued in detinue for refusal to return goods on demand, and answers that he cannot return them because they are lost or stolen. In *Reeve* v. *Palmer* (15) COCKBURN, C.J., WILLIAMS and WILLES, JJ., agreeing, said (5 C.B.N.S. at p. 90):

> "It has been held from a very early time, that, where a chattel has been bailed to a person, it does not lie in his mouth to set up his own wrongful act in answer to an action of detinue, though the chattel has ceased to be in his possession at the time of the demand. The same principle applies where the chattel has ceased, by an act of omission on his part, to continue in his possession or custody. It cannot be permitted to the bailee, though he has done no act to dispossess himself of the article, to defend himself on the ground that he has kept it so carelessly and negligently that he no longer is in a condition to restore it to the bailor."

In *Wilkinson* v. *Verity* (9) WILLES, J., repeated this. He said (L.R. 6 C.P. at p. 210):

> ". . . on the other hand, if the action of detinue is resorted to, as it may be (Com. Dig., Detinue, A.), for the purpose of asserting against a person entrusted for safe custody a breach of his duty as bailee, by detention after demand, independent of any other act of conversion, such as would make him liable in an action of trover, it should seem that the owner is entitled to sue at election either for a wrongful parting with the property (if he discovers and can prove it), or to wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request, and that, in the latter case, it is no answer for the bailee to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor."

The bailee must, therefore, show that the goods were lost without default on his part.

In *Bullen* v. *Swan Electric Engraving Co.* (16) the Court of Appeal, affirming WALTON, J., whose admirable discussion of the law I have found most useful, held that, while it was not necessary for the bailee to show exactly how the loss happened, it was necessary for him to show that he had used as much care as a reasonable man would use in protecting his own chattels, and FARWELL, L.J., expressed the view that, if *Powell* v. *Graves* (17) was correctly reported, it was wrongly decided, as there no evidence was given by the bailee of any reasonable precautions having been taken to avoid loss. Further, I think it is clear that proof of loss does not mean temporary deprivation of possession so that the bailee is relieved from any further duties. I agree with the view expressed by BANKES, L.J., in *Moore* v. *Evans* (18) ([1917] 1 K.B. at p. 471) that "mere temporary deprivation" would not in ordinary circumstances "constitute a loss," though it is not necessary that the bailee should prove "a certainty that the goods can never be recovered." A stranger without fault of the bailee opens a gate so that cattle

stray out, can it be said that they are lost, though the bailee could go out into the road and drive them back, or, by going along the road inquiring, could find where they had strayed to? A thief steals the goods, and the bailee is told of the theft within half an hour. Is he excused from following the thief, or informing the police or the owner? In my view, a bailee, who finds goods in his control threatened by a danger, to prevent which may involve unusual exertion or expenditure outside his usual duty, must either inform the owner of the threatened danger, if he can by doing so get instructions to act or enable the owner to act in time to avert the danger: *Ranson* v. *Platt* (10); or, if he cannot give the owner information in time, he must act as agent of necessity on behalf of and at the expense of the owner, taking the steps which a reasonable owner would take in defence of property of the value in question: *Notara* v. *Henderson* (19); applied to carriers by land by POLLOCK, B., in *Great Northern Rail. Co.* v. *Swaffield* (20); see also *Sims* v. *Midland Rail. Co.* (21). The bailee, then, is in this dilemma: If he could inform the owner in time for him to do anything, he must do so. If he could not because of the owner's absence, the bailee himself must act as agent of necessity and inform the police, the most obvious thing for any owner of bulky goods to do when they have been stolen and he hears of their disappearance within twenty-four hours of the theft. If the bailee wants to show that neither of these steps would be of any use he must prove it.

In my view, there is a recent decision of this court, which was not cited to the Divisional Court, which, however, decides the question and by which we are bound. In *Joseph Travers & Sons* v. *Cooper* (2) a bailee of goods had them in a barge. His lighterman left the barge unattended, and in his absence the barge was either mud-sucked—namely, held in the mud, or caught under a projecting bolt, and in either case was flooded by the rising tide. It was extremely doubtful what exactly happened, and whether, if the lighterman had been on board, he could have prevented the loss. PICKFORD, J., held that the burden of proof was on the bailor to show that there was negligence which caused the loss, and that, as he left the matter in doubt, he failed. All the members of the Court of Appeal thought this was wrong. They took the view that it was incumbent upon the defendant, the bailee, when the goods were lost, to prove that he had taken reasonable care to keep and preserve them. As BUCKLEY, L.J., said ([1915] 1 K.B. at p. 88):

> "The defendant as bailor of the goods is responsible for their return to their owner. If he failed to return them, it rested on him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted."

The court support this view by an unreported decision of the House of Lords in *Morison* v. *Walton* (1) in which I was counsel. In that case the defendant was bailee of a boat which he undertook to tow across the Atlantic with a term in the contract that he should have a man on board. He broke his contract, and had no man on board. The boat was lost at night, and there was no evidence whether she was lost by gradual straining and leakage, or by a sudden and overwhelming wave. There was, therefore, no evidence whether the man, if on board, would have detected the leak and ordered the towing vessel to slacken speed, or whether he would have been destroyed by the overwhelming wave without being able to do anything. The House of Lords held that the man who had, by breaking his contract, destroyed the possibility of any evidence on the subject, could not be heard to say that there was no evidence that his breach of contract caused the loss. It was his duty as bailee to prove that his breach of duty did not cause the loss, not the plaintiff's duty to show that it did. This appears to be merely an application of the principle omnia præsumuntur contra spoliatorem, under which a man who, having converted property, refuses to produce it that its exact value may be known, is liable for the greatest value that such an article could have: *Armory* v. *Delamirie* (22), *Hammersmith and City Rail. Co.* v. *Brand* (23) (L.R. 4 H.L. at p. 224). This decision appears to me exactly to cover this case, and to show that

the county court judge in his accurate and careful judgment took the right view of the legal position. For these reasons, I am of opinion that the decision of the Divisional Court should be reversed and the judgment of the county court judge restored with costs here and below.

Appeal allowed.

Solicitors: *C. P. Fielder, Le Riche & Co.*, for *Biscoe-Smith & Blagg*, Portsmouth; *James Miller & Co.*, for *E. J. Bechervaise*, Portsmouth.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LEYLAND SHIPPING CO., LTD. *v.* NORWICH UNION FIRE INSURANCE SOCIETY, LTD.

[HOUSE OF LORDS (Lord Finlay, L.C., Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Shaw), December 10, 11, 13, 1917, January 31, 1918]

[Reported [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp.M.L.C. 258]

Insurance—Marine insurance—Proximate cause of loss—"Immediate" cause—Immediate in efficiency—Novus casus interveniens—Unsuccessful attempts to obviate consequences of damage.

In determining the cause of a loss covered or excepted by a policy of marine insurance the immediate cause is to be considered. "Immediate" for this purpose means immediate in efficiency, not in time. That efficiency may be preserved although other causes spring up which do not destroy it or truly impair it, so that it culminates in a result of which it still remains the real efficient cause. Accordingly, where a vessel suffers damage from an excepted peril unsuccessful attempts to obviate the natural consequences of that damage do not constitute a novus casus interveniens, and the loss of the vessel is due to the excepted peril in the grip of which the vessel has been throughout.

The plaintiffs insured their vessel with the defendants against marine perils by a policy which contained the ordinary f.c. and s. clause. The vessel was torpedoed near Havre, but she was brought into Havre harbour. Bad weather caused her to bump against the quay, and the harbour authorities, fearing she would sink in the berth which she then occupied, directed her removal to an outer berth. When the tide fell the vessel grounded, and the additional strain caused her to make more water. Subsequent tides caused further damage, and she ultimately became a total wreck. In an action by the shipowners claiming to recover as for a loss by perils of the sea,

Held: the torpedoing of the vessel was the proximate cause of loss, and, therefore, the plaintiffs could not recover under the policy.

Decision of the Court of Appeal, [1917] 1 K.B. 873, affirmed.

Notes. Considered: *Stoomvaart Maatschappij H.* v. *Merchants Marine Insurance Co.* (1918), 35 T.L.R. 25; *Harrisons, Ltd.* v. *Shipping Controller*, [1921] 1 K.B. 122; *P. Samuel & Co.* v. *Dumas*, [1924] All E.R.Rep. 66; *Clan Line Steamers* v. *Board of Trade* (1928), 97 L.J.K.B. 735; *Merchants' Marine Insurance Co.* v. *Liverpool Marine and General Insurance Co.* (1928), 97 L.J.K.B. 589; *Board of Trade* v. *Hain Steamship Co.*, [1929] All E.R.Rep. 26; *Yorkshire Dale Steamship Co.* v. *Minister of War Transport*, [1942] 2 All E.R. 6; *Liverpool and London War Risks Insurance Association* v. *Ocean Steamship Co.*, [1947] 2 All E.R. 586; Applied: *Boiler Inspection and Insurance Co. of Canada* v. *Sherwin-Williams Co.*

of Canada, [1951] A.C. 319. Referred to: *British and Foreign Steamship Co.* v. *R.*, [1918] 2 K.B. 879; *British Steamship Co.* v. *R., British India Steam Navigation Co.* v. *Green and Liverpool and London War Risks Insurance Co.*, [1919] 2 K.B. 670; *Mountain* v. *Whittle*, [1921] All E.R.Rep. 626; *Adelaide Steamship Co.* v. *R.*, [1923] 1 K.B. 59; *Compañia Martiartu v. Royal Exchange Assurance Co.*, [1923] 1 K.B. 650; *Royal Exchange Assurance Co.* v. *Kingsley Navigation Co.*, [1923] A.C. 235; *The Christel Vinnen*, [1924] All E.R.Rep. 197; *Adelaide Steamship Co.* v. *A.-G.*, [1925] All E.R.Rep. 65; *Lazard Bros. & Co.* v. *Brooks* (1932), 37 Com. Cas. 224; *Smith Hogg & Co.* v. *Black Sea and Baltic General Insurance Co.*, [1940] 3 All E.R. 405; *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.*, [1940] 4 All E.R. 169; *Clan Line Steamers, Ltd.* v. *Liverpool and London War Risks Insurance Association, Ltd.*, [1942] 2 All E.R. 367; *Monarch Steamship Co.* v. *Karlshamns Oljefabriker (A/B)*, [1949] 1 All E.R. 1; *Royal Greek Government* v. *Minister of Transport* (1949), 66 (pt. 1) T.L.R. 504.

As to proximate cause of loss in marine insurance, see 22 Halsbury's Laws (3rd Edn.) 90–92; and for cases see 29 Digest 205 et seq.

Cases referred to:

(1) *Reischer* v. *Borwick*, [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238; 10 T.L.R. 568; 7 Asp.M.L.C. 493; 9 R. 558, C.A.; 29 Digest 206, *1650*.

(2) *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518; 57 L.J.Q.B. 24; 57 L.T. 726; 52 J.P. 196; 36 W.R. 369; 3 T.L.R. 768; 6 Asp.M.L.C. 212, H.L.; 29 Digest 203, *1624*.

(3) *Ionides* v. *Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur.N.S. 18; 11 W.R. 858; 1 Mar.L.C. 353; 143 E.R. 445; 29 Digest 229, *1854*.

(4) *Andersen* v. *Marten*, [1908] A.C. 334; 77 L.J.K.B. 950; 99 L.T. 254; 24 T.L.R. 775; 52 Sol. Jo. 680; 11 Asp.M.L.C. 85; 13 Com. Cas. 321, H.L.; 29 Digest 216, *1725*.

(5) *Wilson, Sons & Co.* v. *Xantho (Cargo Owners)*, *The Xantho* (1887), 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 766; 6 Asp.M.L.C. 207, H.L.; 41 Digest 414, *2573*.

(6) *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; 78 L.J.K.B. 684; 100 L.T. 568; 53 Sol. Jo. 266; 25 T.L.R. 287, C.A.; 29 Digest 396, *3148*.

Appeal by the plaintiffs from an order of the Court of Appeal, reported [1917] 1 K.B. 873.

Leslie Scott, K.C., and *Raeburn* for the appellants.
R. A. Wright, K.C., and *Simey* for the respondents.

The facts and arguments are sufficiently stated in their Lordships' opinions. The House took time for consideration.

Jan. 31, 1918. The following opinions were read.

LORD FINLAY, L.C.—This is an appeal from a judgment of the Court of Appeal affirming the judgment of Rowlatt, J., in favour of the respondents, the defendants in the action. The action was brought by the appellants on a policy of marine insurance upon the steamship *Ikaria*. This policy was in the ordinary form covering, inter alia, perils of the seas, but contained the following clause:

> "Warranted free of capture seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

The appellants (plaintiffs) alleged that the vessel was lost by perils of the seas, while the respondents (defendants) contended that the loss was in consequence of hostilities or warlike operations, and was, therefore, excluded by the clause above quoted.

The *Ikaria* was on a voyage from South America to Havre and London. When stopped, on Jan. 30, 1915 (Saturday), about twenty-five miles north-west of Havre for the purpose of taking up a pilot, she was struck abreast of No. 1 hatch by a torpedo fired by a German submarine. Two large holes were made in the vessel and No. 1 hold filled with water. The crew went on board a tug, fearing that the *Ikaria* might sink at once, but as she kept afloat they returned to her and brought her into the outer harbour of Havre. She was moored alongside the Quai d'Escale, where she was always afloat, and would have been saved if she had been allowed to remain there. A gale sprung up on the 31st (Sunday), causing the vessel to range and bump against the quay. The port authorities were apprehensive that she might sink, blocking the quay, which was urgently required for purposes connected with the war, and ordered that she should leave the quay and either be beached outside the harbour altogether or anchored in the outer harbour near the breakwater spoken of in the evidence as the Batardeau. The latter position was chosen, and the vessel was anchored with her head towards the Batardeau. There was a good deal of wind and sea. As the vessel was very much by the head in consequence of the damage done by the torpedo, at each low tide she took the ground forward, while the rest of her structure was water-borne. She was thereby subjected to considerable strain, and the bulkhead between No. 1 and No. 2 holds having been weakened by the explosion of the torpedo, the forward end crumpled up and she became a total loss on Tuesday, Feb. 2. The appellants (plaintiffs) contended that her loss was due to the perils of the seas at her anchorage in the outer harbour. The respondents (defendants) contended that it was caused by hostilities. Both courts below have held that it was so caused by the torpedo, and that, as the warranty applied, the respondents were not liable.

In my opinion, Rowlatt, J., and the Court of Appeal were right in holding that the loss of this vessel was a consequence of hostilities, and, therefore, not covered by the policy sued on. The only chance of saving the vessel after she had been struck by the torpedo was to take her into port, and Havre was obviously the proper port to take her to. The decision of the harbour authorities that the vessel could not be permitted to remain at the Quai d'Escale was final. That decision was given for very intelligible and weighty reasons, and there is no ground for thinking that the port authorities committed any error of judgment in ordering the removal, but those in charge of the ship had to obey the order, right or wrong. The Quai d'Escale consequently was no longer available for the vessel. The case must be dealt with just as if the episode of the vessel's being taken to that quay had not occurred, and she had been taken in the first instance straight to the anchorage near the Batardeau. What was the cause of her becoming a total wreck there? In my opinion, in substance, it was the injury by the torpedo. The injuries received from the torpedo made it impossible for the vessel to keep the sea. She was taken into port. At the anchorage to which she was ordered she took the ground forward at low tides as her draught forward was 32 feet (owing to the injury caused by the torpedo) as against 16 ft. aft, and she was greatly strained by the seas in this position. No. 1 bulkhead, which had been seriously weakened by the explosion of the torpedo, gave way, the vessel breaking her back, crumpling up forward and becoming a total wreck. She was not lost by any new peril, but by the natural consequences of the explosion of the torpedo. On Feb. 3, 1915, the captain, writing to his owners from Havre, says that on Feb. 2 the Nos. 1 and 2 bulkheads gave out with a crash, and goes on to say:

> "I am practically certain that the vessel's back is broken in two places between the bridge and the stem—viz., on the fore part of No. 2 hatch, and again abreast the No. 1 hatch, and the side plating in both those places is very badly buckled, and the sheer of the ship is quite broken from the bridge forward to the forecastle hold, which is plainly visible from the shore."

In a letter of Feb. 4 he says:

> ". . . the ship from forward to amidships has absolutely foundered. Appar-

ently the torpedo has wrecked the ribs and keelsons in the forward end, and then her weight being waterborne aft and on the ground forward has broken her back and opened her out forward. Her condition is hopeless."

In his letter of Feb. 10 the following sentence occurs:

"It seems evident from the very sudden way in which the forward end of the vessel crumpled up that her structure was so weakened by the terrific force of the explosion that there was no strength left to resist the additional strain imposed on her, firstly, by the great weight of water against the bulkheads and afterwards by the bursting strain of the cargo as it swelled in the holds."

It was argued for the appellants that the torpedoing could not be regarded as the proximate cause of the loss of the vessel, as there was a novus casus interveniens —namely, the grounding in the outer harbour and the breaking of the back of the vessel by the consequent straining. ROWLATT, J., deals with this contention in the concluding passage of his judgment:

"Was the grounding a new thing supervening which caused the damage? I cannot think so at all. Those were circumstances which, if you like, thwarted the attempt to save the ship. I grant you that, but they did not constitute a new departure as a casualty. I really cannot say more upon the law than that. Here you have a torpedoed ship which makes for harbour. She finds a berth where she might be saved if she could stay there. She cannot stay there. She has to move on again. She goes to a berth where she cannot be saved, and in fact where, in the effort to keep her there, she receives some slight further damage; but all through she is under the operation of the original torpedoing, and all the struggles that she made, whether she received further injury in the course of them, as she did to some extent undoubtedly, when she bumped on the quay and took the ground at the Batardeau, and all the efforts she made before she became a total loss, were merely efforts to escape from that casualty in the grip of which she was throughout."

SWINFEN EADY, L.J., says:

"As the policy against sea perils in the present case contained a warranty against all consequences of hostilities or warlike operations, the queston arises: Was the loss, assuming it to be by a peril of the sea, the proximate consequence and effect of hostilities? The facts show that the vessel was severely damaged by a torpedo, and that although every effort was made to save her, she sank, and was lost early on the third day afterwards. If to prevent her sinking she had been run ashore immediately after the accident and had become a total loss, the loss would certainly have been the direct consequence of hostilities. Does it make any difference that between two and three days were spent in abortive and unavailing efforts to save her? She was in imminent risk of sinking from the moment of being injured; she was removed from the Quai d'Escale because of the evident risk of her sinking there; she was unable to remain at the Quai, and never was able to reach and remain in any place of safety; the fact that she was so much down by the head prevented her removal to the inner harbour; she had the choice of going outside the breakwater with a view to being beached, or of remaining within the outer harbour; the latter was chosen, but, having regard to her draught, she was bound to ground at every tide at the place where she was moored, unless she could be considerably lightened and her draught lessened, which proved to be impracticable. The risk of her grounding there was deliberately incurred as part of the salvage operations. The train of causation from the act of hostility to the loss was unbroken. She was never out of immediate danger from the time she was first injured to her final loss, and the efforts to save her were acts done by way of salvage. There was not any new intervening cause of loss after the injury by torpedo, no new casualty causing the damage."

SCRUTTON, L.J., was disposed to differ, although in consequence of his view of the effect of the decision in *Reischer* v. *Borwick* (1) he in the end concurred with the other members of the Court of Appeal. After referring to the finding of ROWLATT, J., that the vessel was sunk from her bulkheads giving way, having been weakened by the explosion, and from the strain of the grounding, or, in other words, from grounding in her damaged condition, SCRUTTON, L.J., goes on to say:

> "I agree with these findings, but I think it also follows, whatever the legal effect may be that the sinking did not necessarily follow from the explosion; that is to say, that, with fine weather and a stay in the first berth, the ship would have been saved; with the weather she in fact met, and in the berth to which in consequence of that weather she was ordered, she was lost."

I agree with ROWLATT, J., and the majority of the members of the Court of Appeal in their view of the facts and of the legal effect of these facts, and I cannot share the doubts expressed by SCRUTTON, L.J. The vessel could not remain at the Quai d'Escale, and her short stay there was merely an interlude which may be disregarded. In taking the vessel to the anchorage near the Batardeau, the best practicable course was adopted to save her. The effort was unsuccessful. She sustained further damage there owing to the fact that in consequence of the injury by the torpedo she took the ground forward at low tides. She was consequently strained severely by the motion of the seas and this, coupled with the weakened condition of the bulkhead caused by the explosion, led to her ultimate break-up. Such circumstances do not prevent the injury by the torpedo from being the proximate cause of the loss; indeed they appear to me to establish that the loss was a direct consequence of hostilities.

A great many cases were cited to your Lordships. I do not propose to deal with them in detail. The principles of law are well settled, and the question here is really one of fact. A great deal was said in the Court of Appeal about *Reischer* v. *Borwick* (1). I cannot see that that case introduced any novelty into the law of marine insurance. The policy was against damage received in collision with any object. The ship ran against a snag, which made a hole in her. The vessel was anchored and the hole plugged, and a tug was sent to bring her to dock for repairs. Owing to the motion through the water when being towed, the plug came out and the ship sank. It was held that the loss of the ship was covered by the policy. It is obvious that in that case there was not the intervention of any new cause. The hole occasioned by the collision was the cause of the loss. The fact that ineffectual attempts had been made to stop the hole, and that the plug came out, did not introduce any new element of causation. We have had a good deal of discussion as to the decision in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), a case in which the damage was caused by rats gnawing a hole in a pipe, through which sea water entered and damaged the cargo of rice. There was an exception in the charterparty and bill of lading for dangers and accidents of the seas, and it was decided that the shipowners were not liable. For the clear understanding of that case it is desirable to call attention to a fact which was pointed out by LORD DUNEDIN in the course of the argument of the present case, and which appears in the Stated Case for the appellants (Hamilton, Fraser & Co.) and the evidence there referred to. The hole was in a supply pipe communicating with the sea below the water-line, through which sea water was pumped up into a bath, and the hole made by the rats during the voyage was at a point in the pipe above the water-line when the vessel was fully loaded, but permitted the water to flow into the vessel when she rolled in the course of her voyage. I do not think that any observations are necessary upon the other cases to which our attention was called. In my opinion, the appeal fails, and should be dismissed with costs.

VISCOUNT HALDANE (read by LORD DUNEDIN).—Many authorities were cited at the Bar in the course of the arguments in this appeal. But I do not think that the law applicable is obscure. The real question turns out to be one of fact. The insurance included among the perils which it covered those of the seas, but from

these were expressly excluded all consequences of hostilities or warlike operations. The ship insured, the *Ikaria*, was bound to Havre, and when about twenty-five miles from that port on Saturday, Jan. 30, 1915, was struck by a torpedo from a German submarine. The impact was on the port side and the explosion tore a large hole there 3·15 metres wide and 2·6 metres high 4 ft. below the water-line. A column of water which was thrown up burst out the bulwarks on the port side, No. 1 hold was filled with sea water, the fore peak was similarly about half filled, and some water penetrated into No. 2 hold. The vessel at once began to settle by the head, and the crew took to the boats. But the steamer did not sink, although much down by the head, and they returned, and, with the aid of a tug and a mine-sweeper and her own steam, she reached Havre. She was then 17 ft. down by the head, her draught being 32 ft. forward and 15 ft. aft, while before she was torpedoed her draught had been 23 ft. 6 in. forward and 23 ft. 9 in. aft. The result of the increased draught forward was that she could not enter the inner harbour at Havre or the dry dock, and she was berthed in the outer harbour at the Quai d'Escale. This was a berth used for military, and particularly for British Red Cross, purposes, and the only reason for allowing the steamer to go there was to save her if possible. Had she remained out at sea she would have sunk. The next morning, on Jan. 31, 1915, an effort was made to pump the vessel and to lighten her cargo. But the wind rose and a swell ensued, and the *Ikaria* began to bump and the dislocation to increase. The port authorities therefore, fearing that she would sink and block the Quai, ordered her to be removed, and either to be taken right outside the harbour and beached, or to be moored alongside a breakwater called the "Batardeau." The latter alternative being chosen she was moored alongside the breakwater. But the bottom there was uneven and the water was only 30 ft. deep, while the head of the steamer was drawing 32 ft., and could not be prevented from taking ground. This the ship did and finally sank by the head as the tide rose on Tuesday, Feb. 2, only part of the cargo being salved.

The learned judge who tried the case, ROWLATT, J., found the facts broadly as I have stated them, and that the bulkhead between the holds No. 1 and No. 2 had been seriously disrupted by the explosion. He thought that if the *Ikaria* could have stayed at the Quai d'Escale she might have been saved. But she could not stay there and, partly because of the weakness of the bulkhead and partly because of the grounding at the "Batardeau," she sank. He came to the conclusion, on the facts as proved before him, that "it was not made out that, if she had been a sound ship and had not met this torpedo, and had suffered the same grounding in the same trim at the same spot, she would have suffered these injuries." In his view the grounding was not a new thing supervening which caused damage. The being moored as she was to the "Batardeau" merely thwarted the attempt to save the ship. The loss was, therefore, caused by the explosion itself. The Court of Appeal took substantially the same view of the facts as ROWLATT, J., and the findings of fact were, therefore, concurrent. SWINFEN EADY, L.J., was of opinion that it could make no difference to the conclusion that the loss of the ship was the direct consequence of the explosion of the torpedo that "two or three days were spent in abortive and unavailing efforts to save her. She was in imminent risk of sinking from the moment of being injured." BANKES, L.J., took the same view. "You do not reach a place of safety unless you are allowed to remain there a sufficient time to ensure safety." SCRUTTON, L.J., did not differ from the finding of fact in the words I have quoted from ROWLATT, J., but thought that it might be held that the sinking did not necessarily follow from the explosion as described if, with fine weather and a stay in the first berth, the loss would have been averted, and that this would have been enough to make a general peril of the sea and not the explosion the proxima causa within the meaning of the policy. But he considered himself bound to follow a previous decision of the Court of Appeal of the correctness of which he intimated doubt. He thought that *Reischer* v. *Borwick* (1) had established that, on the facts proved, the *Ikaria* must be held to have been sunk as the immediate consequence of the explosion. This inference he could not,

in his opinion, refuse to draw in view of what was held in *Reischer* v. *Borwick* (1), but he thought it inconsistent with what he considered ought to follow from the general principles affirmed by this House in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2).

I cannot find any such inconsistency between these two authorities as SCRUTTON, L.J., thought to exist. In *Reischer* v. *Borwick* (1) there was a policy which covered collision with any object, but excluded perils of the sea. The ship struck a snag which made a hole in her. She was then anchored and the leak was temporarily plugged, and she was towed towards the nearest dock for repair. But while she was in course of being towed the water burst through the hole and she had to be run aground and abandoned. The Court of Appeal held that the causa proxima of the damage was in reality the collision with the snag. In the words of DAVEY, L.J., it was

> "the inrush of the water through the hole in the condenser. What made the hole in the condenser? The collision made the hole in the condenser, and the broken condenser was a continuing source of risk and danger. The failure of the attempt to mitigate or stop the damage arising from the break of the condenser cannot justly be described as the cause of the ultimate damage."

These words express what the common sense of mankind would assert in such a case. They are in no way inconsistent with what was laid down in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2). There rice was shipped under a charterparty, and bills of lading which excepted "dangers and accidents of the sea." During the voyage rats gnawed a hole in a pipe in the ship and sea-water entered through it and damaged the rice. There was no negligence. It was held that the damage was within the exception, because, whether it was rats that had made the hole or whether, for example, a porthole had got open, the sea was in such a case not the less the immediate cause of the damage. In *Reischer* v. *Borwick* (1), although perils of the sea in general were excluded, a particular kind of such peril, collision, was expressly included. In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), all dangers and accidents of the sea were excluded, and the inrush of water which arose from the gnawing of the pipe by the rats during the voyage was held to be excluded along with them as being a case falling within the class so defined.

In the case before us all consequences of hostilities or warlike operations are excluded from the perils of the seas insured against. There is nothing in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), or in the now familiar rule that the immediate cause of the accident is what is taken to have been in contemplation of the parties to a policy of marine insurance, which prevents the explosion from being taken to be in law, what it was in fact, the cause of the loss. The fact that attempts were made to obviate the natural consequences of the injury inflicted by the torpedo does not introduce any break in the direct relation between the cause and its effect in the shape of the damage sustained. I am, therefore, of opinion that the appeal must fail.

LORD DUNEDIN.—We have had a large citation of authority in this case, and much discussion on what is the true meaning of causa proxima. Yet I think the case turns on a pure question of fact, to be determined by common-sense principles. What was the cause of the loss of the ship? I do not think the ordinary man would have any difficulty in answering. She was lost because she was torpedoed.

I shall state my view very briefly on the facts, but before I do so I wish to say a word as to the policy. It seems to me that the possibility of the prolonged and ingenious argument we have had in the case really flows from the form of the instrument, and the opportunity it gives for looking at one thing from different points of view. The policy, in time-honoured form, first specifies as the perils and adventures which the underwriters are content to bear, perils of the sea in general terms; and then comes a detailed enumeration of certain perils. Now when the f.c.s. clause is added certain enumerated perils are cut out of the original

insurance. When it is a case of one of the perils acting solely and sufficiently, such as, for instance, the peril of capture, no difficulty can arise. But there are certain perils which, so to speak, pray in aid the perils of the sea. A man-of-war fires a shot and hits the ship. If it only hits the top of the bulwark or a bit of the rigging there will be at the worst only a partial average. But if the shot strikes between wind and water and makes a hole, the vessel will be sunk, and the reason of its sinking will not be the mere existence of the hole, but the fact that the sea comes in through the hole, and the vessel founders. Overwhelming by the sea is a peril of the sea in a general sense, and accordingly in such a case, if either the body of the policy or the exception were looked at alone, the peril incurred could be held to fall under either. In the exception it would fall under it, because the sinking was the direct result of the action of the man-of-war. In the body of the policy it would be immaterial whether it fell within the general expression "perils of the sea" or the particular expression "man-of-war." But the moment that the two clauses have to be construed together, it becomes vital to determine under which expression it falls. The solution will always lie in settling as a question of fact which of the two causes was what I will venture to call (though I shrink from the multiplication of epithets) the dominant cause of the two. In other words, you seek for the causa proxima, if it is well understood that the question of which is proxima is not solved by the mere point of order in time. In the illustration I have given no one would have the slightest doubt the dominant cause was the shot of the man-of-war. I would also like to remark that this class of competition between causes can only truly arise when you have to deal with an exception. I say this because of the great stress that was laid by the appellants' counsel on *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2). There it was held that damage by sea water which came in through a hole in a bath supply pipe was a peril of the sea, though the sea would not have been admitted if a rat had not gnawed a hole in the pipe. It was the sea that spoiled the cargo, and the precise way in which it was admitted (putting aside negligence of the ship's servants, which, as it was a bill of lading and not an insurance case, would have altered the question) was immaterial, whether it was owing to rat, iceberg, sunken rock, or swordfish. If in that case there had been an exception of all dangers brought about by rats, then the decision, I take it, would have been different. I say all dangers brought about by rats, for if the exception had been merely against rats, then as a question of construction it might have been held that that only meant to refer to the predatory habits of the rat, and not to anything so exceptional as what occurred. I am not, therefore, pressed by the difficulty which was felt by SCRUTTON, L.J., in reconciling *Reischer's Case* (1) with *Hamilton's Case* (2).

I now turn to the facts in the case. I concur with what has been said by the Lord Chancellor, and do not think it necessary to repeat. Summarised, the facts seem to me to come to this. After the torpedo struck her she was a doomed ship, unless she could get into a real place of safety. She nearly got to a place of safety, but never quite did so. What happened was in the circumstances the natural sequel to the injury by the torpedo. Water was admitted, at first only so far. She was down by the head, and, therefore, took the ground. The combined action of taking the ground and rising and falling with the tide, together with the swelling of the cargo, which had been wetted, strained her and broke her up, so that she became a total wreck. There is no better or truer account than that given by the master himself soon after the event, in his letter of Feb. 10, when he writes to his owners and says:

> "There is no one here now who has the least knowledge of making or fitting shields over fractures in ships' bottoms, and even had there been it is very doubtful whether shields large enough to cover the two large fractures made by the torpedo could have been constructed and fitted in time to save her from sinking. It seems evident from the very sudden way in which the forward end of the vessel crumpled up that her structure was so weakened by the terrific

force of the explosion that there was no strength left to resist the additional strain imposed on her, firstly, by the great weight of water against the bulkheads, and afterwards by the bursting strain of the cargo as it swelled in the holds."

I agree with the judgment of the Court of Appeal.

LORD ATKINSON.—I concur. The appellants, by a policy of marine insurance dated July 8, 1914, insured their steamship *Ikaria* against loss by perils of the sea. The policy contained a warranty clause which ran as follows:

> "Warranted free of capture seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war."

According to the decision of *Ionides* v. *Universal Marine Insurance Co.* (3), this clause is to be construed as if the assured had reinsured against the events enumerated, and the word "consequences" must accordingly be taken to mean proximate or direct or immediate consequences only: see Willes, J., approved of in *Andersen* v. *Marten* (4) ([1908] A.C. at p. 340). The policy, therefore, effects an insurance against perils of the sea other than those which are the direct and immediate consequences of hostile and warlike operations. The rule that in marine insurance policies the proximate not the remote causes are to be regarded is supposed to be based upon the intention of the contracting parties, to be gathered from the language of the contract itself, taken in connection with the surrounding circumstances; but there is such a tendency in argument to treat concurrent causes as preceding and succeeding causes, the latter proximate, the former remote, and to split up complex causes into their components and establish a sequence between them, that it is well always to bear in mind the warning given by Lord Lindley in *Reischer* v. *Borwick* (1) that this rule of maritime insurance must be applied with good sense to give effect to, and not to defeat the intention of, the contracting parties.

I asked counsel, when opening the appeal, if the torpedo had opened such a rent in the *Ikaria*'s side that the sea water rushed into her hold and sank her, could he recover on the policy sued on for a loss by perils of the sea? Of course he replied in the negative. Then the sea peril would be the direct and immediate consequence of hostilities or warlike operations. I then asked him, if the captain of a torpedoed ship, having formed a judgment found to be reasonable in the circumstances, that his ship would, owing to her injuries, sink if kept in deep water, and, accordingly, beached her to prevent her total loss, would the owner be entitled to recover on such a policy as the present? And I understood him also to reply in the negative. I do not think the liability would be in the slightest degree altered if the ship should when beached settle down upon a rock of the existence of which the captain was not aware, and had broken her back. On the whole of the evidence it is, I think, absolutely clear that the vessel was so damaged by the torpedo that she could not keep the sea, or at all events that there was no reasonable probability of her being able to do so. Now, the captain having got the choice he was under the circumstances bound to take, of beaching her outside the harbour or anchoring her inside the breakwater in order to continue the salvage operations he had already commenced at the Quai Marée, brought her to the latter place. The ship's taking the ground in her new anchorage was an obvious and necessary result, as she was drawing 32 ft. 6 in. forward and the depth of water at the anchorage was only 30 ft. at low tide. The risk of her grounding forward was deliberately but reasonably run, and I really cannot see the difference in principle between taking this risk and taking the risk of beaching her completely. It is quite true that in the efforts to salve the cargo and the ship her injuries may have been aggravated, but none the less, in my opinion, was the loss the direct and immediate consequence of the torpedoing, and I do not think that any of the authorities cited are incon-

sistent with this conclusion. The appeal in my opinion fails, and should be dismissed with costs. A

LORD SHAW.—On Jan. 30, 1915, the *Ikaria*, bound from South American ports to Havre with a general cargo, was, about twenty-five miles north-west of Havre, struck by a torpedo fired from a German submarine. She sustained severe injuries; but, assisted by a tug and a minesweeper, she succeeded in making the port of Havre. She was then drawing 32 ft. forward, the injuries and consequent filling being in the fore part of the vessel; and her depth was too great to permit her entry into the inner harbour. In the outer harbour she was berthed for a time at the Quai d'Escale. There being, however, a fear that she might sink there and so interrupt the traffic of the Red Cross organisation at that quay, she was taken to another portion of the harbour. At the latter point, notwithstanding all efforts by pumping and otherwise she bumped, broke her back and sank on the afternoon of Feb. 1. It is admitted that from the time of her being torpedoed everything was done to save her from the fatal effects of the collision, and that after she entered the harbour her officers were bound to obey the orders of the harbour master. The weather was rough, but not severely so. I see no reason whatever to doubt that this happened as Captain Robinson, in his report of Feb. 10, states. B C D

> "It seems evident from the very sudden way in which the forward end of the vessel crumpled up that her structure was so weakened by the terrific force of the explosion that there was no strength left to resist the additional strain imposed on her, firstly, by the great weight of water against the bulkheads, and afterwards by the bursting strain of the cargo as it swelled in the holds." E

To the perils of the sea against which she was insured under the policy founded on, there was a warranty of exception—the words of the warranty being free of "all consequences of hostilities or warlike operations." The question in the appeal is whether the loss of the vessel was proximately caused by such hostilities or warlike operations. If so, the insurers stand free; if not, the insured can recover under the policy against perils of the sea. F

I am of opinion that the loss was caused because the vessel was torpedoed, and that the warranted exception applies. If the case were not complicated, or supposed to be complicated, by legal decisions, there would seem to be no answer to this view. Notwithstanding the conclusion arrived at by SCRUTTON, L.J., I understand from his careful judgment that this would also be his opinion. There was at one time an attempt to differentiate the meaning of the same contractual words as used in a policy of marine insurance from the meaning of the same expression as used in other maritime contracts; but in two judgments of your Lordships' House in the year 1887 the practice was condemned. I refer to *The Xantho* (5), in which the term under examination was "the perils of the sea." In that case LORD MACNAGHTEN dealt with the "error of the Court of Appeal" thus: G H

> "They start with the assumption that the same words have different meanings when used in policies of insurance and when used in bills of lading. For that assumption there is, I venture to think, not any foundation."

In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2) the exception being considered was "dangers and accidents of the sea"; and LORD WATSON observed: I

> "Your Lordships have now disapproved of the novel doctrine that in a contract of sea carriage a meaning must be attached to the expression 'dangers and accidents of the sea' different from that which it bears in a contract insuring cargo against sea risks; that in the case of a charterparty or bill of lading the court ought to look to what has been termed the remote as distinct from the proximate cause of damage, whereas in the case of a policy the proximate cause can alone be regarded."

It would rather appear accordingly that this doctrine of proximate cause will be

considered in the same light whether in contracts of marine insurance or in contracts of sea carriage, and good sense suggests that it should be so.

By the Marine Insurance Act, 1906, s. 55, the expression has become statutory and, by sub-s. 1,

> "the insurer is liable for any loss proximately caused by a peril insured against, but . . . he is not liable for any loss which is not proximately caused by a peril insured against."

In this way the discussion of the scope of proxima causa is very relevant and its ascertainment vital. In my opinion, too much is made of refinements upon this subject. The doctrine of cause has been since the time of Aristotle, and the famous category of material, formal, efficient and final causes, one involving the subtlest of distinctions. The doctrine applied in these to existences rather than to occurrences. But the idea of the cause of an occurrence or the production of an event or the bringing about of a result is an idea perfectly familiar to the mind and to the law, and it is in connection with that that the notion of proxima causa is introduced. Of this, I will venture to remark that one must be careful not to lay the accent upon the word "proximate" in such a sense as to lose sight of or destroy altogether the idea of cause itself. The true and overruling principle is to look at a contract as a whole, and to ascertain what the parties to it really meant. What was it which brought about the loss, the event, the calamity, the accident? And this not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all. To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain but a net. At each point influences, forces, events, precedent and simultaneous, meet, and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

What does "proximate" here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up, which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed. I illustrate that by the present case. Did the vessel perish because she was torpedoed or by a peril of the sea apart from that? It is replied: "She perished by a peril of the sea because sea water entered the gash in her side which the torpedo made." Certainly the entry of sea water was a peril of the sea, and certainly that entry of sea water was proximate in time to the sinking. But how could there be any exception in the case of a vessel lost in harbour or at sea to a loss by perils of the sea, if the proximate cause in the sense of nearness in time to the result were the thing to be looked to? It is hardly possible for the mind to figure anything which would interfere with or be an exception to a cause so proximate as the entry of sea water into or over the hull as the vessel sinks in the waves. The result of this is that the consideration of the exception of the consequences of hostilities, or indeed any other exception so far as I can at present figure, if that consideration be limited to a cause proximate in time, destroys the exception altogether. It might as well never have been written. In my opinion, accordingly, proximate cause is an expression referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency. Fortunately, this much would appear to be in accordance

with the principles of a plain business transaction and it is not at all foreign to the law. A

In *Reischer's Case* (1) Lord Lindley, speaking of causa proxima, says:

> "this rule is based on intention of parties as expressed in the contract into which they have entered, but the rule must be applied with good sense, so as to give effect to and not to defeat those intentions."

B

A second example, which I here give, shows that, although insurers may limit their liability expressly to causa proxima and with elaborate astuteness may enumerate other facts and circumstances which would not be considered direct or proximate causes, the same result will follow, namely, that the proximate cause will be found to be, to use the words employed by Channell, J., in *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.* (6), "the real effective cause of what has happened." He said: C

> "You must have something that may be called a new intervening cause, in order to prevent the existing cause, which is operating to produce a well-known result, from being said to be the real effective cause of what has happened."

Vaughan-Williams, L.J., thought this view of Channell, J., was quite right. So do I. To apply this to the present case. In my opinion, the real efficient cause of the sinking of this vessel was that she was torpedoed. Where an injury is received by a vessel it may be fatal or it may be cured: it has to be dealt with. In so dealing with it there may, it is true, be attendant circumstances which may aggravate or possibly precipitate the result, but are incidents flowing from the injury, or receive from it an operative and disastrous power. The vessel, in short, is all the time in the grip of the casualty. The true efficient cause never loses its hold. The result is produced, a result attributable in common language to the casualty as a cause, and this result, proximate as well as continuous in its efficiency, properly meets, whether under contract or under the statute, the language of the expression "proximately caused." D E

Appeal dismissed.

Solicitors: *Alfred Bright & Sons*, for *Batesons, Warr & Wimshurst*, Liverpool; *William A. Crump & Son.* F

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

WATCHAM *v.* ATTORNEY-GENERAL OF EAST AFRICA PROTECTORATE

[Privy Council (Earl Loreburn, Lord Atkinson, Lord Scott-Dickson and Sir Arthur Channell), May 7, 9, 10, June 11, 1918]

[Reported [1919] A.C. 533; 87 L.J.P.C. 150; 120 L.T. 258; 34 T.L.R. 481]

Evidence—Document—Parol evidence as to effect—Evidence of user under document—Modern document—Patent ambiguity.

The rule that where there is in an ancient deed or other document a latent ambiguity extrinsic evidence of user under it may be received to ascertain its meaning applies also in the case of a modern instrument, to show the sense in which the parties to it used the language they employed and their intention in executing the instrument as revealed by their language interpreted in that sense, and also where the ambiguity in the language of the instrument is patent, not latent.

Real Property—Grant—Parcels—Description in more than one part—One part true, another false—Rejection of false part—Falsa demonstratio—No vitiation of grant.

Where in a grant of real property the description of the parcels is made up of more than one part, and one part is true and the other false, then, if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as a falsa demonstratio and will not vitiate the grant, though it may operate as a restriction.

Notes. Considered: *Gaisberg* v. *Storr*, [1949] 2 All E.R. 411. Referred to: *Re Hollebone's Agreement, Hollebone* v. *W. J. Hollebone*, [1959] 2 All E.R. 152.

As to admission of extrinsic evidence in interpretation of documents and description of parcels, see 11 Halsbury's Laws (3rd Edn.) 396–412, 424–429; and for cases see 17 Digest (Repl.) 286–292, 309 et seq., 381, 382.

Cases referred to:

(1) *A.-G.* v. *Drummond* (1842), 1 Dr. & War. 353; 17 Digest (Repl.) 50, **158.*

(2) *Drummond* v. *A.-G. for Ireland* (1849), 2 H.L.Cas. 837; 14 Jur. 137; 9 E.R. 1312, H.L.; 17 Digest (Repl.) 335, *1416.*

(3) *Lord Waterpark* v. *Fennell* (1859), 7 H.L.Cas. 650; 33 L.T.O.S. 374; 23 J.P. 643; 5 Jur.N.S. 1135; 7 W.R. 634; 11 E.R. 259, H.L.; 17 Digest (Repl.) 330, *1359.*

(4) *R.* v. *Varlo* (1775), 1 Cowp. 248; 98 E.R. 1068; 17 Digest (Repl.) 49, *578.*

(5) *Chad* v. *Tilsed* (1821), 2 Brod. & Bing. 403; 5 Moore, C.P. 185; 129 E.R. 1022; 17 Digest (Repl.) 50, *581.*

(6) *Lord Hastings* v. *North Eastern Rail Co.*, [1899] 1 Ch. 656; 68 L.J.Ch. 315; 80 L.T. 217; 15 T.L.R. 247; affirmed, [1900] A.C. 260; 69 L.J.Ch. 516; 82 L.T. 429; 16 T.L.R. 325, H.L.; 17 Digest (Repl.) 275, *806.*

(7) *Wadley* v. *Bayliss* (1814), 5 Taunt. 752; 128 E.R. 887; 11 Digest (Repl.) 76, *977.*

(8) *Doe d. Pearson* v. *Ries* (1832), 8 Bing. 178; 1 Moo. & S. 259; 1 L.J.C.P. 73; 131 E.R. 369; 17 Digest (Repl.) 336, *1418.*

(9) *Chapman* v. *Bluck* (1838), 4 Bing.N.C. 187; 1 Arn. 27; 5 Scott, 515; 7 L.J.C.P. 100; 2 Jur. 206; 132 E.R. 760; 17 Digest (Repl.) 335, *1412.*

(10) *Van Diemen's Land Co.* v. *Table Cape Marine Board*, [1906] A.C. 92; 75 L.J.P.C. 28; 93 L.T. 709; 54 W.R. 498; 22 T.L.R. 114, P.C.; 17 Digest (Repl.) 331, *1361.*

(11) *Doe d. Norton* v. *Webster* (1840), 12 Ad. & El. 442; 4 Per. & Dav. 270; 9 L.J.Q.B. 373; 4 Jur. 1010; 113 E.R. 879; 17 Digest (Repl.) 348, *1544.*

(12) *Horne* v. *Struben*, [1902] A.C. 454; 71 L.J.P.C. 88; 87 L.T. 1, P.C.; 17 Digest (Repl.) 383, *1873*. A

(13) *Mellor* v. *Walmesley*, [1905] 2 Ch. 164; 74 L.J.Ch. 475; 93 L.T. 574; 53 W.R. 581; 21 T.L.R. 591, C.A.; 17 Digest (Repl.) 288, *938*.

(14) *Morrell* v. *Fisher*, 4 Exch. 591; 19 L.J.Ex. 273; 14 L.T.O.S. 398; 154 E.R. 1350; 17 Digest (Repl.) 287, *932*.

(15) *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309; 68 L.J.Ch. 563; 81 L.T. 104; 47 W.R. 661; 43 Sol. Jo. 622, C.A.; 17 Digest (Repl.) 287, *934*. B

(16) *Eastwood* v. *Ashton*, [1915] A.C. 900; 84 L.J.Ch. 671; 113 L.T. 562; 59 Sol. Jo. 560, H.L.; 17 Digest (Repl.) 383, *1875*.

(17) *Herrick* v. *Sixby* (1867), 17 L.C.R. 146; L.R. 1 P.C. 436; 17 Digest (Repl.) 287, **439*.

(18) *Booth* v. *Ratté* (1890), 15 App. Cas. 188; 59 L.J.P.C. 41; 62 L.T. 198; 38 W.R. 737, P.C.; 44 Digest 49, *351*. C

(19) *Clifton* v. *Walmesley* (1794), 5 Term Rep. 564; 101 E.R. 316; 17 Digest (Repl.) 336, *1417*.

(20) *Clyde Navigation Trustees* v. *Laird* (1883), 8 App. Cas. 658, H.L.; 42 Digest 685, *986*.

(21) *Cooke* v. *Booth* (1778), 2 Cowp. 819; 98 E.R. 1380; 31 Digest (Repl.) 80, *2335*. D

(22) *Baynham* v. *Guy's Hospital* (1796), 3 Ves. 295; 30 E.R. 1019; 17 Digest (Repl.) 335, *1409*.

Appeal from a decree of the Court of Appeal for Eastern Africa whereby that court, by a majority (Bonham-Carter and Tomlinson, JJ., Ehrhardt, J., dissenting), affirmed a decree of the High Court, East Africa, made in an action in which the respondent, as plaintiff on behalf of the government of the East Africa Protectorate, sued the appellant, defendant in the action, for ejectment from 753½ acres of land in the Nairobi district and for subsidiary relief. E

Hughes, *K.C.*, and *Sheldon* for the appellant.
Tomlin, *K.C.*, and *Vernon* for the respondent.

June 11, 1918. **LORD ATKINSON.**—This is an appeal from a decree of the Court of Appeal for Eastern Africa whereby that court affirmed a decree of the High Court of Eastern Africa made in an action in which the respondent, as plaintiff on behalf of the government, sued the appellant in ejectment to recover possession of 753½ acres of land in the Nairobi district and for subsidiary relief. F

The defendant claims to be entitled to these lands under three different titles. First, the Riverside estate, under a certificate from the Crown dated Dec. 1, 1899, made or granted in accordance with the East African Land Regulations dated Dec. 29, 1897, and described as follows, the words in italics being in print and the rest typewritten: G

> "*The piece of land delineated on the plan hereto attached, situate in the railway mile zone, and containing 66¼ acres or thereabouts, being* in extent from the intake of the Nairobi water supply down the pipe-line for a distance of one mile on the right bank of the river for a width of one-quarter of a mile from the river, and contains an area of 66 acres 3 roods 22 perches, as per plan attached." H

The second, styled Moya's land, under a permit dated Mar. 31, 1904, issued to him by the Survey and Land Commissioner, claimed to comprise 350 acres, and the third, styled Masondo's land, alleged to have been acquired by him from Masondo, a native, and claimed to be about 350 acres in extent. The case was tried before Hamilton, C.J., who held that all the land acquired by the defendant through Moya, coloured green on a plan given in evidence at the trial, and numbered plan 1, was outside the land the possession of which was claimed by the government. He further held that the land acquired by the defendant through Masondo, styled in the case Masondo's land, and edged brown on said plan No. 1, formed no part of the area claimed by the government, and by his decree dated May 8, I

1913, he ordered that the areas of the lands in respect of which the defendant paid compensation to these two natives, Moya and Masondo, and of which the plaintiff had undertaken to grant leases to the defendant were such as were shown on plan in the action—i.e., plan No. 1, marked respectively Moya and Masondo. Their Lordships, after careful consideration of the evidence given in the case and the judgments of the learned Chief Justice and of the learned judges in the Court of Appeal, see no reason to differ from the conclusion which has been arrived at in respect of these two pieces of land. They think the decree pronounced as to them should be confirmed. It only remains to consider the decision arrived at in reference to the Riverside estate.

That estate was, in the year 1907, surveyed by a Mr. Woodruffe, the boundaries being pointed out by the Misses Watcham, the sisters of the defendant. It is delineated on the same plan and edged yellow, and as surveyed is found to contain only 39·7 acres. Their Lordships are not satisfied that these ladies were authorised by the defendant to point out the boundaries of the estates, as they apparently did, at least to some extent, and do not think that the defendant can be held bound by anything they may have said or done in reference to that subject. The Attorney-General raised no objection at the trial to the boundary of the Riverside estate being extended so as to include a total area of sixty-six acres or thereabouts, and the Chief Justice held that under the certificate of Dec. 1, 1899, the defendant was entitled to occupy the land edged yellow on the plan, and a further area of 27·21 acres, and ordered that the plaintiff should survey out an additional area to the plot marked Riverside on the plan in the action, so as to make up the holding of the defendant to 66 acres 3 roods 27 poles or thereabouts, the area mentioned in the certificate. He further ordered:

> "That the defendant do deliver up to the plaintiff possession of all that area within the line marked in red on the said plan, save and except a sufficient area as may be agreed on the survey above mentioned and adjoining Riverside on the south, as shown on the said plan, to make up that holding to 66 acres 3 roods 27 poles or thereabouts."

By the third of the above mentioned land regulations it is provided that every certificate shall be accompanied by a plan of the lands, prepared or approved of and signed by a government surveyor or other officer for the purpose of the commission, but though words "as per plan attached" appear in the certificate immediately after the description of the parcels, no plan of the kind prescribed was attached to the certificate or produced. An effort was made to show from the conduct and admission of the defendant that a plan found in the registry marked "three" and not signed by anyone, had been attached to the certificate and was the plan referred to in the certificate, but in their Lordships' view the effort was not successful. The question, therefore, which their Lordships have to determine, unaided by any map, in effect resolves itself into whether the extent of the property conveyed or assured by the certificate is to be fixed by the description of its boundaries or by the description of its area. It is not a very easy question.

When there is in an ancient deed or other document a latent ambiguity, extrinsic evidence of user under it may be received to ascertain its meaning. Lord Sugden, in the oft-quoted passage in *A.-G.* v. *Drummond* (1), said (1 Dr. & War. at p. 368):

> "One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed: tell me what you have done under such a deed and I will tell you what that deed means."

The reason for that rule is said to be that in the lapse of time and change of manners the words used in the instrument may have acquired a meaning different from that which they bore when originally employed: *Drummond* v. *A.-G. for Ireland* (2). In *Lord Waterpark* v. *Fennell* (3) Lord Cranworth states the rule of law thus (7 H.L.Cas. at p. 680):

"It is certain that where parcels are described in old documents in words of a general nature, or of doubtful import, we may, indeed, we must, recur to usage to show what they comprehend. Where, indeed, words have a clear, definite meaning no evidence can be admitted to explain or control them. Thus a demise of my messuage at Dale could not by any parole evidence be shown to have been meant to describe, not a messuage, but a sheet of water. The distinction is obvious."

But where contemporary exposition is thus relied upon on the ground that the meaning of the words of an ancient grant has changed, the instrument must be old enough to permit this change, and there must be uncertainty or ambiguity in its language: *R.* v. *Varlo* (4); *Chad* v. *Tilsed* (5); *Lord Hastings* v. *North Eastern Rail. Co.* (6). A patent and a latent ambiguity are, in SIR F. BACON'S LAW TRACTS, Maxims of the Law (1st Edn., 1737), reg. 23, p. 99, defined as follows:

"Patens is that which appears to be ambiguous upon the deed or instrument; Latens is that which seemeth certain, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."

The principle of the above-mentioned decisions, so far as it is based on the probability of a change during the lapse of time in the meaning of the language used in an ancient document, cannot of course have any application to the construction of modern instruments, but even in these cases extrinsic evidence may be given to identify the subject-matter to which they refer, and where their language is ambiguous the circumstances surrounding their execution may be similarly proved to show the sense in which the parties used the language they have employed, and what was their intention as revealed by their language used in that sense. The question, however, remains whether, in such instruments as these, proof of user, or what the parties to them did under them and in pursuance of them, can be used for the like purpose. In *Wadley* v. *Bayliss* (7) it was decided that the user of a road described in an ambiguous way in an award made under an Enclosure Act by the owner of a holding by the award allotted to him, might be proved in evidence in order to ascertain the meaning of those who worded the award. In *Doe d. Pearson* v. *Ries* (8) TINDAL, C.J., in delivering judgment, the document to be construed being modern, said (8 Bing. at p. 181):

"We are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was; if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties."

The fact mainly relied upon in that case to show that the document to be construed was a legal demise, and not a mere agreement for a lease, was that the person who claimed to be the tenant or lessee had been put into possession and remained there. *Chapman* v. *Bluck* (9) was practically to the same effect. TINDAL, C.J., in giving judgment, said (4 Bing.N.C. at p. 193):

"Looking only at the first two letters between the parties, on which the tenancy depends, I think this falls within the class of cases in which it has been held that an instrument may operate as a demise notwithstanding a stipulation for the future execution of a lease. But we may look at the acts of the parties also, for there is no better way of seeing what they intended than seeing what they did under the instrument in dispute."

PARK, J., said (ibid. at p. 195):

"The intention of the parties must be collected from the language of the instrument, and may be elucidated by the conduct they have pursued."

In *Van Diemen's Land Co.* v. *Table Cape Marine Board* (10) the action out of which the appeal arose was brought for trespass on the foreshore of Emu Bay, in Bass's Straits. The plaintiff claimed to be entitled under a grant from the

Crown, dated July 17, 1898, in which there was a latent ambiguity. One of the questions in issue was the construction of this grant, and the substantial point in controversy was whether the piece of land granted extended to low-water mark, thus including the foreshore, or only to high-water mark. The plaintiffs sought to prove their title to the locus in quo, including the foreshore, by proof of acts of ownership over it before the grant—namely, that they had been in possession of it and had spent money in improving it, and had continued in possession of it after the making of the grant. The judge at the trial rejected this evidence, and a new trial was moved for because of this rejection. The deed of July 17, 1898, contained a recital "that the company had been authorised to take possession of certain lands, and had ever since been in possession thereof." It was held that the evidence above was improperly rejected. LORD HALSBURY, in delivering judgment, is, after referring to this recital, reported to have said ([1906] A.C. at p. 98):

> "When these are the circumstances under which the grant is actually made, why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved? It would be a singular application of the maxim quoted by COKE (2 INSTITUTES, 11), 'Contemporanea expositio est fortissima in lege,' to suggest that proof of user must be confined to ancient documents, whatever the word 'ancient' may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued and thus to have brought the user back to the contemporaneous exposition of the deed. The contemporaneous exposition is not confined to user under the deed. All the circumstances which tend to show the intention of the parties, whether before or after the execution of the deed, may be relevant, and in this case their Lordships think are very relevant, to the questions in debate."

Lord Hastings v. *North Eastern Rail. Co.* (6), above referred to, is not inconsistent with this case, as in it the decision was rested solely on the fact that the language of the instrument to be construed was plain and unambiguous.

These cases, their Lordships think, establish the principle that even in the case of a modern instrument in which there is a latent ambiguity, evidence may be given of user under it to show the sense in which the parties to it used the language they have employed and their intention in executing the instrument as revealed by their language interpreted in this sense. The question remains, however, whether such evidence can be adduced for the same or a similar purpose, where the ambiguity in the language of the instrument is patent not latent, as when, for instance, the description by the boundaries of the property granted conflicts with its description by its acreage, especially where those boundaries are fixed by or measured from natural physical features of the locality. Parcel or no parcel is, no doubt, a matter of fact to be decided by the judge or judges of fact. Extrinsic evidence may be given, as in *Doe d. Norton* v. *Webster* (11), where a garden proved to have been occupied with a house was held to have passed with the house under the word appurtenances. Direct evidence of the intention of the parties to it is of course inadmissible. Where in a grant of land there is a discrepancy between the parcels described, and any plan referred to, then, as far as that discrepancy extends, the description of the parcels will generally prevail: *Horne* v. *Struben* (12). Where a deed contains an adequate and sufficient definition of the property which it was intended to pass, any erroneous statements contained in it as to the dimensions or quantity of the property, or any inaccuracy in a plan by which it purports to be described will not vitiate this description: *Mellor* v. *Walmesley* (13). Where in a grant the description of the parcels is made up of more than one part, and one part is true and the other false, then, if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as a falsa demonstratio, and will not vitiate the grant. It may, however, operate as a restriction: *Morrell* v. *Fisher* (14). It is immaterial, moreover,

in what part of the description the falsa demonstratio occurs: *Cowen* v. *Truefitt, Ltd.* (15). A

In *Eastwood* v. *Ashton* (16) four heads of identification of the parcels were mentioned in the instrument to be construed. The fourth was a plan endorsed on the deed and coloured pink. The first three were uncertain and insufficient, and the plan was accordingly preferred and adopted. In *Herrick* v. *Sixby* (17) a piece of land, about 140 or 150 acres in extent, was divided into two lots and sold. B The eastern portion became vested in the appellant. It was described in the deed of conveyance as containing about ninety acres, more or less; the western portion, vested in the defendant, was described as containing about fifty acres. The descriptions in the deeds did not agree as to the way in which the boundary line between them should run. It was found that on the language of the deed it was very doubtful where it was intended the boundaries should run, the description C of them equally admitting of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making that quantity different. The former was held to prevail. At the trial the respondent went into considerable evidence to prove his continuous possession and enjoyment of the land claimed in accordance with the construction of the deed which he relied on. This evidence was not dealt with by SIR RICHARD D KINDERSLEY, who delivered the judgment, as inadmissible, though he found it to be unsatisfactory. SIR WILLIAM ERLE, SIR JAMES COLVILE and SIR EDWARD VAUGHAN WILLIAMS formed with him the Board. And it is scarcely possible that if they considered this evidence of possession and acts of ownership to be inadmissible, that fact would not have been mentioned. In *Booth* v. *Ratté* (18) the Crown, under the Great Seal of the Province, granted to one Joseph Aumond, a piece of E land in the town of Bytown, styled a water lot, bounded as therein described. One of these boundaries was described as

> "from a point on the River Ottawa, two chains distant from the shore, southerly parallel to the general course of the shore to a point on the northern limit of Cathcart Street, produced on a course of south 66·30 west distant two chains from the aforesaid shore of the River Ottawa." F

The grantee sold portions of this lot to different persons, one of whom was Amable Prevost, to whom he conveyed the lot described in the grant from the Crown, exceptng those portions conveyed to the other purchasers. Prevost conveyed to the plaintiff, Booth, part of the water lot so granted to Aumond, describing the boundary towards the river as G

> "thence along the northerly line of Cathcart Street in a westerly direction to the water's edge of the River Ottawa, thence along the water's edge down the stream in a northerly direction to the line of Bolton Street."

Here the boundary on the river's side is called the water's edge, whilst in the Crown grant the boundary on the land granted is described as two chains from the shore. The plaintiff before the conveyance to him was executed was put into H possession by Prevost. The contention of the defendants in the original action and on the hearing of the appeal was to the effect that the words "along the water's edge" meant the line which separated the land from the water, and that the plaintiff was not entitled to any strip of subaqueous soil. The plaintiff was allowed to prove acts of ownership over this subaqueous strip, by the erection of a large floating wharf and the boating-house moored to the bank of the river, the I use and occupation of which he had been permitted to enjoy for many years without objection by the Crown or Prevost. It was held that the description in the conveyance was capable of being explained by possession, and that the possession which in that case followed upon the conveyance was sufficient to give the plaintiff as against Prevost a good primâ facie title to the whole of the two chains.

In all these cases the ambiguity, such as it was, was patent not latent. They in no way conflict with the decision in *Clifton* v. *Walmesley* (19), to the effect that where a covenant in a lease is clear and unambiguous the parties whatever their

intention, in fact, may have been on entering into it are bound by its terms and extraneous evidence cannot be received in explanation of it. To the same effect are the judgments of Lord Blackburn and Lord Watson in *Clyde Navigation Trustees* v. *Laird* (20). *Cooke* v. *Booth* (21) to the contrary effect has been discredited and cannot now be regarded as well decided: *Baynham* v. *Guy's Hospital* (22).

Applying the principles established by these authorities to the present case, how does the matter stand as regards the first issue upon which the case went to trial, namely, what is the area covered by the original certificate of the Riverside estate granted by government to the defendant to which he is now entitled? It appears from the judge's note that on April 30, 1913, the defendant put in a medical certificate to the effect that he should not strain his voice, and alleged that he was very unwell, but he never then or at any subsequent sitting of the court was examined to establish into what area of land he went into possession under the certificate of December, 1899, or what acts of ownership he exercised over any, and, if so, what, portion of the land he now claims. It is found by Hamilton, C.J., and not disputed, that the area included within the boundaries mentioned in the certificate is 160 acres in extent. It is also found by the Chief Justice that a Mr. Wilson had for several years before 1904 occupied under the government a plot of land, 18 acres in extent, L.O. No. 991. This plot would, if the boundaries were correct, form portion of the 160 acres. In addition, the defendant when applying for a certificate for Masondo's land furnished a rough sketch, No. 7, which showed that his Riverside estate was bounded on the west by Mr. Wilson's holding. If the defendant was the owner and occupier of the whole 160 acres this sketch amounted to an admission by him against his proprietary interest. It was urged that Wilson might have acquired his portion either by assignment from the defendant, or from the government with the defendant's consent. There was no proof whatever of any transaction of this kind. On the contrary, a certificate was, in the year 1902, given to Wilson by the commissioner to hold this 18 acres of land direct from the government for ninety years. No evidence was given on the behalf of the defendant to explain how it came about that he was from before 1902 out of possession of portions of the land he now claims as his own, or how it came about that the Crown in 1902 conveyed it to another, without, as far as it appears, his consent or concurrence. If, however, all that was conveyed to the defendant by certificate was 66 acres 3 roods and 27 poles no such difficulty presents itself since Wilson's holding might well lie outside that area. Again the rough sketch represents the defendant's holding as bounded on the east by Moya's holding abutting upon the river Nairobi, as both the Riverside and Wilson holdings are represented to do. The permit, dated Mar. 31, 1904, given to the defendant to occupy Moya's holding and accepted by him describes that holding as adjoining the Riverside estate. In this respect the rough sketch must be accurate, but if the relative dimensions of the three plots of land be looked at either on the sketch map, or on the so-called trial map, it is perfectly clear that the river frontage of Riverside could not approach a mile in length which, if the boundaries in the certificate were accurate, it should do. Again, the rough sketch represents Wilson's holding as bounded on the west by the mission holding, also abutting on the same river. If the boundaries were accurate the mission holding would be cut by a line drawn from the intake at right angles to the course of the river, as it is contended it should be, and a large slice of that holding would be included in the 160 acres which the defendant claims. In fact, this mission land appears to have been sold to Father Burke, presumably as trustee for the missions, and conveyed to him by the Crown in an agreement dated July 12, 1904. In this case, as in Wilson's, there is no proof whatever that this was done with the consent or approval of the defendant, or that Father Burke acquired any interest in the land from the defendant. If the defendant was the grantee of the 160 acres included within the boundaries as he claims to be, this rough sketch would necessarily involve and embody several admissions against his proprietary interest

to the effect that persons other than himself were owners of or were in possession of property he claimed as his own. The certificate is his only title. His user of any of the land must, therefore, be a user under it. It is a user, however, entirely inconsistent with the larger claim, since it only amounts to the possession and enjoyment of a small portion of that area, lying along a comparatively short stretch of the river, not a mile of it. No doubt the part within the map edged yellow is less than the acreage stated in the certificate. The extent of the river frontage of it is not so inconsistent with the area as it is with the boundaries. A trifling removal of the southern boundary of the lot further southward would obviously increase the contents by 27 acres and bring the area up to the figure named.

It is, their Lordships think, clear from these facts that the statement of the boundaries contained in the certificate is no true guide to the ascertainment of the property intended to be conveyed. There is only one other guide—the area. The choice lies between them; one or other must be a falsa demonstratio. The area comes first and is repeated after the boundaries. In their Lordships' view the description of the boundaries is the falsa demonstratio, and the other being complete and sufficient in itself, that of the boundaries should be rejected. Their Lordships are, therefore, of opinion that the judgment appealed from was right and should be affirmed, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: *Thompson, Quarrell & Jones*; *Burchells*.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law*.]

CASDAGLI *v.* CASDAGLI

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Phillimore), July 25, 26, 29, 30, October 28, 1918]

[Reported [1919] A.C. 145; 88 L.J.P. 49; 120 L.T. 52; 35 T.L.R. 30; 63 Sol. Jo. 39]

Domicil—Change of domicil—Burden of proof—Presumption against acquirement by Englishman of domicil in eastern, non-Christian country—Extra territoriality—Ability of English member of protected community in eastern country to acquire domicil in that country.

There is a strong presumption of fact against the acquisition by an Englishman of a domicil in an eastern, non-Christian, country owing to the institutions of such a country in relation to religion, law, and customs and manners being so radically divergent from those of an English person, and cogent proof is necessary of the intent to acquire such a domicil. The existence of those divergencies must not be treated as creating an absolute bar to the acquisition of a domicil of choice by an English person resident in an eastern country; it is only a fact from which the absence of the necessary intention may be inferred, and the strength of the presumption will be diminished where special arrangements have been made between the British government and the government of the foreign territory for the protection of British subjects residing therein. A British subject who is a member of a community so protected is not in a position of extra-territoriality so as to be unable to acquire a domicil in the country of his residence and to remain always subject to English law. There is no test which must be satisfied for the acquisition of a domicil of choice in a non-Christian country other than that by which a similar domicil

is acquired in a European country, viz., voluntary residence there plus a deliberate intention to make that residence a permanent home for an unlimited period.

Re Tootal's Trusts (1) (1883), 23 Ch.D. 532, and observations of LORD WATSON, *Abd-ul-Messih* v. *Farra* (2) (1888), 13 App. Cas. 431, disapproved.

Decision of Court of Appeal, [1918] P. 89, reversed.

Notes. Considered: *Re Askew*, *Marjoribanks* v. *Askew*, [1930] All E.R.Rep. 174. Referred to: *Rudd* v. *Rudd*, [1923] All E.R.Rep. 637; *Bartlett* v. *Bartlett*, [1925] A.C. 377; *Re Annesley*, *Davidson* v. *Annesley*, [1926] Ch. 692; *Re Ross*, *Ross* v. *Waterfield*, [1929] All E.R.Rep. 456; *Jaber Elias Kotia* v. *Katr Bint Jiryes Nahas*, [1941] 3 All E.R. 20; *Re Duke of Wellington*, *Glentanar* v. *Wellington*, [1947] 2 All E.R. 854.

As to acquirement of a domicil of choice, see 7 HALSBURY'S LAWS (3rd Edn.) 16 et seq.; and for cases see 11 DIGEST (Repl.) 334 et seq.

Cases referred to:

(1) *Re Tootal's Trusts* (1883), 23 Ch.D. 532; 52 L.J.Ch. 664; 48 L.T. 816; 31 W.R. 653; 11 Digest (Repl.) 344, *137*.

(2) *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431; 57 L.J.P.C. 88; 59 L.T. 106; 4 T.L.R. 407, P.C.; 11 Digest (Repl.) 344, *138*.

(3) *The Indian Chief* (1801), 3 Ch. Rob. 12; 1 Eng. Pr. Cas. 251; 11 Digest (Repl.) 361, *296*.

(4) *Maltass* v. *Maltass* (1844), 1 Rob. Eccl. 67; 3 Notes on Cases, 257; 8 Jur. 860; 163 E.R. 967; 11 Digest (Repl.) 343, *136*.

(5) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, *22*.

(6) *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, *39*.

(7) *The Eumaeus* (1915), 85 L.J.P. 130; 114 L.T. 190; 32 T.L.R. 125; 60 Sol. Jo. 122; 13 App.M.L.C. 228; 11 Digest (Repl.) 362, *306*.

(8) *Mather* v. *Cunningham* (1909), 105 Me. 326; 74 Atlantic Rep. 809.

(9) *Re Probate of the Will of Young J. Allen* (1907), decided in the U.S. Court for China and cited in *Mather* v. *Cunningham*, No. 8 supra.

(10) *The Derfflinger* (*No.* 1) (1916), 1 P.Cas. 386; on appeal sub nom. *The Gutenfels*, *The Barenfels*, *The Derfflinger* (1916), 85 L.J.P.C. 146; 114 L.T. 953; 32 T.L.R. 433, P.C.; 37 Digest 643; *957*.

(11) *Winans* v. *A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 20 T.L.R. 510, H.L.; 11 Digest (Repl.) 329, *41*.

(12) *The Lauderdale Peerage* (1885), 10 App. Cas. 692, H.L.; 11 Digest (Repl.) 333, *66*.

(13) *Re Craignish*, *Craignish* v. *Hewitt*, [1892] 3 Ch. 180; 67 L.T. 689; 8 T.L.R. 451, C.A.; 11 Digest (Repl.) 354, *235*.

(14) *A.-G.* v. *Pottinger* (1861), 6 H. & N. 733; 30 L.J.Ex. 284; 4 L.T. 368; 7 Jur.N.S. 470; 9 W.R. 578; 158 E.R. 303; 11 Digest (Repl.) 359, *275*.

(15) *Douglas* v. *Douglas*, *Douglas* v. *Webster* (1871), L.R. 12 Eq. 617; 41 L.J.Ch. 74; 25 L.T. 530; 20 W.R. 55; 11 Digest (Repl.) 333, *60*.

(16) *Moorhouse* v. *Lord* (1863), 10 H.L.Cas. 272; 1 New Rep. 555; 32 L.J.Ch. 295; 8 L.T. 212; 9 Jur.N.S. 677; 11 W.R. 637; 11 E.R. 1030, H.L.; 11 Digest (Repl.) 332, *56*.

(17) *Re Steer* (1858), 3 H. & N. 594; 28 L.J.Ex. 22; 32 L.T.O.S. 130; 157 E.R. 606; 11 Digest (Repl.) 335, *78*.

(18) *The Jonge Klassina* (1804), 5 Ch. Rob. 297; 11 Digest (Repl.) 360, *291*.

(19) *Forbes* v. *Forbes* (1854), Kay, 341; 2 Eq. Rep. 178; 23 L.J.Ch. 724; 18 Jur. 642; 2 W.R. 253; 69 E.R. 145; 11 Digest (Repl.) 327, *24*.

(20) *Jopp* v. *Wood* (1865), 4 De G.J. & Sm. 616; 5 New Rep. 422; 34 L.J.Ch. 212; 12 L.T. 41; 11 Jur.N.S. 212; 13 W.R. 481; 46 E.R. 1057, L.JJ.; 11 Digest (Repl.) 326, *21*.

(21) *Re Mitchell, ex parte Cunningham* (1884), 13 Q.B.D. 418; 53 L.J.Ch. 1067; 51 L.T. 447; 33 W.R. 22; 1 Morr. 137, C.A.; 11 Digest (Repl.) 342, *126.*
(22) *The Angelique* (1801), 3 Ch. Rob. App. 7; 11 Digest (Repl.) 563, *16.*
(23) *Abdallah* v. *Rickards* (1888), 4 T.L.R. 622; 44 Digest 286, *1185.*

Also referred to in argument:

The Lutzow, [1918] A.C. 435; 87 L.J.P.C. 52; 118 L.T. 265; 34 T.L.R. 147; 14 Asp.M.L.C. 187, P.C.; 2 Digest (Repl.) 217, *301.*
Secretary of State for Foreign Affairs v. *Charlesworth, Pilling & Co.*, [1901] A.C. 373; 70 L.J.P.C. 25; 84 L.T. 212; 17 T.L.R. 265, P.C.; 22 Digest (Repl.) 612, *7066.*

Appeal by the husband, Demetrius Emanuel Casdagli, from an order of the Court of Appeal, reported [1918] P. 89, affirming an order made by HORRIDGE, J., on an act on petition in which the appellant claimed that he had acquired a domicil of choice in Egypt, with the result that the English courts could not entertain a suit for divorce brought against him by his wife, Jeanne Casdagli. The majority of the Court of Appeal, SWINFEN EADY and WARRINGTON, L.JJ., SCRUTTON, L.J., dissentiente, held that the appellant had not acquired the domicil he claimed, and dismissed his act on petition, thereby asserting the jurisdiction of the English court to dissolve his marriage. The facts appear from the opinion of LORD FINLAY, L.C.

George Wallace, K.C., and *J. Harvey Murphy* for the appellant.
Sir W. E. Hume-Williams, K.C., and *Patrick Hastings* for the respondent.

Their Lordships took time for consideration.
Oct. 28, 1918. The following opinions were read.

LORD FINLAY, L.C.—This appeal arises out of proceedings for divorce taken in the Divorce Court of England by the wife (the respondent in this appeal) against her husband (the appellant). The husband by act on petition alleged that he had acquired a domicil of choice in Egypt, that there was no English domicil and that the English court had no jurisdiction to entertain a suit against him for dissolution of marriage. The wife by her answer set up that the husband had never abandoned his domicil of origin, which was English, and that the court, therefore, had jurisdiction. Evidence was taken orally and upon affidavit. The case was tried before HORRIDGE, J. He held that he was bound by authority to decide that a British subject registered as such at the British Consulate could not in point of law acquire a domicil in Egypt, and his decision was affirmed by the majority of the Court of Appeal (SWINFEN EADY, L.J., and WARRINGTON, L.J.), while SCRUTTON, L.J., dissented, holding that there was no rule of law against the acquisition of a domicil in Egypt by a British subject. From the decision of the Court of Appeal the present appeal is now brought to your Lordships' House.

The facts are not in dispute, and the only question is whether it is in point of law impossible for a registered British subject to acquire a domicil in Egypt. It was contended for the respondent that this point had been decided in her favour by CHITTY, J., in *Re Tootal's Trusts* (1), and by the Judicial Committee in *Abd-ul-Messih* v. *Farra* (2), and that these cases had been correctly decided and ought to be followed by your Lordships' House. It is admitted that the appellant is and always has been a British subject. He was born in England in 1872, his father being a naturalised British subject residing in England and carrying on business there and in Egypt. The appellant was taken to Egypt in 1879 on account of his health, and remained there until 1882, when he returned to England. He was educated in England and in France, and returned to Egypt in 1895, when he was twenty-three years of age. He resided in Alexandria from 1895 to 1900, and was engaged in his father's business there. In 1900 he went to Cairo to manage the business in Cairo, and has resided in Cairo from that time until the present. He always has been and is a member of the Greek Orthodox Church,

A and the respondent, who was born in Egypt, is a member of the same church. They were married according to the rites of their Church in Alexandria on July 1, 1905, and on the 5th of the same month the civil marriage took place at the British Consulate at Alexandria. The appellant was taken into partnership by his father, together with the appellant's four brothers, in 1910. The father died in 1911, and since his death the appellant has carried on the Egyptian branch of the business B along with two of his brothers. The appellant has been and is registered as a British subject at the British Consulate at Cairo. Horridge, J., found that the appellant had fixed his residence in Egypt with the intention of residing there for an unlimited time. He decided against the husband on the question of jurisdiction, not at all upon the facts as to residence, but simply on the ground that in point of law it was impossible for a British subject to acquire a domicil in Egypt on C account of the extra-territorial rights which British subjects there enjoy. The same view was taken by the majority of the Court of Appeal.

[His Lordship then referred to the legal position of British subjects in Egypt and the jurisdiction of the mixed and consular courts then in existence, and continued:] It follows that the marriage between the appellant and the respondent could not be dissolved by the consular court. It was urged upon us that this pointed to D the inference that the Divorce Court in England must have jurisdiction, as otherwise the wife would be unable to obtain anywhere the relief to which she alleges she is entitled. It is, however, well settled that the jurisdiction of the Divorce Court depends upon domicil. If the husband's domicil be English, he or his wife may sue for a divorce in the English court. If the domicil is not English, jurisdiction will not be conferred by the fact that the relief cannot be obtained in the E consular court. The fact that the acquisition by a British subject of an Egyptian domicil would make it impossible to get relief by way of divorce has no bearing on the question of law whether such a domicil can be obtained by him in point of law; it might conceivably in some cases form an element for consideration in inquiring whether he had the intention to acquire a domicil in Egypt. The present case, therefore, depends upon the question whether the husband has an Egyptian F domicil. Upon the evidence and according to the findings of the courts below, the husband has done everything possible to acquire an Egyptian domicil, and this he had acquired unless as a matter of law it be impossible for a British subject in his position to acquire such a domicil.

It was argued that British subjects in Egypt enjoy extra-territoriality and that this prevents the acquisition of Egyptian domicil. This argument appears to me G to rest upon a misconception as to the position of a British subject in Egypt. His position is in no respect analogous to that of an ambassador and his staff in a foreign country. He is subject to the law of Egypt as administered by the mixed tribunals and pays taxes. It is true that on a criminal charge, not being one of those enumerated in the law as to mixed tribunals, he must be tried in His Majesty's Consular Court, and civil disputes between him and other British H subjects and questions as to his personal status and succession must be there determined. The jurisdiction exercised by His Majesty in Egypt is indeed extra-territorial, but it is exercised with the consent of the Egyptian government, and its jurisdiction is, therefore, for this purpose really part of the law of Egypt affecting foreigners there resident. The position of a British subject in Egypt is not extra-territorial; if resident there he is subject to the law applicable to persons I of his nationality. Whether that law owes its existence simply to the decree of the government of Egypt or to the exercise by His Majesty of the powers conferred on him by treaty is immaterial.

It has often been pointed out that there is a presumption against the acquisition by a British subject of a domicil in such countries as China and the Ottoman dominions owing to the difference of law, usages, and manners. Before special provision was made in the case of foreigners resident in such countries for the application to their property of their own law of succession, for their trial on criminal charges by courts which will command their confidence, and for the settle-

ment of disputes between them and others of the same nationality by such courts, the presumption against the acquisition of a domicil in such a country might be regarded as overwhelming unless under very special circumstances. But since special provision for the protection of foreigners in such countries has been made, the strength of the presumption against the acquisition of a domicil there is very much diminished. Egypt affords a very good illustration of this. What presumption is there against the acquisition of an Egyptian domicil by a British subject when the country is under British protection and when the British subject is safeguarded in all his rights in the manner which I have described? The question is one to be tried on the ordinary principles applicable to such questions of fact. The view that it is impossible in point of law could be supported only on the assumption that the doctrine of extra-territoriality applies to all British subjects, so that, though actually in Egypt, they are in contemplation of law still in their own country, and that for this reason there is not, and cannot be, the residence in the particular locality necessary for the acquisition of domicil. Any such view as to impossibility appears to be erroneous in principle and inconsistent with the evidence in this case as to the position of a foreigner resident in Egypt.

It is, however, necessary to examine the authorities which were strongly pressed upon us as showing that the point should be treated by this House as no longer open to discussion. In *The Indian Chief* (3) the question arose whether the owner of cargo, being an American citizen resident at Calcutta, should be treated as a British subject so as to render illegal his trading with the enemy. All that was decided in the case was that the nominal sovereignty of the Great Mogul might be for this purpose disregarded, and that the cargo-owner, as he resided and traded in Calcutta under the government of the East India Co., must be treated as a British subject, and, as he had traded with the enemy, the cargo was condemned. The case was cited merely on account of the passage in Sir W. Scott's judgment (3 Ch. Rob. at pp. 28–30), in which he explains, with even more than his wonted charm of expression, the position of foreign traders in Eastern countries. The passage illustrates the presumption against the acquisition of a domicil of choice in such Eastern countries, but is not otherwise relevant to the present discussion.

In 1844 *Maltass* v. *Maltass* (4) came before Dr. Lushington, sitting for Sir H. Jenner Fust in the Prerogative Court of Canterbury. The question was as to the law which should govern the will of a British subject who for many years had resided in Smyrna. Dr. Lushington found that the deceased was a British subject, and then proceeded to inquire whether he was domiciled in Smyrna, but pointed out that this inquiry would be superfluous if, with respect to his succession, the law of England and the law applicable in Turkey were the same. Referring to the provisions of the capitulations that the property of British subjects dying in Turkey should be disposed of according to English law, he held that this applied even in cases in which the deceased had become domiciled in Turkey, and that it was immaterial whether he had acquired a domicil in Smyrna or retained his English domicil, as in either case the English law would apply. He concluded with the following observations (1 Rob. Ecc. at p. 80):

> "I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicil. But this I must say—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte. As to British subjects originally Mussulmans, as in the East Indies, the same reasoning does not apply to them, as Lord Stowell has said does apply in cases of a total and entire difference of religion, customs, and habits."

The language of Dr. Lushington in this judgment lends no countenance to the idea that it is impossible for an English subject to acquire a domicil of choice in a country like Turkey. So far as he touches upon the question at all, he treats it not as a matter of law, but as a question of fact.

In 1882 *Re Tootal's Trusts* (1) was decided by CHITTY, J. In that case a petition was presented by residuary legatees asking for a declaration that the testator was domiciled at Shanghai at the time of his death, and consequently that no legacy duty was payable. The testator was a British subject who resided at Shanghai and died there. If the domicil was English, the duty was payable, while if the deceased had acquired a domicil in China the duty was not payable. The testator had for some years before his death determined to reside permanently at Shanghai, and had formed and expressed the intention of never returning to England. It was admitted that it could not be contended that the domicil was Chinese. It is clear that what was meant by this admission was that it could not be contended that the testator had become domiciled in China so as to attract to his estate the law applicable in China to natives of that country, and CHITTY, J., said (23 Ch.D. at p. 534):

> "This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by LORD STOWELL in his judgment in *The Indian Chief* (3) and by DR. LUSHINGTON in *Maltass* v. *Maltass* (4)."

Both of these great judges had treated the question as one of fact, and had pointed out the improbability of the acquisition of such a domicil. It is obvious that the admission that there was no Chinese domicil in that sense was rightly made. What the petitioners contended for in *Re Tootal's Trusts* (1) was what is there called an Anglo-Chinese domicil. Some criticism has been bestowed upon this and analogous expressions, but it appears to me that the expression "Anglo-Chinese domicil" is apt to denote compendiously a domicil in China acquired by a British subject and carrying with it the privileges conferred by treaty upon British subjects there residing. These privileges appear to have been analogous to those enjoyed by British subjects residing in Egypt: see 23 Ch.D. at pp. 535, 536. At p. 536 CHITTY, J., says that the exception from the jurisdiction of His Majesty's Supreme Court at Shanghai as a matrimonial court in regard to dissolution, nullity, or jactitation of marriage, apparently left Englishmen subject to the jurisdiction of the court for matrimonial causes in England in respect of such matters. This statement requires qualification. The absence of provisions for divorce in Shanghai cannot of itself confer jurisdiction upon the English court; it depends upon the question whether the domicil has remained English. If the English domicil has been replaced by an Anglo-Chinese one, the jurisdiction of the English courts would be gone. CHITTY, J., went on to consider whether on principle an Anglo-Chinese domicil could be established. He came to the conclusion that "there is no such thing known to the law as an Anglo-Chinese domicil" (ibid. at p. 542). The reasoning by which he arrived at this conclusion is as follows (ibid. at pp. 538–9):

> "On principle, then, can an Anglo-Chinese domicil be established? The British community at Shanghai, such as it is, resides on foreign territory; it is not a British colony, nor even a Crown colony, although by the statutes above referred to the Crown has, as between itself and its own subjects there, a jurisdiction similar to that exercised in conquered or ceded territory. Residence in a territory or country is an essential part of the legal idea of domicil. Domicil of choice, says LORD WESTBURY in *Udny* v. *Udny* (5), is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. He speaks of residence in a particular place, and not of a man attaching himself to a particular community resident in the place. In *Bell* v. *Kennedy* (6) he uses similar expressions. Domicil is an idea of the law, 'it is the relation which the law creates between an individual and a particular locality or country.' He refers to locality or country, and not to a particular society subsisting in the locality or country.

The difference of law, religion, habits, and customs of the governing community may, as I have already pointed out, be such as to raise a strong presumption against the individual becoming domiciled in a particular country; but there is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign territorial power. There may be, and, indeed, are, numerous examples of particular sects or communities residing within a territory governed by particular laws applicable to them specially. British India affords a familiar illustration of this proposition. But the special laws applicable to sects or communities are not laws of their own enactment; they are merely parts of the law of the governing community or supreme power. It may well be that a Hindu or Mussulman settling in British India and attaching himself to his own religious sect there would acquire an Anglo-Indian domicil, and by virtue of such domicil would enjoy the civil status as to marriage, inheritance, and the like, accorded by the laws of British India to Hindus or Mussulmans, and such civil status would differ materially from that of a European settling there and attaching himself to the British community. But the civil status of the Hindu, the Mussulman, and the European would in each case be regulated by the law of the supreme territorial power. In the case before me the contention is for a domicil which may not improperly be termed extra-territorial. The sovereignty over the soil of Shanghai remains vested in the Emperor of China, with this exception, that he had by treaty bound himself to permit British subjects to reside at the place for the purpose of commerce only, without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects, but over no other persons."

The view of CHITTY, J., was that the domicil alleged is in nature extra-territorial. I cannot agree. The position of British subjects in such a country is not extra-territorial. The domicil is acquired and can be acquired only by residence in Egypt. The law applicable to the foreigner so residing is, by the consent of the Egyptian government, partly Egyptian and partly English. This is the result of the convention between the two governments. Though the domicil is Egyptian, the law applicable to persons who have acquired such a domicil varies according to the nationality of the person. The foreigner does not become domiciled as a member of the English community in Egypt, but he acquires an Egyptian domicil because he by his own choice has made Egypt his permanent home, and you have then to consider by what code of law he and his estate are governed according to the law in force in Egypt. The domicil is purely territorial, and you go to the law in force in the territory to see what system of law it treats as applicable to resident foreigners and to what courts they are subject. CHITTY, J., refers to the case of British India, where there are many particular sects governed by particular laws applicable to them specially, and distinguishes it on the ground that these special laws are not laws of their own enactment, but are merely parts of the law of the governing community or supreme power. The supposed distinction does not exist. In Egypt it is part of the law of the governing community or supreme power. In other words, it is part of the law of Egypt that English residents are governed by English law, and that they are amenable in certain cases only to certain English courts established by the King of England with the consent of the Egyptian government. CHITTY, J. (ibid. at p. 539), puts the case of a citizen of the United States who attaches himself to the British community at Shanghai, and says that, according to the petitioner's argument, he would acquire an Anglo-Chinese domicil, and this he treats as a reductio ad absurdum of the petitioner's contention. A citizen of the United States resident permanently in Shanghai would be subject to the law which attaches to citizens of the United States so settling in China according to the law of China. His domicil and the law applicable would not arise from attaching himself to any particular community, but from his personal residence in Shanghai

coupled with his nationality. His having attached himself (whatever that may denote) to the English community would be immaterial unless he had acquired English nationality. I think that the respondent's counsel were entitled to treat *Re Tootal's Trusts* (1) as a decision in their favour of the point now in dispute, and indeed I do not think that this was contested by counsel for the appellant. But the decision is, of course, not binding upon this House, and it is, in my opinion, erroneous. There has been no such general acquiescence in the correctness of the decision in *Re Tootal's Trusts* (1) and change of position in reliance upon that decision as to render it improper that this House should act upon its own view of the law.

Abd-ul-Messih v. *Farra* (2) came before the Judicial Committee of the Privy Council in 1887 on an appeal from the Supreme Consular Court at Constantinople. The question related to the succession to a person who had died in Egypt. The deceased was born at Baghdad, in the Ottoman dominions, of Ottoman parents, and in early life went to India, whence, after a considerable period, he went to Jedda, which was also in the dominions of the Porte. In 1858 he went to Cairo, where he remained until his death under the protection of the British government. Proceedings were taken in the consular court by his widow to obtain probate of his will, which was in the English form. The judge found that the testator died domiciled in the Ottoman Empire, that his domicil of origin was there, and that he was a member of the Chaldean Catholic community, and decreed that the law of Turkey governing the succession to a member of the Chaldean Catholic community in Ottoman dominions should be followed in distributing the effects of the deceased. From this order an appeal was brought by the widow to His Majesty in Council. In support of the appeal, two arguments were put forward (13 App. Cas. at pp. 432–434). First, that English law should apply to the succession of the deceased as a British protected person, and, secondly, that the deceased was affiliated to the community of persons under English jurisdiction at Cairo, who formed, as it were, an extra-territorial colony of the Crown, and that subjection to the jurisdiction of the consular court is equivalent to residence in the country to which these courts belong, so as to establish a domicil in that country. The nature of these contentions must be borne in mind in order to appreciate the terms of the judgment. What the Judicial Committee decided was that the testator was not a British subject, and that the fact that he was a person under British protection resident in Egypt did not render English law applicable to his succession. The judgment was delivered by Lord Watson, who points out (ibid. at p. 439) that the idea of domicil, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicil to be found in the books. He goes on to say (ibid. at pp. 440, 441):

> "Their Lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as domicil arising from society, and not from connection with a locality. *Re Tootal's Trusts* (1) is an authority directly in point, and their Lordships entirely concur in the reasoning by which Chitty, J., supported his decision in that case."

I concur with the proposition that there is no such thing as domicil independent of locality. Residence in a particular locality is of the very essence of domicil, and the contention put forward by the appellant in *Abd-ul-Messih's Case* (2) (ibid. at pp. 433, 434) that subjection to the jurisdiction of the consular courts is equivalent to residence in the country to which these courts belong, so as to establish domicil in that country, was preposterous. On the assumption that the deceased Abd-ul-Messih was domiciled in Egypt in virtue of permanent residence there, then, if he had become in fact a British subject, the law applicable to British subjects resident in Egypt would have applied in his case. Mere association with the British in Egypt could not have that effect. If Chitty, J., in *Re Tootal's Trusts* (1) had merely decided that there is no such thing as domicil arising from society and not from connection with a locality, the decision would have been beyond

criticism. It went, I think, a great deal further, and I find myself unable to agree with the judgment of CHITTY, J., in that case or with LORD WATSON's approval of his reasoning, an approval which was in no way necessary for the decision of the case before the Judicial Committee. LORD WATSON gives a statement as to the position of foreigners in Egypt in the following terms (ibid at p. 439):

> "Certain privileges have been conceded by treaty to residents in Egypt, whether subjects of the Queen or foreigners, whose names are duly inscribed in the register kept for that purpose at the British consulate. They are amenable only to the jurisdiction of our consular courts in matters civil and criminal, and they enjoy immunity from territorial rule and taxation. They constitute a privileged society, living under English law on Egyptian soil, and independent of Egyptian courts and tax-gatherers."

This description is not in accordance with the evidence in the case now before your Lordships, and I cannot help thinking that it is due to some misconception of the evidence in the *Abd-ul-Messih Case* (2). Foreigners residing in Egypt have since 1875 been subject to the jurisdiction of mixed courts which are Egyptian tribunals administering Egyptian law, and in certain cases to their consular courts, and they are subject to Egyptian taxation. If the facts as to the position of foreigners in Egypt had been correctly appreciated, it would have been impossible for the appellant to put forward the contention which LORD WATSON summarises as follows (ibid. at p. 439):

> "The appellant maintained that a community of that description ought, for all purposes of domicil, to be regarded as an ex-territorial colony of the Crown; and that permanent membership ought to carry with it the same civil consequences as permanent residence in England, or in one of the colonial possessions of Great Britain, where English law prevails."

The appellant in the *Abd-ul-Messih Case* (2) appears also to have argued that the effect of the Order in Council was that English law is the sole criterion by which in the case not only of British subjects, but also of persons under British protection resident in Egypt at the time of their decease, the capacity to make a will, and its validity when made, must be determined. This argument was dismissed and rightly dismissed by LORD WATSON as wholly unsustainable on the construction of the Order in Council. [HIS LORDSHIP referred to certain questions of fact raised in the *Abd-ul-Messih Case* (2) and continued:] The decision in the *Abd-ul-Messih Case* (2) was clearly right on the broad ground that the deceased was not a British subject, but I must with all respect express my dissent from some of the dicta which occur in the course of the judgment, for the reasons which I have given in referring to them. The correctness of the decision is in no way dependent upon these dicta.

The decision in *Re Tootal's Trusts* (1) has been a good deal canvassed. SIR SAMUEL EVANS, sitting in the Prize Court, made some observations with regard to *Re Tootal's Trusts* (1) which are worth quoting. In giving judgment in *The Eumaeus* (7) he said (85 L.J.P. at p. 135):

> "In this case I am not called upon to express any opinion upon the question whether at the present day a British subject can acquire a civil domicil in an Oriental country like China. *Re Tootal's Trust* (1) may or may not be good law. It has been much criticised by jurists, and has been recently dissented from in a judgment of the Supreme Judicial Court of Maine in *Mather* v. *Cunningham* (8). The decision in the case now before the court does not involve that question."

In the case to which SIR SAMUEL EVANS refers—*Mather* v. *Cunningham* (8) (as appears from the report in 74 ATLANTIC REPORTER, the only report which I have seen)—the Supreme Court of Maine, sitting as the Supreme Court of Probate, allowed an appeal from an order of the Probate Court in Waldo county appointing an administrator. The court on the appeal consisted of EMERY, C.J., and five

other judges. The deceased had made his home and carried on his business at Shanghai, his domicil of origin having been in Waldo county, Maine, and the question on which the case turned was whether an American could as a matter of law acquire a domicil in the province of Shanghai, where, by treaty, American law was substituted for the Chinese local laws. The Supreme Court made an elaborate examination of *Re Tootal's Trusts* (1) and of the many criticisms and comments which had been made on that decision, and arrived at the conclusion that its doctrine could not be supported. It was pointed out that domicil depends upon locality, and that the law of the locality attaches to the person who has acquired a domicil there, whether that law be decreed by the supreme Power of the foreign country or is the result of treaty. They say that the "whole trend of modern authority is in opposition to the dictum advanced in *Re Tootal's Trusts* (1)." The court went on to refer to a case which had been decided at Shanghai in 1907, and said:

> "JUDGE WILFLEY, the United States Court for China, sitting at Shanghai in 1907, in *Re Probate of the Will of Young J. Allen* (9), pronounced a strong opinion in which he rejected the dictum of *Re Tootal's Trusts* (1) and came to a directly opposite conclusion."

The court in *Mather* v. *Cunningham* (8) gave its decision in the following terms:

> "The court is of the opinion that Henry J. Cunningham, the decedent, at the time of his decease had abandoned his domicil of origin in Waldo county and had acquired a domicil of choice in Shanghai."

The appeal was sustained.

The case of *Allen's Will* (9) is also cited by MR. WESTLAKE in his PRIVATE INTERNATIONAL LAW (5th Edn.), p. 349. MR. WESTLAKE says:

> "The testator's domicil of origin was in Georgia, and the question was whether the law of Georgia was to be applied in the administration of his estate or 'the law which Congress had extended to Americans in China, which is the common law.' JUDGE WILFLEY decided for the latter, saying that 'We can see no good reason for holding that a citizen of the United States cannot be domiciled in China.' "

I have made endeavours to get the pamphlet report of this case, but without success.

In March, 1916, in His Majesty's Court of Prize for Egypt sitting at Alexandria, CATOR, P., made the following observations in *The Derfflinger, No. 1* (10) (1 P.Cas. at p. 389):

> "From time to time questions as to the status of British subjects in China and the Ottoman dominions have come before our courts, and it has been settled that no British subject can change his legal domicil by residence in any place where the Crown has extra-territorial authority. That, as we know to our cost, owing to the great inconvenience which it has entailed upon the British community, is, I think, the effect of *Re Tootal's Trusts* (1), approved of by the Privy Council in *Abd-ul-Messih* v. *Farra* (2). These decisions, it is true, relate only to the subtle and artificial doctrine of personal domicil which has been evolved by our civil courts for the purpose of determining questions relating principally to probate and administration; and a legal domicil for the purpose of a Court of Probate is, I need hardly say, a very different thing from a commercial domicil for the purpose of a Prize Court. But *Re Tootal's Trusts* (1) emphasises the fact that there still exist countries where, owing to fundamental differences in race and religion, Europeans do not merge in the general life of the native inhabitants, but keep themselves apart in separate communities; and where such separation is sanctioned by the exercise of ex-territorial authority I am of opinion that it is impossible for any individual to acquire a trade domicil other than that of the country to which he owes allegiance."

The fact that inconvenience has resulted from a particular decision would, of course, be no reason for disturbing it, if sound in law. But, as in my opinion *Tootal's Case* (1) and the dicta approving it are erroneous, I think that the British community in Egypt should be relieved from the inconvenience which CATOR, P., says has been thereby caused. I entirely agree with the conclusion arrived at by SCRUTTON, L.J., in his admirably reasoned judgment, and for those reasons I think the appeal should be allowed.

VISCOUNT HALDANE.—I agree, and will not recapitulate the facts in the case. It is quite clear that, while the appellant had an English domicil of origin, he had migrated to Egypt in 1895, and had made his permanent home in Cairo with no intention of returning to England. Under these circumstances he must have acquired an Egyptian domicil, if Egypt were a country where a domicil could be acquired, and he had done nothing to prevent its acquisition. But he remained a British subject, and he registered himself at the British consulate at Cairo as a member of the society of British subjects resident there. The question is whether such registration with its consequences prevented him from losing his English domicil of origin. Persons so registered undoubtedly acquire certain privileges, among which is that their litigations, disputes, and differences, if among themselves, are settled by the British consular courts, and if between themselves and Egyptians or other foreigners are settled by the mixed tribunals established for the purpose. This was so for long before the war, and since the war the Sultan of Egypt has continued this privilege. But Egypt is a civilised country in which I have no doubt that a domicil could, apart from special obstacles, be acquired, and what we have to determine is whether membership of the society of British subjects who possess these privileges was an obstacle to the presumption of an Egyptian domicil of choice receiving effect.

I do not think that CHITTY, J., intended in *Re Tootal's Trusts* (1) to decide, as has been suggested to us, that it was impossible to acquire a domicil in the Chinese Empire. What I think he did intend to decide was that the institutions of that country were so radically divergent from those of this country as to raise a very strong presumption of fact against any intention to acquire such a domicil. Not only towards the foot of p. 534, but again at the foot of p. 538 of the report of his judgment (25 Ch.D.) he used words which indicate that he considered the point to be one of presumption of intention, and, therefore, a question of evidence and not of substantive law. Nor does it appear to me that the judgment of the Judicial Committee of the Privy Council in *Abd-ul-Messih* v. *Farra* (2) delivered by LORD WATSON in 1888, on an appeal from the Supreme Consular Court of Constantinople, carries the matter any further in favour of the present respondent. There a testator, whose domicil of origin was Turkish, and who was a member of the Chaldean Catholic community, fixed his permanent residence at Cairo, which was then part of the dominions of the Sultan of Turkey. He got himself registered as a member of the British community in Egypt, but only in the capacity of a protected person who enjoyed the measure of protection accorded primarily to British subjects, but granted to all those who could obtain the inscription of their names in the register kept at the British consulate in Egypt. It was held that he was not, in the sense of English law, a British subject. It was also held that he had not lost his Turkish domicil of origin, and that his residence as a privileged member of the community, although it might have been effectual to destroy a previous residential domicil elsewhere acquired by choice, was ineffectual to create a new domicil of choice. It was said, approving the decision in *Re Tootal's Trusts* (1), that there cannot be created a domicil arising merely from membership of such a community if there be not also such connection with the locality where the community is established as will attract the municipal law of the territory where the member of the community has settled, so that it becomes the measure of his personal capacity. The result was that the succession to the testator was treated as depending on the Turkish law applicable to the Chaldean Catholic community

to which he belonged, a law which could apply in Egypt, which was then part of the Turkish dominions.

All that these two cases decided was that mere membership of a protected British society in a foreign country is not enough to establish a domicil which would attract the British municipal law governing succession, unless it was accompanied by other essentials required in order to establish a British domicil. These essentials comprise settlement in a home on territory that is actually British, along with intention to make that home permanent. It is said to be difficult to find an adequate definition of domicil, and no doubt it is difficult. The reason is to be looked for in the older decisions in which the fundamental principle has been obscured by qualifications made in the earlier cases in order to provide for residence occasioned by considerations of health, or of the anomalous conditions of service in India under the East India Co. Some obscurity existed at one time whether a change of allegiance was not also required in order to establish the acquisition of a new domicil, an obscurity which has now been removed. The effort to reconcile expressions used in numerous cases decided in these connections, cases which have never been overruled in terms, has embarrassed those who have attempted to find words which would cover everything of apparent authority which appears in the books. But it is clear to-day that there is no reason for hesitating to hold that a man who has shaken the dust of England from off his shoes, and has gone to reside in a civilised foreign country with the intention of making a new and permanent home there, gets rid of his English domicil of origin. Of course, the condition of that foreign country may be so barbarous as to make it so unlikely that he should have intended to make it his home to the full sense of accepting its institutions as his own that he may not have the intention to do so imputed to him. That happened in *Re Tootal's Trusts* (1). But between China, at all events as it was when CHITTY, J., gave the decision, and Egypt as it is to-day there is a vast difference. At the time when the respondent's Egyptian domicil was challenged Cairo had become a modern and civilised city situated in the country of a friendly Sultan. I do not think that even before the war there was anything short of a great divergence between the conditions in China at the period I have referred to and Cairo as it has been for many years. The divergence was quite enough to obviate the difficulty which CHITTY, J., encountered in ascribing intention. I am, therefore, of opinion that there is no room for drawing in the present case the inference which CHITTY, J., made. The thing needful is not lacking in the facts with which we have to deal, and the appeal ought to succeed.

LORD DUNEDIN.—The practical question here is whether the courts of England have or have not jurisdiction to dissolve the marriage of the appellant and respondent at the suit of the respondent. The appellant disputes the jurisdiction. Admittedly such jurisdiction is founded on the domicil of the husband. The appellant had an English domicil of origin, and is, therefore, subject to the jurisdiction, unless he has abandoned that domicil, which he can only do by the acquisition of another domicil not English. Now, the acquisition of another domicil depends on intention and the carrying into effect of that intention by residence. Intention may be, and in most cases is, gathered from what a person does, not merely from what he says. But it has been conceded throughout the argument that if the country here in question were any of the States of Western Europe or the United States of America instead of Egypt, the appellant has discharged the burden upon him—that is to say, has shown intention and the carrying into effect of that intention by residence. The sole reason against the usual result following is that it is urged that in the case of Egypt, inasmuch as the appellant is registered at the British consulate as a British subject, and in consequence is in the enjoyment of certain privileges as to his subjection to local tribunals, it is impossible for him to acquire an Egyptian domicil. I think that proposition is neither laid down by authority nor sound on principle.

As to authority, the matter is reduced to two cases—*Re Tootal's Trusts* (1) and *Abd-ul-Messih* v. *Farra* (2). Neither of those cases are technically binding on your Lordships, but I will for the moment treat them as if they were so. I do not set forth the facts as that has already been done by the noble Lords who preceded me. *Re Tootal's Trusts* (1) can be no authority for the proposition contended for, because all that it actually decided was that mere enrolment as a member of a British community in China, to which community certain privileges were by treaty conceded, did not per se create for the person so enrolled an Anglo-Chinese domicil. The fact that in that case Tootal had no Chinese domicil was based on admission, and, therefore, possibility had not to be considered. Apart from the actual decision, I cannot say that I approve of the remarks of CHITTY, J., or am I able to follow the noble viscount in thinking that all that he meant was that a Chinese domicil was such an improbable domicil for an Englishman to adopt that he would not easily be brought to think that it had been adopted. I think the American court in *Mather's Case* (8) were right upon the facts to refuse to follow what would seemingly have been CHITTY, J.'s opinion. Further, I am quite clear that the headnote in the *Abd-ul-Messih Case* (2) (13 App. Cas. 431) goes too far in saying "*Re Tootal's Trusts* (1) approved." The approval given by the Judicial Committee was, as I read the judgment, limited to the proposition—which, indeed, I think, no one now disputes—that mere membership of a privileged community will not per se constitute domicil.

I turn to the *Abd-ul-Messih Case* (2). The first part of the judgment deals with the forlorn hope of showing that the proposition settled by *Tootal's Case* (1) was wrong. That was all that had been dealt with in the court below. The de quo was the displacement of a Turkish domicil. It was said in the court below, and it was all that was said, that this was effected by the acquisition of an English domicil. As Egypt, where the residence took place, was not England, this could only be if it were possible to acquire such a domicil by registration in the English community. Judgment on that point really disposed of the appeal. But at the last moment an argument seems to have occurred to counsel—namely, to say that the Turkish domicil was displaced by an Egyptian domicil, and no doubt LORD WATSON deals with that in his judgment. He says that the argument only made its appearance at the end of the case, and that there are two answers to it, either of which would be sufficient—(i) that there was no averment that in the matter of succession (which was the practical point of the case) the law of an Egyptian domicil was different from that of a Turkish domicil. I agree that that was a sufficient answer. But (ii) he goes on to say (13 App. Cas. at p. 445):

> "Residence in a foreign State as a privileged member of an extra-territorial community, though it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice."

This dictum, which was unnecessary for the decision of the case and was, therefore, obiter, is really the sheet anchor of the respondent's argument. Doubtless any dictum of LORD WATSON is entitled to great respect. But there have been cases before this where the obiter dicta of the most learned judges have on fuller consideration given to them been abandoned. The dictum, however, remains, and I am not able to explain it away. I am bound to say, as I do, that I think it unsound. LORD WATSON gives no reasons for it. If his reasons are to be inferred from the prior passages in the judgment where he is describing the position of the privileged English community, it is not unfair to point out that that description, even if accurate when given, is certainly not accurate as at the date of this case.

Is there, then, any principle on which such a proposition can rest? I can see none. I respectfully adopt on this branch of the subject what has just been said by the noble viscount, whose opinion I had the advantage of reading before I wrote my own. The fallacy of the opposing argument seems to me to rest on the idea of extra-territoriality. That is a conception which, having its legitimate application in such things as the position of an ambassador or of a British ship

in foreign territorial waters, has no application to the matter in hand. It seems to me that the whole privileges which were conceded by the capitulations, or are now continued by the order of the present ruler of Egypt, are privileges which are made good by Egyptian law and not by English law. Can there be an inconsistency in the fact of an Egyptian domicil with the existence of a privilege given by Egyptian law to a certain class of persons simply because that privilege sometimes consists in a law being applied which is not Egyptian law? The opposite view seems to postulate the idea that you cannot be domiciled unless there is no possible difference between the law applicable to you and that applicable to every other native of the country in which the domicil is said to be acquired. On such a theory how could we explain the position of matters in India? No one denies that a person may acquire an Indian domicil. Yet after he has done so the law to be applied to him will vary according as he is a Hindu, a Mussulman, or a person not professing either of those religions. I think the appeal should be allowed. I agree with the opinion of SCRUTTON, L.J., and I think it clear that HORRIDGE, J., would have come to the same result had he not felt himself disentitled to go in the teeth of a dictum of LORD WATSON which was so directly in point.

LORD ATKINSON.—I concur. The facts have been already stated and I do not repeat them. HORRIDGE, J., found that it was abundantly proved that the appellant had voluntarily fixed his sole or chief residence in Egypt, with the intention of continuing to reside there for an unlimited time, and the correctness of this finding of fact upon the evidence has not been questioned either by the respondent's counsel in the Court of Appeal or in this House. Nor is it questioned by either of the lords justices who constituted the majority in the Court of Appeal. The ordinary consequence of such a finding, if it stood alone, would, according to well-established authority, be that the appellant would be held to have acquired a domicil of choice in Egypt. But it is contended that it cannot have that result in this case owing to two matters: First, the registration of the appellant as a British subject; and, secondly, the so-called extra-territorial jurisdiction alleged to be exercised in Egypt by His Majesty the King of England through his consular courts, under the capitulations confirmed in 1809 by the Treaty of the Dardanelles entered into between the Sultan of Turkey and Great Britain conjoined with the English Order in Council of Nov. 7, 1910. It is contended that the appellant being so registered, his residence in Egypt must, upon the authorities, be treated, not as the residence of an ordinary inhabitant there, but as that of a privileged member of an ex-territorial community unconnected with locality, and, therefore, incapable of conferring a domicil.

It is plain that HORRIDGE, J., would have held against this contention that the appellant had acquired a domicil of choice in Egypt but for the decisions in two cases by which he considered he was bound. He decided, accordingly, that the appellant's objection to the wife's petition failed. These two cases are *Re Tootal's Trusts* (1), decided by CHITTY, J., and *Abd-ul-Messih* v. *Farra* (2). The majority of the Court of Appeal followed these cases and applied what they considered to be the principle laid down in them. SCRUTTON, L.J., in a most able judgment dealing exhaustively with all the authorities, showed conclusively, I think, that the principles said to have been laid down by these authorities, if they were such as was contended for, were unsound, and held, as HORRIDGE, J., would have held, had he considered himself free to do so, that the appellant had acquired an Egyptian domicil of choice. In this conflict of judicial opinion it becomes necessary, I think, to examine carefully the decisions in these two comparatively modern cases, as well as the decision of DR. LUSHINGTON in *Maltass* v. *Maltass* (4) and that of LORD STOWELL in *The Indian Chief* (3), on which the decisions in the two former cases purport to be based, with a view to distinguishing the points of actual decision from the obiter dicta in which those most distinguished judges indulged, and to ascertain if possible what precisely were the principles upon which these decisions rested.

In this connection I may say it would appear to me to be quite illegitimate to assume that the laws, habits, manners, and customs of Eastern countries are stable, and have remained as repellent to English subjects as they might have been a century ago—an assumption which applied to Japan, if not indeed to Egypt, would be unjust and inaccurate. About the general law touching the acquisition of a domicil of choice in European countries, the United States of America, or the self-governing colonies of the British Empire, there was no dispute. It is laid down as shortly and as neatly by LORD LINDLEY in his judgment in *Winans* v. *A.-G.* (11) as could well be desired. He said ([1904] A.C. at p. 299):

> "I take it to be clearly settled—by the *Lauderdale Peerage Case* (12), *Udny* v. *Udny* (5) and *Bell* v. *Kennedy* (6)—that the burden of proof in all inquiries of this nature [i.e., as to domicil] lies upon those who assert that a domicil of origin has been lost and some other domicil has been acquired. Further, I take it to be clearly settled that no person who is sui juris can change his domicil without a physical change of place coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression be preferred. If a change of residence is proved, the intention necessary to establish a change of domicil is an intention to adopt the second residence as a home, or, in other words, an intention to remain without any intention of further change except possibly for a temporary purpose: see STOREY'S CONFLICT OF LAWS, s. 43; *Re Craignish* (13), [1892] 3 Ch. at p. 192; *A.-G.* v. *Pottinger* (14); and *Douglas* v. *Douglas* (15) (L.R. 12 Eq. at p. 643). . . . An intention to change nationality . . . was said to be necessary in *Moorhouse* v. *Lord* (16), but that view was decided to be incorrect in *Udny* v. *Udny* (5). Intention may be inferred from conduct, and there are cases in which domicil has been changed notwithstanding a clear statement that no change of domicil was intended: see *Re Steer* (17); and per WICKENS, V.-C., in [*Douglas* v. *Douglas* (15)] L.R. 12 Eq. 644."

In *Winans' Case* (11) the tastes, habits, conduct, actions, ambitions, health, hopes, and projects of Mr. Winans, deceased, were all considered as keys to his intention to make a home in England. LORD HALSBURY and LORD MACNAGHTEN laid down the law in words to the same effect as those used by LORD LINDLEY. They differed from him on the inference of fact to be drawn from all the matters I have mentioned as to Mr. Winans' intention to make a home in England. It was contended, however, on the authority of *The Indian Chief* (3), decided by LORD STOWELL, and the cases which have followed it and upon which the decisions by which HORRIDGE, J., considered himself bound,

> "that the rules of law so laid down by LORD LINDLEY are entirely inapplicable to the acquisition by a British subject on the ground of the supposed 'immiscibility' of such a subject with the native population."

In the present case in the Court of Appeal SWINFEN EADY, L.J., in the following passage of his judgment indicates what he apparently considers a British citizen must accomplish before he can acquire a domicil in one of those Eastern countries; no matter how long he may have lived there voluntarily or how ardent he may desire and deliberately intend to make his home there. He said ([1918] P. at p. 98):

> "No question is raised on this appeal with regard to the domicil of a person who voluntarily fixes his place of residence in a foreign country, whether Christian or not, intending to make it his permanent home, intending to make himself a member of the civil society of that country, and manifesting this intention by adopting its manner of life and identifying himself with its customs; not living in a community separate and apart, but merging in the general life of the native inhabitants. The appellant has done nothing of the kind here, but has always been careful to preserve his status and position as a member of a privileged community, living separate and apart from the native inhabitants of Egypt."

The voluntary residence there, the deliberate intention to make a home there, are apparently not enough. The British subject must adopt the manner of life, make himself a member of the civil society of that country. He must identify himself with its customs; he must merge in the general life of the inhabitants; but upon what rational principle? These are conditions which could not be fulfilled by a Hindu Brahmin, faithful to his religion and bound by all the rigid rules of his caste, coming to reside in London. And they would be preposterous as applied to British India, where the population is not homogeneous, but composed of different races living side by side and mingling together, but professing different religions, observing different customs, obeying different laws. For instance, is the English resident in India to obey the laws binding on a Hindu and regulating the enjoyment and descent of his property, or the laws touching these matters observed by the Mahommedans? And if the former, are they to be the law of Milakshara or the law of Dayabhaya, and, if the latter, is he to adopt the laws and customs of the Shiahs or Sunnis? How is it possible for a British subject "to adopt the manner of life of a population" where caste holds the majority of that population in its iron and unchanging grasp? In England, by the common law, aliens could not hold landed property even under lease. By 32 Hen. 8, c. 16, s. 83 [repealed, Statute Law Revision Act, 1863], it is enacted that leases of dwelling-houses made to alien artificers should be void, and a penalty of £100, a large sum in those days, was imposed upon the lessor or lessee who violated the statute. By the 7 & 8 Vict., c. 66 [repealed, Naturalisation Act, 1870], aliens were empowered to hold land or houses for the purpose of residence or business, but they did not by this ownership acquire either the Parliamentary or municipal franchise. They were disqualified to fill all offices or places of trust, civil or military. They could not inherit landed estate nor, till the passing of the 11 & 12 Vict., c. 20 [repealed, Statute Law Revision, 1875], transmit it by descent. Things are now, of course, quite different, but, despite all these disabilities, this narrow, starved, and restricted citizenship, if such it could be called, which was all they could enjoy, they could acquire a domicil of choice in England.

It is quite natural that the laws of an Eastern country, at least a century ago, might appear to a British citizen to be so arbitrary and oppressive, and the religion, customs, and habits of the natives so repellant, that he would not be likely voluntarily to make his permanent home among them. The fact that the laws and customs were of that character would, therefore, be strong evidence on the issue of fact to disprove an existence in the testator's mind of an intention to make his home there. But if, despite the character of these laws and these habits and customs, it be clearly established that the British subject who has voluntarily gone to reside in this foreign State desires to make his home there, and deliberately intends if permitted so to do, it is difficult to see upon what principle he should be debarred from acquiring a domicil there. I do not think the authorities so much relied upon by the respondent when examined closely lay down any such principle as this. Before considering these cases it is desirable to point out that a very anomalous kind of domicil may be acquired in Eastern countries by resident merchants, owners of factories, or persons engaged in trading associations. It is wholly different from civil domicil, so different, indeed, that a merchant may at the same moment have a commercial domicil in each of several different and unconnected Eastern States, in each of which he has established factories or trading associations: see *The Jonge Klassina* (18), 5 Ch. Rod. at p. 302. In *The Indian Chief* (3) Sir William Scott laid it down that it was a rule of the law of nations that whenever a factory is founded in an Eastern part of the world, European persons trading under their shelter and protection take their national character from the associations under which they live and carry on their commerce. I think it will be found that judicial observations made in reference to this commercial domicil have been treated as applicable to civil domicil, a most misleading error. The second kind of anomalous domicil is the Anglo-Indian domicil. The nature of

this domicil is explained by LORD HATHERLEY in *Forbes* v. *Forbes* (19). He said (Kay, at p. 356):

> "I apprehend that the question does not turn upon the simple fact of the party being under an obligation by his commission to serve in India; but when an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law from such circumstances presumes an intention consistent with his duty, and holds his residence to be animo et facto in India."

TURNER, L.J., in *Jopp* v. *Wood* (20), referring to these cases, said (4 De G.J. & Sm. at p. 623):

> "At the time when these cases were decided the East India Co. was in a great degree, if not wholly, a separate and independent government, foreign to the government of this country, and it may well have been thought that persons who had contracted obligations with such a government for service abroad could not reasonably be considered to have intended to retain their domicil here. They, in fact, became as much estranged from this country as if they had become servants of a foreign government."

When the officer left the service of the company his domicil of origin revived: *Re Mitchel, Ex parte Cunningham* (21).

In *The Indian Chief* (3) the ship in the year 1775 left the port of London on a voyage from that port to Madeira, thence to Madras, Saquabar, Batavia, and back to Hamburg. In the course of the last trip on this round voyage she called at Cowes for orders, where she was seized as being a ship belonging to an English subject trading with the enemy. A Mr. Johnson, who claimed the ship as owner, asserted that he was an American, not a British subject. A Mr. Miller, likewise asserting that he was an American subject, claimed the cargo as owner of it. The question in controversy in the case was the national character of these respective claimants. In *The Angelique* (22) it had been decided by the Court of Appeal in England that by the general law all foreigners resident within the British dominions incurred all the obligations of British subjects; that as the Crown alone had power to make war, so it alone had power to dispense with the observance of these laws; that the East India Co. had no power to license a trade carried on with the general public enemy of the Crown of Great Britain; and that, therefore, a ship belonging to an Armenian merchant resident in Madras, taken on a voyage from Madras to Manilla, was properly condemned as the property of a British subject taken in trade with the enemy. The events in Johnson's history affecting his national character were stated to be these. He was born in America. In the year 1773 he came to England and settled in London as a merchant. During the American war of 1778 he left England and settled in France as one of a firm engaged in trade, reserving to himself by the articles of partnership the liberty of returning to America should he desire to do so. In 1785 he returned to England, established himself as a merchant, and remained there till September, 1797, when he left two months before the capture of the ship. In the latter part of 1790 he acted as American Consul in London; that was, however, considered by SIR W. SCOTT as an immaterial circumstance. Had he remained till the capture of the ship, it was held that the whole transaction must be considered as a British transaction, and, therefore, a criminal transaction, on the principle that it is illegal in any person owing allegiance to the British Crown, as he did as a merchant resident in England, even though that allegiance were temporary, to trade with the public enemy; but that, inasmuch as he had quitted England for America before that date, sine animo revertendi, he was in the act of resuming his original character, and was to be considered to be an American, the character he gained by residence ceasing with that residence, and that he was, therefore, entitled to have his ship restored to him. Now, these were the only matters in issue in Johnson's

case, and the only matters decided in that case. In the case of Miller it was held that if he had in fact engaged in trade in Calcutta, he became a resident merchant, his mercantile character not taking the benefit of his official character. A point was made that the trading was not direct to Batavia, the enemy port; but that circumstance was held to be immaterial. A third point was urged, namely, that Miller had not been resident in British territory, since the English Sovereign was not in possession of Bengal with the same imperial rights as belonged to the Mogul; that the King of Great Britain did not hold British possessions in the East Indies in right of sovereignty; and therefore that the character of British merchants did not necessarily attach on British residents there. It was held that, even assuming, as was contended, that Great Britain could not be deemed to possess sovereign rights in Bengal, still it was a rule of the law of nations that wherever a new factory was founded in an Eastern part of the world European persons trading under the shelter and protection of that establishment took their national character from an association under which they lived and carried on their commerce; that the sovereignty of the Mogul only existed as a phantom and did not in any way affect such establishments as these; that a foreign merchant resident at Bombay was in just the same position as a British merchant resident there; that he was subject to the same duties and amenable to the same common authority; and that, therefore, Miller should be considered as a British merchant, and his property be treated as that of a British merchant taken in trade with the enemy, and, therefore, liable to condemnation.

These were the only issues properly raised and decided in the case. They referred exclusively to what is not very happily styled commercial domicil. The general observations made by Sir William Scott in *The Indian Chief* (3), so far as they applied to civil domicil, dealt with matters wholly different in kind and nature from the subject-matter of the suits, and though they are of high authority in one sense, owing to the eminence of the distinguished judge who made them, still they are, after all, only obiter dicta, and do not in any sense amount to decisions of the Court of Admiralty. In addition, the particular passage so much relied upon begins and ends with reference to commercial transactions, and is based upon assumptions of fact which, at the present day at all events, are of questionable accuracy. The passage begins where Sir William Scott says (3 Ch. Rob. at p. 29):

> "In the western parts of the world alien merchants mix in the society of natives, access and intermixture are permitted, and they become incorporated to almost the full extent. But in the East, from the oldest times, an immiscible character has been kept up. Foreigners are not admitted into the general body and mass of the society of the nations; they continue strangers and sojourners as all their fathers were. Doris amara suam non intermiscuit undam, not acquiring any national character under the general sovereignty of the country, and not trading under any recognised authority of their own original country, they have been held to derive their present character from that association or factory under whose protection they live and carry on their trade."

It will be observed that no reference is made in this passage to the so-called extra-territorial jurisdiction of consular tribunals. It is the immiscible character of the foreigner on which the rule of law is based. However well that character may have clung to English immigrants into Eastern States in the year 1800, I take leave to doubt very much if to-day British residents in Cairo or Alexandria do not mix more in the society of natives and are not more completely incorporated into native society than they were over a century ago.

In the other case to which Chitty, J., refers—namely, *Maltass* v. *Maltass* (4)—the son of a deceased testator propounded the latter's will in the year 1844 in the Prerogative Court of Canterbury. The deceased himself was born at Smyrna of British parents (who were British subjects). After being educated in England, he joined his father at Smyrna, was occupied in commercial pursuits there for many

years, and was a member of a trading firm established there. This firm was dissolved a considerable time before the death of the deceased. In his will the deceased described himself as a British merchant, but the learned judge, DR. LUSHINGTON, was unable to discover any evidence that he was engaged in trade at the time of his death. The commercial domicil principle was, therefore, questioned. He married at Smyrna, was constantly resident there, and died leaving a widow and several children. The question to be decided was what law governed the succession to his property. It was held that the law of his domicil must in some shape govern the succession. The inquiry as to domicil would be unnecessary if it should turn out that the law of Turkey applied to this individual succession was the same as the law of Great Britain. DR. LUSHINGTON held that by the Treaty of the Dardanelles, 1809, the law of Great Britain operated on property left by a British merchant in the situation of the deceased, no distinction having been drawn in the case by the deceased having ceased to carry on trade. He studiously abstains, however, from expressing any opinion upon any question not necessary to be decided in the case. He gave no opinion whether a British subject could or could not acquire a Turkish domicil, and added a sentence which, in my judgment, furnishes a key to this whole matter. He said (1 Rob. Ecc. at p. 80):

> "But this I say, that every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte."

Precisely so, since residence in a particular country plus an intention to make that residence a home for an indefinite period are the elements necessary to create a civil domicil there. The existence of such an intention is an inference of facts to be drawn from the conduct and action of the resident, and all the circumstances of the case. The observations already made apply as to the proof of that intention. The error, in my view, consists in treating the existence of these native laws, habits, and customs, not as a fact from which the absence of the necessary intention may be inferred, but as an absolute bar to the acquisition by an English resident in an eastern country of a domicil of choice there under any circumstances.

I do not think the decision of *Tootal's Case* (1) was in conflict with this view. The struggle in that case was to show that the testator's domicil of choice was an Anglo-Chinese domicil, a term invented in analogy to the term Anglo-Indian domicil, already explained, and, therefore, to get rid of his English domicil of origin, which, if it had continued to exist, would make his personal estate subject to legacy duty. The facts were these. The testator went to reside at Shanghai in 1862. With the exception of two short visits to England in 1864 and 1865 for health and business, he continued to reside in Shanghai till his death in 1878. He was the manager and part proprietor of two newspapers published there. Uncontradicted evidence was given to the effect that for many years before his death he had determined to reside permanently at Shanghai, had relinquished all intention of returning to England, and on several occasions expressed his determination to that effect. Counsel for the petitioner, thinking apparently again that their client's best chance of escaping the payment of duty was by establishing for the deceased this fanciful thing, an Anglo-Chinese domicil, admitted that they could not contend that his domicil was Chinese. In giving judgment CHITTY, J., alluding to this admission, said (23 Ch.D. at p. 534):

> "This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by LORD STOWELL in his celebrated judgment in *The Indian Chief* (3) and by DR. LUSHINGTON in *Maltass* v. *Maltass* (4), but it is contended on the part of the petitioners that the testator's domicil was what their counsel terms 'Anglo-Chinese,' a term egregiously invented in analogy to the term 'Anglo-Indian.' "

It will be observed that the existence of those Chinese laws, manners, habits, religion, and customs is not treated as establishing an absolute bar to the acquisition of a domicil of choice in China, but merely as raising a strong presumption against its acquisition, which can only have meant that in that particular case the existence was a fact leading one to infer that he, the testator, had no intention of making his permanent home in a place where he has so long resided. If the bar was absolute, the term presumption was misapplied. The learned judge at an earlier part of his judgment dealt with the extra-territorial jurisdiction set up at Shanghai under the treaties made between the then Queen of England and the Emperor of China in the years 1842, 1843, and 1858, the statutes 6 & 7 Vict., c. 80 and c. 94, and the Order in Council of Mar. 9, 1865, which constituted a Supreme Court at Shanghai. These treaties did not contain any cession of territory so far as related to Shanghai, but they very closely resembled those existing in Egypt. As in the present case, they conferred upon British subjects special exemption from the ordinary territorial jurisdiction of the Emperor of China, and permitted such subjects to enjoy their own laws at specified places. He then said that upon these facts the petitioners had contended that the testator had become a member of an organised British society independent of Chinese laws and not amenable to the ordinary tribunals of the country, but bound together by the laws of England, and had, therefore, acquired an Anglo-Chinese domicil. He then repeats what he had already said about the presumption arising from the habits, customs, &c., of the natives, and adds (23 Ch.D. at p. 538):

> "But there is no authority that I am aware of in English law that an individual can become domiciled as a member of a particular community which is not the community possessing the supreme or sovereign power. There may be, and there indeed are, numerous examples of particular sects or communities residing within a territory governed by particular laws applicable to them specially. British India is a familiar illustration of the proposition. But the special laws applicable to sects or communities are not laws of their own enactment; they are merely parts of the law of the governing community or supreme power."

And he winds up by saying (ibid. at p. 542) that there is no such thing known to the law as an Anglo-Chinese domicil, that the testator's domicil remained English, and that, therefore, his personal property was liable to legacy duty. These were the only matters decided. Incidentally it was said that native manners, customs, &c., may have effect as evidence of the absence of intention to make a home among them. That is all.

In *Abd-ul-Messih* v. *Farra* (2) the appellant instituted a suit in Her Majesty's Supreme Consular Court of Constantinople for the probate of the will of her husband, Antonis Youssof Abdul Messih, who died at Cairo in February, 1885, leaving large personal estate, having previously acquired the position of a protected British subject. The widow's application was opposed by the next-of-kin of the deceased on its merits, and also on the ground that the court had no jurisdiction in the matter. Two issues were ultimately framed by or with the consent of the parties. (i) "Is the English law to be followed in distributing the assets of the deceased"; and (ii) "If the court is of opinion that the English law is not applicable, is Turkish law or what other law?" The consular court by the order appealed from, dated May 28, 1886, found that the testator died domiciled in the Ottoman Empire, his domicil of origin, and a member of the Chaldean Catholic community, and decreed accordingly that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey should be followed in considering the deceased's power of testacy and in distributing his effects. But for the fact that he had enjoyed British protection it would have been clear that at time of his death he had his domicil in the dominions of the Porte. If he had ever acquired a domicil of choice in India, he had lost that domicil when he left India and went to live in Cairo, his domicil of origin then

reviving. But it was contended by the appellant that by reason of his living at Cairo under the enjoyment of British protection he had acquired this fanciful thing, an Anglo-Egyptian domicil not based upon connection with English soil. The testator's history was, as far as it was relevant, shortly this. He was born at Baghdad of Ottoman parents resident there. He then went to India and remained there for a considerable time. He then returned to the Ottoman dominions, going to reside in Jeddah. He left Jeddah in 1858 and went to live in Cairo, Egypt not then being independent, and registered himself so as to become a British protected subject. In 1876 he married the appellant, the ceremony being performed in the manner prescribed by the Consular Marriages Act, 1849 [repealed by the Foreign Marriage Act, 1892], a statute enacted to facilitate the marriages of Her then Majesty's subjects resident abroad. LORD WATSON, in delivering judgment, said (13 App. Cas. at p. 439):

> "The idea of domicil not depending upon locality and arising simply from membership of a privileged society is not reconcilable with any of the numerous definitions to be found in the book. In most, if not all, of these, from the Roman Code (10.39.7) to STOREY'S CONFLICT (s. 41) domicil is defined as locality—as the place where a man has his principal establishment and true home."

He then cited the well-known passages from the judgments of LORD WESTBURY in *Bell* v. *Kennedy* (6) (L.R. 1 Sc. & Div. at p. 320) and *Udny* v. *Udny* (5) (L.R. 1 Sc. & Div. at p. 458), and having conclusively shown that the testator could not acquire an Anglo-Egyptian domicil, said (13 App. Cas. at p. 445):

> "The appellant lastly endeavoured to maintain that the deceased's residence in Cairo had at least the effect of giving him an Egyptian as distinguished from a Turkish domicil. That argument was not addressed to the court below, but there appear to be two sufficient answers to it. The one is that the appellant has not shown that a domicil in Egypt, so far as regards its civil consequences, differs in any respect from his domicil in other parts of the Ottoman dominions; and the other, that residence in a foreign State as a privileged member of an extra-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice."

It is, I think, quite plain that what LORD WATSON meant was that, though the testator's residence in Cairo could not, under the circumstances, create this so-called Anglo-Egyptian domicil, his residence there might be effectual to destroy any domicil of choice which he might have previously acquired in India, and that, having thus been left without any domicil of choice, his domicil of origin would revive. So that really the only points raised in the case and actually decided were that there could be no such thing as the so-called Anglo-Egyptian domicil since it was not connected with locality, as all domicil must be, and that consequently the testator did not acquire such a domicil, that the testator's domicil of origin had revived, and that, therefore, the order of the consular court appealed from was right.

Two passages in LORD WATSON'S judgment have, however, given occasion to much argument on this appeal (ibid. at p. 439). In dealing with the question of the Anglo-Egyptian domicil of choice claimed for the testator, after alluding to the fact that Cairo was not a British possession governed by English law, and was not British soil, but the possession of a foreign government, and subject to the sovereignty of the Porte, he proceeded to say (ibid. at p. 439):

> "Certain privileges have been conceded by treaty to residents in Egypt, whether subjects of the Queen or foreigners, whose names are duly inscribed in the register kept for that purpose at the British Consulate. *They are amenable only to the jurisdiction of our consular courts in matters civil and criminal, and they enjoy immunity from territorial rule and taxation. They*

A *constitute a privileged society living under English law on Egyptian soil, and independent of Egyptian courts and tax-gatherers.* The appellant maintained that a community of that description ought, for all purposes of domicil, to be regarded as an extra-territorial colony of the Crown, and that permanent membership of it ought to carry the same civil consequences as permanent residence in England, or in one of the colonial possessions of Great Britain B where English law prevails."

He proceeds to show that domicil cannot be independent of locality. The second passage, which follows immediately after the quotation from the judgment of Lord Westbury in *Udny* v. *Udny* (5), runs as follows (ibid. at p. 439):

> "According to English law, the conclusion or inference is that the man has C thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity upon which his majority or minority, his succession, testacy or intestacy, must depend. But the law which thus regulates his personal status must be that of the governing body in whose dominion he resides, and residence in a foreign country without subjection to the municipal laws and customs is D therefore ineffectual to create a new domicil."

The italics are mine. The passage in italics gives a very incorrect description of the true position of this privileged community in Egypt. It is not true that its members are only amenable to the jurisdiction of the consular courts in matters civil and criminal. They are in many matters, as I shall presently show, subject to the jurisdiction of the mixed tribunals, which are Egyptian courts established E by an Egyptian statute, and even in the case of the consular courts its decrees and orders are enforced and carried out not by consular but by Egyptian officers. Neither is it true that they enjoy immunity from territorial rule or taxation, or that they are independent of Egyptian courts and tax-gatherers. They pay such taxes as the English Sovereign has, by arrangement with the Khedive, consented that they should pay. The only point decided in the case was that the testator, a F subject of the Porte by birth and parentage, had not, and could not, acquire an Anglo-Egyptian domicil. The obiter dicta observations made by Lord Watson were made in reply to the extravagant contention that for the purpose of acquiring such a domicil, Cairo was to be taken as a possession of the British Crown, where English law prevailed, but it will be observed that he says nothing about the necessity of a person voluntarily residing in a particular place with the intention G of making it his home, in addition manifesting a desire to adopt the manners of life of native society, or identifying himself with its customs. I cannot think that by the words "attracted to himself the municipal law of the territory in which he has voluntarily settled so that it becomes the measure of his personal capacity," Lord Watson ever meant to lay down that the foreign resident must be bound by all the laws that bind natives, and by no other laws, and must observe all the H lawful customs that natives observe else the existence of the slightest exemption from the operation of the ordinary municipal law conferred upon a foreign resident as a privilege would make the acquisition of a domicil of choice by him impossible, especially in India, where different systems of law touching the majority and minority, succession to property, testacy and intestacy of the Hindu and Mahommedan races differ substantially. Indeed, during the argument of counsel for the I respondent, I asked him if the extra-territorial jurisdiction of the consular courts only extended to actions of libel and slander between British subjects or protected persons, would it still make the acquisition of an Egyptian domicil of choice impossible? I did not get a very positive answer. I cannot but think a fallacy lurks in the phrase "municipal law." Surely if by a special law of the sovereign power of a State some section of society is relieved from a duty or burden imposed upon the general community by a general municipal law, the municipal law, the lex domicilii, which that section should "attract to themselves" in order to acquire a domicil would be the general municipal law as modified by the special law passed

in their favour. For instance, if after this war [the war of 1914–1918] an Act of Parliament were passed in England that every French citizen coming to reside in England would be relieved of 75 per cent. of the income tax payable by English residents with equal incomes, the municipal income tax laws which he would be bound to obey would be the Income Tax Acts so modified. He would not have to pay up to 75 per cent. of his income tax to acquire in England a domicil of choice, and the fact, if it were a fact, that this special Act was passed in pursuance of a treaty made between England and France would not alter matters in the slightest degree. During the argument these consular courts were treated as if they were set up and the jurisdiction they exercised was conferred upon them by an Act of the British Crown propio vigore altogether independent of the Sultan of Turkey or the Khedive of Egypt. In my opinion, that is not the correct view. They are set up and jurisdiction is conferred upon them by the consent and in the exercise of the power of the legislative governing authority of Egypt. The lex domicilii for these English residents is the general law of Egypt applicable to native Egyptians modified by the provisions of the capitulations and the statute dealing with the mixed tribunals. It matters nothing, in my view, that these courts were set up and jurisdiction conferred upon them in pursuance of a treaty.

By art. 9 of the Statute of Judicial Organisation for Mixed Courts in Egypt, 1892, an Egyptian statute establishing Egyptian courts, exclusive jurisdiction is conferred upon these courts over all civil and commercial causes (not coming within the law of personal status) between Egyptians and foreigners and between foreigners of different nationalities. Jurisdiction (though not apparently exclusive) is also conferred in all actions relating to real rights over immovable property between all persons, even those belonging to the same nationality. By art. 13 it is provided that the bare fact of the creation of a mortgage of immovable property in favour of a foreigner, whoever be the possessor and owner of the property, shall render these courts (i.e., the mixed courts) competent to adjudicate upon the validity of the mortgage and upon all its consequences up to and including the forced sale of such property as well as the distribution of the proceeds. By arts. 6, 7, and 8 of Title 2 of the statute, prosecutions for petty offences, in addition to the trial of persons as principals or accomplices for any one of a vast number of felonies and misdemeanours, including wounding and homicide, are made subject to the jurisdiction of the Egyptian courts whoever the accused may be, whether native or foreigner. By art. 4 of the preliminary provision it is enacted that questions relating to legal status and capacity of persons, and to the law of marriage, to the rights of natural and testamentary succession, and to guardianship and curatorship, remain in the jurisdiction of the Personal Status judge. The fifteenth of the Articles of Capitulation and Peace of 1676, confirmed by the treaty of 1809, provided for litigation between Englishmen and others being dealt with in the Egyptian courts. The twenty-fourth article did the same; a safeguard is provided; the ambassador, consul, or interpreter must be present; the fifty-second article is to the same effect. By the sixteenth article the foundation was laid upon which the so-called extra-territorial jurisdiction was erected. It provided that if there happened to be any suit or other difference or dispute among the English themselves the decision thereof shall be left to their own ambassador or consul, according to their custom, without the judge or other governors (our slaves) interfering with them. The Order in Council of Nov. 7, which merely prescribes the mode in which any jurisdiction belonging to the Sovereign of Great Britain shall be exercised, does not carry the matter any further.

In the face of these enactments it cannot, I think, be said with the faintest approach to accuracy that British subjects, properly so called, and British protected persons "constitute a privileged society living under English law on Egyptian soil and independent of Egyptian courts and tax-gatherers." The main, indeed the only, contention of the respondent in this appeal that the existence of the extra-territorial jurisdiction renders impossible the acquisition by a British subject of a domicil of choice in Egypt is, in my view, unsupported by authority and wholly

A fails. I concur with SCRUTTON, L.J., in thinking that there is no test which must be satisfied for the acquisition of a domicil of choice in Egypt other than, and in addition to, those by which a similar domicil is acquired in a European country—namely, voluntary residence there plus a deliberate intention to make that residence a permanent home for an unlimited period. On the whole, therefore, I am of opinion that the order appealed from was wrong and should be reversed, and this B appeal should be allowed with costs here and below.

LORD PHILLIMORE.—The jurisdiction of the High Court of Justice in its matrimonial Division is founded upon domicil. The domicil must be English. In this case the husband, who has been sued by his wife, had, no doubt, his domicil of origin in England, and the burden lies upon him, as he disputes the jurisdiction, C to show that he has acquired another domicil. But HORRIDGE, J., has found, and it is not disputed that he has rightly found, that, if it be possible for the husband to have changed his domicil of origin into an Egyptian domicil, he has done so. I think also that if HORRIDGE, J., had not felt himself fettered by authority he would have held there was no impossibility in the husband's acquiring an Egyptian domicil.

D The authorities on which the counsel for the wife rely are apparently cited for two different purposes. The one is to show the impossibility of a European Christian intending to change his domicil for one of an Oriental and un-Christian country, and they certainly show that this improbability is considerable. Domicil being acquired animo et facto, the tribunal which determines the facts will take this improbability into very serious consideration; but it is only an improbability, E and, as DR. LUSHINGTON observed in *Maltass* v. *Maltass* (4), this improbability diminishes if the habits or religion of a person are not inconsistent with those of the country to which he has migrated. Here the husband is of Greek extraction; his wife apparently is an Egyptian; he married her in Egypt, and the branch of the Christian Church to which he is attached is one that has a considerable footing throughout the Levant and in Egypt. In *The Indian Chief* (3) SIR WILLIAM SCOTT F had to consider whether a merchant of American nationality resident in the English factory at Calcutta could be allowed to trade as a neutral with the enemy, or whether he should be considered as a temporary British subject by reason of his residence under British protection. It was suggested on behalf of the claimant that Calcutta was to be considered as part of the dominions of the Great Mogul; on behalf of the Crown that it was an imperium in imperio, and, upon this latter G principle and in conformity with some other decisions as to residence in Dutch and English factories in the East Indies, the claimant was deemed to be in the position of a British subject trading with the enemy, and his goods were condemned. In the course of his judgment and in support of his conclusions, SIR WILLIAM SCOTT dwelt upon the peculiar and isolated position of Europeans gathered together in factories in the East, and the immiscibility of the European with the Oriental. H In *Re Tootal's Trusts* (1) an Englishman living and dying in China, and the evidence being that he had determined to reside permanently in China, made a will in English form which, according to the peculiar privileges granted to Europeans in China, was proved in the British Consular Court. The question was whether legacy duty should be paid on his bequests. If he was domiciled in England, it had to be paid. If he was domiciled anywhere else, it had not to be I paid. The first line of defence might have been that he was domiciled in China. Counsel for the legatees gave up the contention for a Chinese domicil, and did this with the approbation of the judge, who thought that, having regard to the difference of Chinese habits, manners, and religion, more was required to establish a change of domicil than would be required if the change was to a country of Western civilisation, and that this more had not been established. Whether their admission was right or wrong was not a matter of judicial determination, and the approbation was given by a judge who was apparently unassisted by argument. The first line of defence having been given up, counsel argued that there was

such a thing as an Anglo-Chinese domicil arising out of the existence of the peculiar privileges of Englishmen and other Europeans in China, and the establishment of Consular courts, which was neither English nor Chinese, but a tertium quid. This contention CHITTY, J., rejected, holding, and certainly rightly holding, that domicil is not acquired by membership of a community, but by residence in a locality, and that, if the testator had not a Chinese domicil, he retained his English domicil. This decision of CHITTY, J., and it is the only point which he decided, so far from supporting the decision in the present case, is, as will be hereafter seen, rather opposed to it. As to the bearing of dissimilarity of habits upon the probability of a change of domicil, I adopt the opinion of HORRIDGE, J., that this dissimilarity is an element to be considered, but nothing more.

The second and more important purpose for which the counsel for the wife relied upon the authorities was to establish, if they could, the proposition that British subjects having a domicil of origin somewhere in the British Empire could not acquire a domicil of choice (or that no evidence which could be given would prove a choice) in any Oriental country subject to the régime established by the capitulations in Turkey or by analogous treaties with China and other Oriental countries. It was said that the effect of these arrangements was to put a British subject in a position of extra-territoriality not dissimilar to that of an ambassador, and that his residence as one of a privileged and protected community was a mere prolongation of his previous residence under direct British sovereignty. For this purpose *Re Tootal's Trusts* (1) and *Abd-ul-Messih* v. *Farra* (2) and *Abdallah* v. *Rickards* (23) are those upon which the principal reliance was placed.

Upon a careful examination of *Re Tootal's Trusts* (1) it will be seen that it lends no support to this proposition. CHITTY, J., in stating his reasons for approving the concession of counsel, does not rely upon the privileges of Englishmen in China as affording any reason against a change to a Chinese domicil. Indeed, if Tootal could by preserving his English nationality have kept his privileges though he acquired a Chinese domicil, it would rather seem that one motive for abstaining from change was thereby removed. When the existence of these privileges was relied upon to support the peculiar Anglo-Chinese domicil for which counsel contended, CHITTY, J., apparently attached no weight to the argument. If Tootal, instead of having an English domicil of origin had been a British subject of Chinese race and habits with a domicil of origin at Hong Kong or Singapore, there is no reason to suppose that CHITTY, J., would have found any difficulty in accepting a change of domicil to China, or that the existence of the British Consular Court with its jurisdiction over all British subjects would have been considered as a reason against a change of domicil.

In *Abd-ul-Messih* v. *Farra* (2) the testator was a Turkish subject professing the Mahommedan faith. Under the Mahommedan law, which applies to Turkey, at any rate to all persons of that religion, the liberty of testacy is restricted, and such part of the estate as cannot be disposed of by will descends in a particular manner. It did not suit the interests of the widow that the Mahommedan law should prevail, and, therefore, she set up a case for an English or Anglo-Egyptian domicil. The testator was born at Baghdad, and, after some time spent in India, took up his residence at Jeddah, and finally went to Egypt, where he died, all these places being in the Ottoman dominions. When he went to Egypt he registered himself as a protected British person, and it was upon this slender foundation and his temporary residence in India that counsel for the widow argued for an English domicil. When that failed, her counsel took up a second point of the nature of which the late JAMES, L.J., used to call a tabula in naufragio, that the deceased had acquired an Anglo-Egyptian domicil (why an Anglo-Egyptian rather than an Indo-Egyptian or indeed a Scoto-Egyptian did not appear), which would attract to itself the English law of succession, and this contention was also rejected by the Privy Council. So far as the decision went, it tended in the same direction as that in *Re Tootal's Trusts* (1), towards the disregard of the existence of special privileges for Europeans and the establishment of consular courts as an element

of any importance in considering the question of domicil. The two points actually decided were, as stated in the judgment of Swinfen Eady, L.J., that the commutiny of British subjects and persons having the status of protected British persons in Egypt was not an extra-territorial colony of the Crown, and that permanent membership of it did not carry with it the same civil consequences as permanent residence in England. It was, no doubt, further stated that, supposing it to be an extra-territorial community, residence in it would not create a domicil of choice. But this was stated in respect of a Turkish subject moving from one part of the Ottoman dominions to another and supposed to be thereby seeking to acquire, not a domicil in the new part, if that would make any difference, but a domicil which would be given by residence as a member of the supposed extra-territorial community. Scrutton, L.J., drew, I think, the right conclusion from this judgment. But his colleagues were led away by attaching too much importance to certain dicta in the judgment as stating the law of England and, what is even more doubtful, the law of Egypt. Speaking with all respect, I must say that the passage which states the position of British subjects in Egypt according to Egyptian law (a point which was immaterial, because the testator was held not to be a British subject) states that law to some extent incorrectly. It is open to me to say this because the position in Egypt is a matter of Egyptian law, and foreign law according to our jurisprudence is treated as fact, not law. The judgment ignored the existence of the mixed tribunals in Egypt, and treated British subjects as amenable only to the British Consular Courts. It also spoke of them as immune from all local taxation. This last fact may or may not have been so in 1888, when the judgment was delivered. It is not the case now. As to the mixed tribunals, they were established in 1876 by a decree of the Khedive, made, no doubt, with the consent of the principal European Powers, but by virtue of his delegated authority under the Ottoman Porte. The tribunals consist partly of foreigners and partly of Egyptians. There is no special requirement that the foreign judge in any particular case should be of the nationality of the European whose case is before the tribunal, and they are given jurisdiction (Art. 9 of the Statute of Judicial Organisation for Mixed Courts in Egypt, 1892)

> "over all civil and commercial causes (not coming within the law of personal status) between Egyptians and foreigners and between foreigners of different nationalities. They shall also have jurisdiction in all actions relating to real rights over immovable property between any persons, even persons belonging to the same nationality."

They have also in several matters criminal jurisdiction over foreigners, even in some capital cases. If, therefore, it is a principle of law (as to which I should desire to reserve my opinion) that (13 App. Cas. at p. 439)

> "residence in a foreign country, without subjection to its municipal laws and customs, is . . . ineffectual to create a new domicil,"

the principle does not affect a British subject resident in Egypt so as to make it impossible for him to acquire an Egyptian domicil. The other passage which is relied upon in support of the judgments in the courts below runs as follows (ibid. at p. 445):

> "Residence in a foreign State, as a privileged member of an extra-territorial community, although it may be effectual to destroy a residential domicil elsewhere, is ineffectual to create a new domicil of choice."

This passage professes to be an answer to the argument that the deceased had at least acquired an Egyptian instead of a Turkish domicil. Whether an Egyptian or an Anglo-Egyptian domicil is meant is not clear. I have not found any trace in the report of the suggestion that the law of Egypt differs as to succession from that of other parts of the Ottoman dominions. Be this as it may, let me apply the general statement to the concrete facts. Residence at Cairo as a British protected person may suffice to destroy any domicil acquired in India or at Jeddah,

but it is not sufficient to destroy the domicil of origin at Baghdad and give a new domicil of choice, either an Egyptian or an Anglo-Egyptian one. If an Egyptian domicil proper is intended, this passage does give weight to the connection with a privileged community; but then there was no importance in an Egyptian domicil. If an Anglo-Egyptian domicil is meant, the passage shows what little weight their Lordships attached to the privileged community.

In *Abdallah* v. *Rickards* (23) CHITTY, J., took this last passage in *Abd-ul-Messih* v. *Farra* (2) as stating the law. But all that he decided was that a testator who had a domicil of origin in England, went to the Turkish dominions, married a Mahommedan, returned to England and married a Christian, went again to the East (Syria) and lived and died there, keeping up his English habits and registering himself as a British subject, could not be held to have intended to change from his British domicil. This may or may not have been a right decision upon the facts, but, whatever its weight or its applicability, it is not binding upon this House.

These decisions, or, at any rate, the principles supposed to be extracted from them, have been commented upon and dissented from in an important decision of the Supreme Court of Maine—*Mather* v. *Cunningham* (8). It is true that in two cases in the Egyptian Prize Court the learned judges have given their adhesion to them. But, on the other hand, in *The Eumaeus* (7) the President expressly reserved his opinion upon the principle supposed to be extracted from *Re Tootal's Trusts* (1). In the present case SWINFEN EADY, L.J., as I read his judgment, and certainly WARRINGTON, L.J., thought that if the husband had segregated himself from the European community he could have acquired an Egyptian domicil. If by imposing this condition they meant that he must have renounced his British nationality, they make nationality the criterion of domicil, which is contrary to all authority. If they did not mean that, non-segregation is only a factor to be considered as a piece of evidence of the person's intention. It does not appear to me that the position of Europeans in the Ottoman dominions under the régime of the capitulations, or under any modification of them of which we have cognisance in the now independent State of Egypt, is rightly described as extra-territorial. It is possible that this description might have been applied to the ancient Dutch and English factories in the East Indies, and it may be that in *Abd-ul-Messih* v. *Farra* (2) it was assumed, upon the imperfect materials before the Privy Council, that the position in Egypt was like that of a factory. Under the capitulations and the subsequent treaties and arrangements with Turkey, with Egypt under the Khedive as still a part of the Ottoman dominions, with Egypt now as a protected State, and under the analogous arrangements which exist in China and at one time existed in Japan and Zanzibar, Europeans of many nations, including the British, have peculiar privileges and some immunities, the measure of which is to be found in the expressed terms of the several grants. In so far as it may be said that the effect of them is to constitute separate little national communities, this is immaterial on the question of domicil.

The result is that, while there is authority for saying that there is improbability in the change of domicil to an Oriental country, even so highly a civilised one as Egypt, there is no legal impossibility. I think that the trend of HORRIDGE, J.'s mind was in the right direction, and that the decision of SCRUTTON, L.J., which has been of great assistance to your Lordships, was right, and that the judgment of the other learned lords justices has not sufficiently analysed the actual points decided, and has attached too much weight to the dicta in the cases which have so often been quoted. It is established, I think, that the husband had a domicil in Egypt, and was, therefore, not subject to the High Court of Justice in England in its matrimonial jurisdiction. I am of opinion that the appeal should be allowed.

Appeal allowed.

Solicitors: *Halchett-Jones, Bisgood, Marshall & Thomas*; *Treherne, Higgins & Co.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

R. *v.* FEIGENBAUM

[Court of Criminal Appeal (Darling, Avory and Shearman, JJ.), January 13, 1919]

[Reported [1919] 1 K.B. 431; 88 L.J.K.B. 551; 120 L.T. 572; 83 J.P. 123; 26 Cox, C.C. 387; 14 Cr. App. Rep. 1]

Criminal Law—Evidence—Corroboration—Accomplice—Failure of prisoner to reply when told of statement of accomplice incriminating him.

The appellant was charged at quarter sessions with having incited certain boys to steal fodder. At the trial the boys gave evidence, and a police officer stated that after the boys' arrest he called at the appellant's house and told him that the boys had informed the police that he (the appellant) had sent them to steal the fodder, that they had stolen fodder for the appellant on other specified dates, and had been paid certain sums for the fodder by him. The appellant made no reply to the statement made by the police officer.

Held: that the deputy chairman was right in directing the jury that they were entitled to consider whether or not the silence of the appellant was some corroboration of the evidence given by the boys.

Notes. A distinction would appear to be necessary between the admissibility of evidence of a prisoner's silence in a case like the present and that of evidence of his silence, and consequent failure to deny commission of the crime, when a formal charge, accompanied by a caution, is made against him, as in *R.* v. *Whitehead*, [1928] All E.R.Rep. 186.

Considered: *R.* v. *Keeling*, [1942] 1 All E.R. 507. Referred to: *R.* v. *Parker*, [1933] 1 K.B. 850.

As to corroboration, see 10 Halsbury's Laws (3rd Edn.) 458–462; and for cases see 14 Digest (Repl.) 533–548, 15 Digest (Repl.) 829–832.

Cases referred to in argument:

R. v. *Cramp* (1880), 14 Cox, C.C. 390; affirmed 5 Q.B.D. 307; 42 L.T. 442, C.C.R.; 14 Digest (Repl.) 447, *4338*.

R. v. *Tate*, [1908] 2 K.B. 680; 77 L.J.K.B. 1043; 99 L.T. 620; 72 J.P. 391; 52 Sol. Jo. 699; 21 Cox, C.C. 693; 1 Cr. App. Rep. 39, C.C.A.; 14 Digest (Repl.) 539, *5240*.

R. v. *Christie* (1913), 109 L.T. 746, C.C.A.; affirmed, [1914] A.C. 545; sub nom. *D.P.P.* v. *Christie*, 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 30 T.L.R. 471; 58 Sol. Jo. 515; 24 Cox, C.C. 249; 10 Cr. App. Rep. 141, H.L.; 14 Digest (Repl.) 405, *3962*.

R. v. *Everest* (1909), 73 J.P. 269; 2 Cr. App. Rep. 130, C.C.A.; 14 Digest (Repl.) 536, *5210*.

R. v. *Cohen* (1914), 111 L.T. 77; 24 Cox, C.C. 216; 10 Cr. App. Rep. 91, C.C.A.; 14 Digest (Repl.) 516, *4999*.

R. v. *Baskerville*, [1916] 2 K.B. 658; 86 L.J.K.B. 28; 115 L.T. 453; 80 J.P. 446; 60 Sol. Jo. 696; 25 Cox, C.C. 524; 12 Cr. App. Rep. 81, C.C.A.; 14 Digest (Repl.) 536, *5214*.

Appeal on a point of law against a conviction at the London Sessions for inciting six boys to steal horse fodder, and for having received the fodder knowing it to have been stolen. Evidence on behalf of the prosecution was given by the boys, and also by a police officer. The police officer deposed that he went to the appellant's house for the purpose of arrest; that he then made a statement to the appellant to the effect that three of the boys said that the appellant had sent them out for the fodder, and that the appellant had recently given them money for fodder stolen on two occasions. To these statements the appellant made no reply. In summing up the case to the jury, the deputy chairman told them that the boys were accomplices, and gave the necessary warning as to accepting the evidence

of an accomplice when uncorroborated; but he also pointed out that the jury were entitled to consider whether the silence of the appellant, when confronted by the statements said to have been made by three of the boys, was not some corroboration of their evidence. The jury convicted the appellant.

Keeves for the appellant.

Percival Clarke and *Roland Oliver*, for the Crown, were not called on to argue.

The judgment of the court was delivered by

DARLING, J.—The appellant was charged with having incited some boys to steal sacks of fodder. He was also charged with receiving the fodder well knowing it to have been stolen. The evidence of the boys, if true, showed that they had been incited to steal the fodder by the appellant, who had afterwards bought it from them very cheaply. But it is also quite clear that these boys were accomplices. It is a rule of law that a jury may convict on the uncorroborated evidence of an accomplice, and it follows that upon the trial of an accused person, where the case for the prosecution is closed, a judge ought not to direct the jury to acquit because in his opinion the only evidence against the accused is the evidence of an accomplice and uncorroborated. But many authorities have laid down that before leaving a case to the jury the judge should warn them that any evidence given by an accomplice should be regarded with grave suspicion, and that they ought not to convict in the absence of corroborative evidence; he should also point out what evidence there is, if any, by way of corroboration, or direct the jury accordingly if in his opinion there is no corroborative evidence. In the present case the jury were properly directed as to the necessity for caution in dealing with the uncorroborated evidence of the accomplices, and also as to what amounted to corroboration, and we think that in the circumstances the deputy chairman would have been wrong in saying that in his opinion the boys' evidence was uncorroborated. The evidence showed that after the arrest of the boys they made statements to the police which implicated the appellant. A police officer then went to the appellant's house and told him in detail what the boys had said against him and the charge against the boys themselves. The appellant made no statement in reply to what was said by the police officer. We think that in these circumstances it could not be said that there was no evidence on which the jury could find that the evidence of the boys was corroborated. It was quite properly pointed out to the jury by the deputy chairman that, having regard to the statement made by the police officer, and the circumstances under which it was made, the silence of the appellant might be considered as being corroboration of the boys' evidence; that it was for the jury to consider whether they thought that it did, or did not, amount to corroboration, and that, if they thought it did, they must say whether, in their opinion, there was sufficient evidence to warrant the conviction of the appellant. The appeal will be dismissed, but the sentence will be reduced from four to three years' penal servitude.

Appeal dismissed.

Solicitors: *J. B. Howard & Son*; *Wontner & Sons.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

R. *v.* VOISIN

[Court of Criminal Appeal (A. T. Lawrence, Lush and Salter, JJ.), February 11, 1918]

[Reported [1918] 1 K.B. 531; 87 L.J.K.B. 574; 118 L.T. 654; 82 J.P. 96; 34 T.L.R. 263; 62 Sol. Jo. 423; 26 Cox, C.C. 224; 13 Cr. App. Rep. 89]

Criminal Law—Evidence—Statement by prisoner—Words written at request of police—Prisoner in custody, but not charged or cautioned.

A statement by an accused person is not admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it was not extorted by fear of prejudice or induced by hope of advantage held out by a person in authority. The fact that the accused was not cautioned before making the statement does not as a matter of law make it inadmissible, but in the absence of a caution the judge has a discretion whether or not to exclude the statement in evidence.

The police, who were making inquiries into the murder of a woman the trunk of whose body had been found in a parcel on which was attached a label with the words "Bladie Belgiam", requested the appellant to go with them to the police station and account for his movements at the time when the murder was believed to have been committed. While detained there the appellant made a statement which was taken down in writing, and he was then asked whether he had any objection to writing down the words "Bloody Belgian". He said: "Not at all", and then wrote the words as mis-spelled on the label. At no time either before he made the statement or afterwards was he cautioned, but the police had not then decided to charge him with the murder.

Held: the words written by the appellant were written voluntarily in the sense, defined above, and were, therefore, admissible in evidence despite the absence of a caution.

Statement of law in *Ibrahim* v. *R.* (1), [1914] A.C. at p. 609, applied.

Criminal Law—Trial—Summing-up—Comment on accused not giving evidence and not calling a particular witness—Discretion of judge.

The court declined to review the comments of a judge in his summing-up relating to the accused not giving evidence and not calling a particular witness.

Notes. Considered: *R.* v. *Cook* (1918), 34 T.L.R. 515; *R.* v. *Wattam* (1952), 36 Cr. App. Rep. 72. Applied: *R.* v. *Bass*, [1953] 1 All E.R. 1064.

As to admissibility of statements and confessions of accused, see 10 Halsbury's Laws (3rd Edn.) 469 et seq.; as to judge's summing-up, see ibid. 423–425; and for cases see 14 Digest (Repl.) 467 et seq., 341.

Cases referred to:

(1) *Ibrahim* v. *R.*, [1914] A.C. 599; 83 L.J.P.C. 185; 111 L.T. 20; 30 T.L.R. 383; 24 Cox, C.C. 174, P.C.; 14 Digest (Repl.) 468, *4513*.

(2) *R.* v. *Best*, [1909] 1 K.B. 692; 78 L.J.K.B. 658; 100 L.T. 622; 25 T.L.R. 280; 22 Cox, C.C. 97; 2 Cr. App. Rep. 30; 73 J.P.Jo. 77, C.C.A.; 14 Digest (Repl.) 475, *4558*.

Also referred to in argument:

R. v. *Brackenbury* (1893), 17 Cox, C.C. 628; 14 Digest (Repl.) 474, *4529*.

R. v. *Gavin* (1885), 15 Cox, C.C. 656; 14 Digest (Repl.) 475, *4554*.

R. v. *Male and Cooper* (1893), 17 Cox, C.C. 689; 14 Digest (Repl.) 475, *4555*.

Rogers v. *Hawken* (1898), 67 L.J.Q.B. 526; 78 L.T. 655; 62 J.P. 279; 42 Sol. Jo. 381; 19 Cox, C.C. 122, D.C.; 14 Digest (Repl.) 468, *4515*.

R. v. *Histed* (1898), 19 Cox, C.C. 16; 14 Digest (Repl.) 474, *4543*.

Lewis v. *Harris* (1913), 110 L.T. 337; 78 J.P. 68; 30 T.L.R. 109; 58 Sol. Jo. 156; 24 Cox, C.C. 66, D.C.; 14 Digest (Repl.) 474, *4533*.

R. v. *Knight and Thayre* (1905), 69 J.P. 108; 21 T.L.R. 310; 20 Cox, C.C. 711; 14 Digest (Repl.) 474, *4542.*

The Yeovil Murder Case (1877), 41 J.P. 187.

Kops v. *R., Ex parte Kops*, [1894] A.C. 650; 64 L.J.P.C. 34; 70 L.T. 890; 58 J.P. 668; 10 T.L.R. 525; 6 R. 522, P.C.; 14 Digest (Repl.) 341, *3313.*

R. v. *Rhodes*, [1899] 1 Q.B. 77; 68 L.J.Q.B. 83; 79 L.T. 360; 62 J.P. 774; 47 W.R. 121; 15 T.L.R. 37; 43 Sol. Jo. 45; 19 Cox, C.C. 182, C.C.R.; 14 Digest (Repl.) 341, *3314.*

R. v. *Colpus and Boorman*, *R.* v. *White*, [1917] 1 K.B. 574; 86 L.J.K.B. 459; 116 L.T. 703; 81 J.P. 135; 33 T.L.R. 184; 61 Sol. Jo. 268; 25 Cox, C.C. 716; 12 Cr. App. Rep. 193, C.C.A.; 14 Digest (Repl.) 465, *4489.*

R. v. *Booth and Jones* (1910), 74 J.P. 475; 5 Cr. App. Rep. 177, C.C.A.; 14 Digest (Repl.) 474, *4532.*

R. v. *Miller* (1895), 18 Cox, C.C. 54; 14 Digest (Repl.) 474, *4530.*

R. v. *Thompson*, [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T. 22; 57 J.P. 312; 41 W.R. 525; 9 T.L.R. 435; 37 Sol. Jo. 457; 17 Cox, C.C. 641; 5 R. 392, C.C.R.; 14 Digest (Repl.) 468, *4521.*

Appeal on a point of law against a conviction for murder before DARLING, J., at the Central Criminal Court.

The accused Louis Marie Joseph Voisin, a Frenchman, was convicted of the murder of a woman named Emilienne Gerard. Shortly after the disappearance of Madame Gerard the trunk of her body was found in a parcel in Regent Square, and attached to the parcel was a piece of paper with the words "Bladie Belgiam" upon it. The police made inquiries and asked the accused to go to Bow Street Police Station and account for his movements at the time when the murder was supposed to have been committed. At the police station the accused made a statement which was taken down in writing. He was then asked if he had any objection to writing the words "Bloody Belgian." He said he had no objection, and then wrote the words "Bladie Belgiam." No caution was given to the accused by the police either before he made the statement or wrote the words. At this time the trunk discovered in Regent Square had not been identified, nor had the head and hands of the murdered woman been found. The police detained the accused in custody for the purpose of making inquiries, but they had not at that time decided to charge him with the crime. He was subsequently arrested and charged with the crime of wilful murder. At the trial he was found guilty and sentenced to death. He appealed against his conviction on the grounds that evidence had been wrongly admitted, and that the judge at the trial had misdirected the jury.

L. Morgan May for the appellant.

R. D. Muir and *Percival Clarke* for the Crown.

Cur. adv. vult.

The judgment of the court was read by

A. T. LAWRENCE, J.—The appellant and a woman named Berthe Roche were indicted for the murder of Emilienne Gerard. A verdict of not guilty was directed by the judge in the case of Roche. The jury found Voisin guilty of murder and he was sentenced to death. He has appealed to this court against his conviction on the grounds of misdirection and misreception of evidence. The arguments on misdirection may be dealt with quite shortly. Counsel for the appellant presented his case with considerable skill, but had to admit that the passages from the summing-up on which he relied as misdirection did not in themselves amount to directions in point of law, but were comments on the evidence, from which, he said, the jury would infer that the judge was of opinion that the appellant was guilty. He argued that, as there were three or four such passages in the summing-up, they had a cumulative effect, and amounted together to misdirection in law. We think that this argument is founded on an erroneous view of the law. Comments on the evidence which are not misdirections do not, by being added together, constitute a misdirection. The only ground of appeal where such cumulative effect

of a judge's observation is relied on is where it can be said that they have caused, or contributed to cause, a miscarriage of justice. Counsel for the appellant could not, and did not, suggest that there had been any miscarriage of justice in this case, and it is plain to us that the learned judge was throughout endeavouring, in the case of a very horrible murder, to be scrupulously fair to the prisoner. The judge's comments on the appellant's not going into the witness-box and his not calling the woman Roche after her discharge were within his judicial discretion and are not matters for this court to review. It was a case demanding explanation by the only persons who could know the facts if ever a case did. For both the rooms occupied by the appellant and Roche and those occupied by the victim contained many traces of human blood, and in the appellant's cellar were found the head and hands of the dead woman. Both the appellant and Roche had keys of the deceased's flat, and the appellant had the key of his cellar in his pocket.

The alleged misreception of evidence relates to a paper writing containing the words "Bladie Belgiam." This was written by the appellant at the request of the police at a time while he was being detained at Bow Street. The trunk of the body of the deceased woman had been found contained in a parcel in Regent Square with a label containing these words on it. The police were making investigations; they had requested the appellant to go to Bow Street and to account for his movements at the supposed time of the murder; he had just made a statement which had been taken down in writing, and after he had done so he was asked whether he would have any objection to write down the two words above mentioned. He said, "Not at all," and then wrote them down, and it was argued that the writing was inadmissible in evidence on the ground that it was obtained by the police without having first cautioned the appellant, and while he was in custody. A number of cases were called to our attention in which different views had been entertained by judges when statements by prisoners should, and when they should not, be excluded from consideration by the jury. It is clear, and has been frequently held, that the duty of the judge to exclude statements is one that must depend on the particular circumstances of each case. The general principle is admirably stated by LORD SUMNER in his judgment in the Privy Council in *Ibrahim* v. *R.* (1):

> "It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE."

The point of that passage is that the statement must be a voluntary statement. Any statement which has been extorted by fear of prejudice, or induced by hope of advantage held out by a person in authority is not admissible. As LORD SUMNER points out, logically these considerations go to the value of the statement rather than to its admissibility. The question whether the person has been duly cautioned before the statement was made is one of the circumstances which must be taken into consideration, but this is a circumstance on which the judge should exercise his discretion. It cannot be said, as a matter of law, that the absence of a caution makes the statement inadmissible. It may tend to show that the person was not on his guard against the importance of what he was saying or as to its bearing on some charge of which he has not been informed. In this case the appellant wrote these words quite voluntarily. The mere fact that the words were written at the request of police officers or that he was being detained at Bow Street does not make the writing inadmissible in evidence. These facts do not tend to change the character of handwriting, nor do they explain the resemblance between his handwriting and that on the label or account for the same mis-spellings occurring in both. There was nothing in the nature of a "trap" or of the "manufacture of evidence." The identity of the deceased woman had not at this moment been

established, and the police, though they were detaining the appellant in custody for inquiries, had not then decided to charge him with this crime; indeed, if the writing had turned out other than it did and other circumstances had not subsequently happened, it is certain that he, like others who were similarly detained, would have been discharged. It is desirable in the interests of the community that investigations into crimes should not be cramped. The court is of opinion that they would be most unduly cramped if it were to be held that a writing voluntarily made in the circumstances here proved was inadmissible in evidence.

We think an error has crept into LORD SUMNER's judgment in *Ibrahim* v. *R.* (1) where he is made to say that the actual decision in *R.* v. *Best* (2) "was that, under the proviso of s. 4 of the Criminal Appeal Act, 1907, the court could not interfere." As reported, there is no allusion in *R.* v. *Best* (2) to the proviso of s. 4. We read that case as deciding that the mere fact that a statement is made in answer to a question put by a police-constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion to exclude the evidence; but he should do so only if he thinks that the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made in circumstances that rendered it unreliable, or unfair, for some reason, to be allowed in evidence against the prisoner. Even if we disagreed with the mode in which the judge had in this case exercised his discretion, which we do not, we should not be entitled to overrule his decision on appeal. This would be evidence admissible in law, unless it could be fairly inferred from the other circumstances that it was not voluntary.

In 1912 the judges, at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law. They are administrative directions the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

STEARN *v.* PRENTICE BROS., LTD.

[KING'S BENCH DIVISION (Bray and Avory, JJ.), November 19, December 20, 1918]

[Reported [1919] 1 K.B. 394; 88 L.J.K.B. 422; 120 L.T. 445; 35 T.L.R. 207; 63 Sol. Jo. 229; 17 L.G.R. 142]

Animal—Rats—Trespass—Damage to crops on farm—Rats attracted to adjoining premises by heap of bones—Liability of owners of adjoining premises.

The plaintiff was the owner of a farm close to the premises of the defendants, who were bone merchants. For the purpose of their business the defendants had a heap of bones on their premises that attracted large numbers of rats which passed backwards and forwards between the defendants' premises and a field belonging to the plaintiff where they ate his corn. In an action by the plaintiff for damages for trespass it was not proved that the defendants' business had increased, or that the heap of bones was larger, than in past years, or that the increase in the numbers of rats was due to anything done by the defendants.

Held: no cause of action lay against the defendants.

Boulston's Case (1) (1597), 5 Co. Rep. 104 b, applied.

R. v. *Moore* (2) (1832), 3 B. & Ad. 184, and *Bland* v. *Yates* (3) (1914), 58 Sol. Jo. 612, distinguished.

Notes. Considered: *Seligman* v. *Docker*, [1948] 2 All E.R. 887.

As to trespass by animals, see 1 HALSBURY'S LAWS (3rd Edn.) 668 et seq.; and for cases see 2 DIGEST (Repl.) 335 et seq.

Cases referred to:

(1) *Bowlston* (*Boulston*) v. *Hardy* (1597), Moore, K.B. 453; Cro. Eliz. 547; 78 E.R. 794; sub nom. *Boulston's Case*, 5 Co. Rep. 104 b; 2 Digest (Repl.) 335, *247*.

(2) *R.* v. *Moore* (1832), 3 B. & Ad. 184; 1 L.J.M.C. 30; 110 E.R. 68; 36 Digest (Repl.) 345, *856*.

(3) *Bland* v. *Yates* (1914), 58 Sol. Jo. 612; 36 Digest (Repl.) 268, *214*.

(4) *Giles* v. *Walker* (1890), 24 Q.B.D. 656; 59 L.J.Q.B. 416; 62 L.T. 933; 54 J.P. 599; 38 W.R. 782; 2 Digest (Repl.) 4, *1*.

(5) *Brady* v. *Warren*, [1900] 2 I.R. 632; 2 Digest (Repl.) 296, **15*.

(6) *Farrer* v. *Nelson* (1885), 15 Q.B.D. 258; 54 L.J.Q.B. 385; 52 L.T. 766; 49 J.P. 725; 33 W.R. 800; 1 T.L.R. 483; 25 Digest 359, *98*.

Appeal from Stowmarket County Court.

The facts are set out in the judgment of BRAY, J.

Haydon for the plaintiff.

C. E. Jones for the defendants.

Cur. adv. vult.

Dec. 20, 1918. **BRAY, J.,** read the following judgment: This action was brought by the plaintiff, a farmer, for injury to his crops by rats, which, he alleged, the defendants (who carried on the business of bone manure manufacturers on premises contiguous to the plaintiff's fields) had suffered to collect on their premises in large numbers and to escape and invade the plaintiff's crops. The county court judge, at the conclusion of the plaintiff's case, held that there was no evidence to prove a cause of action and entered judgment for the defendants, and the plaintiff appealed from this judgment.

It appeared from the evidence adduced on behalf of the plaintiff that the defendants had premises on land divided by a meadow from the plaintiff's fields where the damage was done. The defendants had a factory on their premises, where they had carried on the business of artificial manure manufacturers for at least thirty years; that the plaintiff had made no complaint till the years 1916 and 1917, when there had been a large increase in the numbers of rats on the plaintiff's fields; that, for the purpose of their business, the defendants had a heap of bones, and that this attracted the rats; and that, between the defendants' factory and the plaintiff's

fields, there were runs which showed that large numbers of rats had passed backwards and forwards between the defendants' factory and the plaintiff's fields. There was no evidence to show that the bone department of the defendants' business had been increased, or that the heap of bones was larger than in past years, or anything to show that the increase in the numbers of rats was due to anything done by the defendants. A

It was quite consistent with the plaintiff's evidence that the increase in the number of rats was due to its being a good breeding year, or to the fact that the neighbours had not killed down the rats sufficiently in the previous winter for want of labour or some other cause. It was not shown that rats bred on the defendants' premises, nor did it appear where they bred, nor that the defendants had neglected any duty, if duty there was on them, to destroy the rats. The plaintiff had made no attempt to destroy rats or to protect his crops from being damaged by them, although during the year 1917 he had occupied the meadow. There remained, therefore, only the facts that the defendants had a heap of bones on their land which was likely to attract rats and had, in fact, attracted rats, that the plaintiff had ripening corn crops on his land which would afford food for rats, and that rats were in the habit of crossing the meadow backwards and forwards between the defendants' factory and the plaintiff's crops, and that the rats, by feeding on the plaintiff's corn, did substantial damage. B C D

Is a man who, in the ordinary course of his business, has large quantities of food on his premises which is likely to attract rats responsible for damage caused by rats so attracted without any evidence that the quantities of food were unusual or excessive? It is certain that this is a novel cause of action. Bone manure manufactories must have existed for a very great number of years. Bones are a natural but valuable waste product from the rearing of cattle or sheep for slaughter for the purpose of providing meat. Rats have been the enemies of farmers ever since land was cultivated. If proper measures are not taken by occupiers of lands to destroy them they quickly increase. They are feræ naturæ. I think under these circumstances it is incumbent on the plaintiff to produce some authority in support of his proposition. As Lord Coleridge, C.J., said in *Giles* v. *Walker* (4) (24 Q.B.D. at p. 657): E F

> "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil."

Several cases were cited which I will examine. The earliest case is *Boulston's Case* (1). It was there held that, if a man makes coneyboroughs in his own land, which increase in so great numbers that they destroy his neighbour's land next adjoining, his neighbour cannot have an action on the case against him who makes the coneyboroughs, for, so soon as the coneys come on his neighbour's land, he may kill them, for they are feræ naturæ, and he who makes the coneyboroughs has no property in them and he shall not be punished for the damage which the coneys do in which he has no property, and which the other may lawfully kill. This was an action on the case, as here, and seems to be directly in point. I am not aware that this decision has ever been overruled or questioned. It was approved and followed in *Brady* v. *Warren* (5). It was cited in *Farrer* v. *Nelson* (6), a case relied on by the plaintiff. There the plaintiff was tenant to the defendant of a farm, the defendant reserving the right to kill game. The defendant had reared large quantities of pheasants and had turned them down in a wood adjoining the plaintiff's land, whence they had strayed on to the plaintiff's land and damaged his crops. This, of course, was clearly distinguishable from *Boulston's Case* (1), as the defendant had deprived the plaintiff of his right to kill or destroy the pheasants. In giving judgment, Pollock, B., said the moment he brings on game to an unreasonable amount or causes it to increase to an unreasonable extent, he is doing that which is unlawful, and an action may be maintained by his neighbour for the damage sustained. That case does not, in my opinion, support the plaintiff's proposition. G H I

R. v. *Moore* (2) and the cases which followed it, all cases of nuisance, were cited to us. They lay down that, if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance. These cases are clearly distinguishable in my opinion. The plaintiff could not kill the crowd or stop them. The crowd are not feræ naturæ. The last case relied on was *Bland* v. *Yates* (3). There, Warrington, J., decided that an unusual and excessive collection of manure was a nuisance, and he granted an injunction restraining the defendant from depositing, stacking and handling manure on his land so as to be a nuisance. The nuisance consisted partly of smell and partly of flies which nested and bred in the manure. That case is, in my opinion, distinguishable. The learned judge found that there was an unusual and excessive collection of manure. There is no evidence here of anything unusual or excessive done by the defendants.

In my opinion, there is no authority for the proposition put forward by the plaintiff. I think the appeal fails and must be dismissed with costs.

Avory, J.—I have had the advantage of reading my brother's judgment. I agree in it, and I have nothing to add.

Appeal dismissed.

Solicitors: *Whites & Co.*, for *Greene & Greene*, Bury St. Edmunds; *Elvy Robb & Welch*, for *Turner, Turner & Martin*, Ipswich.

[*Reported by* W. V. Ball, Esq., *Barrister-at-Law.*]

LEWIS *v.* THOMAS

[King's Bench Division (Avory and Shearman, JJ.), March 21, 1918]

[Reported [1919] 1 K.B. 319; 88 L.J.K.B. 275; 118 L.T. 689; [1918–19] B. & C.R. 65]

Bill of Sale—"True owner" of goods—Agreement to hire goods with option to purchase—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict.*, *c.* 43), *s.* 5.

The hirer of personal goods under an agreement for hire which gives him an option to purchase, but is not an absolute agreement to purchase, is a bailee, and not the "true owner," of the goods within the meaning of the Bills of Sale Act (1878) Amendment Act, 1882, s. 5.

Notes. As to chattels of which the grantor is not the true owner, see 3 Halsbury's Laws (3rd Edn.) 282 et seq.; and for cases see 7 Digest 118 et seq. For the Bills of Sale Act (1878) Amendment Act, 1882, s. 5, see 2 Halsbury's Statutes (2nd Edn.) 576.

Cases referred to:

(1) *Lee* v. *Butler*, [1893] 2 Q.B. 318; 62 L.J.Q.B. 591; 69 L.T. 370; 42 W.R. 88; 9 T.L.R. 631; 4 R. 563, C.A.; 26 Digest (Repl.) 659, *5*.

(2) *Helby* v. *Matthews*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 26 Digest (Repl.) 660, *14*.

(3) *Re Sarl, Ex parte Williams*, [1892] 2 Q.B. 591; 67 L.T. 597; 9 Morr. 263; 7 Digest 126, *716*.

(4) *Re Tamplin & Son, Ex parte Barnett* (1890), 59 L.J.Q.B. 194; 62 L.T. 264; 38 W.R. 351; 6 T.L.R. 206; 7 Morr. 70, D.C.; 7 Digest 126, *714*.

Also referred to in argument:

Re Robertson, Ex parte Crawcour (1878), 9 Ch.D. 419; 47 L.J.Bcy. 94; 39 L.T. 2; 26 W.R. 733, C.A.; 7 Digest 15, *67*.

Belsize Motor Supply Co. v. *Cox*, [1914] 1 K.B. 244; 83 L.J.K.B. 261; 110 L.T. 151; 26 Digest (Repl.) 660, *16*.

Re Feild, Ex parte Pratt (1890), 63 L.T. 289; 7 Morr. 132; sub nom. *Re Field, Ex parte Pratt*, 6 T.L.R. 286; 7 Digest 126, *715*.

Woodall v. *Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 54 W.R. 7; 21 T.L.R. 581, C.A.; 30 Digest (Repl.) 495, *1395*.

Appeal from the Llanelly County Court.

On April 23, 1917, Lewis & Sons, execution creditors, obtained judgment against one Hoff for £18 6s. They issued execution on June 29, 1917. On July 30, 1917, one Thomas, a registered moneylender (hereafter referred to as "the claimant"), claimed the goods under a bill of sale executed by Hoff in his favour on Jan. 7, 1917, as security for an advance. An interpleader issue was directed on Nov. 30, 1917. The goods in question formed the subject-matter of two hire-purchase agreements. By the first of these, which was dated June 14, 1916, and was expressed to have been "originally drawn by the Lord Chief Justice of the Common Pleas and approved by His Majesty's Solicitor-General," Hoff hired certain furniture from Pugh Brothers at £5 a month, the goods to become his after full payment of £80 19s. 6d. The agreement contained the usual default clause. By the second agreement, dated Dec. 9, 1916, Hoff hired from Bevan & Co. certain further household goods. By cl. 2 of this agreement:

> "The said hirer agrees to pay to the said owners the further sum of £32 10s. 6d. by fourteen instalments, one instalment to be paid each successive month until the whole is paid . . . provided that the hirer shall be at liberty to terminate this agreement at his own cost after not less than half of the said total amount of the instalments has been paid."

By cl. 5:

> "If all the instalments of hire previously due shall have been regularly paid and all the conditions of this agreement performed by the said hirer up to the payment of the last instalment, the said hirer shall be at liberty to purchase the said household goods and effects at or for the amount of the said last instalment."

Between July 30, 1917, and the trial certain instalments due were paid by the claimant. The county court judge held that, at the time when the bill of sale was granted, the grantor had an equitable interest which entitled him to grant the bill of sale. He gave judgment for the claimant.

The execution creditors appealed.

The Bills of Sale Act (1878) Amendment Act, 1882, s. 5, provides:

> "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale."

Rowland Thomas for the appellants, the execution creditors.

Barrett Lennard for the respondent, the claimant.

AVORY, J.—The question for the county court judge to decide was whether the claimant had a good title to the goods. To decide that, he had to determine whether a bill of sale granted by one Hoff was valid under s. 5 of the Act of 1882. [His Lordship read the section and continued:] The question was whether the grantor was the true owner of the goods at the time when the bill of sale was executed. The goods were in his possession under two agreements. One, which was made with Pugh Bros., was dated June 14, 1916. The other was made with Bevan & Co. on Dec. 9, 1916. It has not been contended that Hoff was in any sense the purchaser of the goods referred to in the first agreement, which was simply an agreement for hire; but it has been urged that, under the agreement made with Bevan & Co., Hoff became and was a hirer with an option to purchase,

A and that, as he had agreed to pay the whole price—namely, £32 10s.—with liberty to terminate the agreement after he had paid half the sum, he should be treated in law as the true owner of the goods when the bill of sale was granted. In my opinion, the agreement made with Bevan & Co. is not within the principle of *Lee* v. *Butler* (1). It is not like the agreement referred to in that case. There was here no absolute agreement to purchase as was held to be the case in *Helby* v. *Matthews* B (2), where LORD HERSCHELL, L.C., said ([1895] A.C. at p. 477):

> "In [*Lee* v. *Butler* (1)] there was an agreement to buy. The purchase money was to be paid in two instalments, but as soon as the agreement was entered into there was an absolute obligation to pay both of them, which might have been enforced by action."

C Whatever may be the answer to the question whether the grantor of a bill of sale who has made an agreement similar to that discussed in *Lee* v. *Butler* (1) is a true owner, I am clearly of opinion that in this case Hoff, the grantor, was in the position of a person who had a mere option to purchase, and was not the true owner. The learned county court judge appears to have held that he had an equitable interest, and that that was sufficient. I do not agree with him. This D appeal must be allowed.

SHEARMAN, J.—The goods were hired under two agreements which had the same effect in law. Hoff had agreed to hire with an option to purchase. He was in fact a bailee with an option to purchase. He represented to the claimant that he was the owner, and on such representation obtained an advance. The bill of sale is now attacked on the ground that Hoff was not the true owner. A trustee E (*Re Sarl* (3)), or a person who has the beneficial interest (*Re Tamplin & Son* (4)), may be a true owner; but there is no case which goes so far as to say that a mere bailee with an option to purchase is the true owner. He merely has the right to call for the property from the true owner. The appeal must be allowed.

Appeal allowed.

F Solicitors: *Rhys Thomas & Co.*, for *W. Davies*, Llanelly; *H. Greenard.*

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law.*]

G

R. *v.* DE MUNCK

H [COURT OF CRIMINAL APPEAL (Darling, Coleridge and Salter, JJ.), March 11, 1918]

[Reported [1918] 1 K.B. 635; 87 L.J.K.B. 682; 119 L.T. 88; 82 J.P. 160; 34 T.L.R. 305; 62 Sol. Jo. 405; 26 Cox, C.C. 302]

Criminal Law—Prostitution—"Common prostitute"—Woman committing lewd acts without sexual intercourse—Criminal Law Amendment Act, 1885 (48 & 49 *Vict.*, *c.* 69), *s.* 2 (2)—*Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 17—*Criminal Law Amendment Act*, 1912 (2 & 3 *Geo.* 5, *c.* 20), *s.* 7 (4).

I The term "common prostitute" is not limited to mean only a woman who permits acts of lewdness with those who hire her when such acts consist of ordinary sexual intercourse; it includes a woman who offers her body for purposes amounting to common lewdness in return for payment without ordinary sexual intercourse taking place.

Notes. The Criminal Law Amendment Act, 1885, and the Criminal Law Amendment Act, 1912, have been repealed and replaced by the Sexual Offences

Act, 1956. The Children Act, 1908, s. 17, was repealed and replaced by the Children and Young Persons Act, 1933, s. 2, which has been repealed and replaced by the Act of 1956. See now s. 22, s. 28 and s. 31 of the Act of 1956.

Considered: *Winter* v. *Woolfe*, [1930] All E.R.Rep. 623.

As to offences against decency and morality, see 10 HALSBURY'S LAWS (3rd Edn.) 671 et seq.; and for cases see 15 DIGEST (Repl.) 1021 et seq. For the Sexual Offences Act, 1956, ss. 22, 28, 31, see 36 HALSBURY'S STATUTES (2nd Edn.) 228, 231, 232.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on twelve counts of attempted procuration, of having for gain exercised control over the movements of a prostitute in such a manner as to show that the appellant was aiding her prostitution, and of encouraging the prostitution of a girl under the age of sixteen, contrary to the Criminal Law Amendment Act, 1885, s. 2 (2), the Criminal Law Amendment Act, 1912, s. 7, and the Children Act, 1908, s. 17, respectively. The facts are set out in the judgment of the court.

E. J. Purchase for the appellant.

Percival Clarke for the Crown.

DARLING, J., delivered the following judgment of the court.—The indictment on which the appellant was convicted contained twelve counts, which were framed under three different statutes. The charge which is common to all the counts is that of procuring or attempting to procure a girl under the age of sixteen years to become a common prostitute. The evidence showed that the appellant allowed her daughter to take men home, and that she allowed those men to be alone with the girl under circumstances which would have led anyone to suppose that she had had connection with them. The medical evidence showed, however, that the girl was, in a medical sense, virgo intacta, and that she had never had sexual intercourse with a man in the ordinary way. There was, on the other hand, ample evidence to satisfy the jury, and they were satisfied, that lewd conduct had taken place between the girl and the men whom she took home, that the girl exposed herself to these men in order to gratify their passions, and that the appellant procured her daughter to do this.

The question for the court is to decide on all the counts in the indictment whether what was done by the appellant amounts to procuring or attempting to procure her daughter to become a common prostitute, and the court has to decide what is a prostitute, or what is prostitution. It has been contended on behalf of the appellant that, if a woman offers her body in order to gratify the sexual passions of men, even if it is done as a regular trade, indiscriminately and in return for money, that is not prostitution unless there is an act of sexual connection. We think that this contention cannot be supported. The court is of opinion that the term "common prostitute" cannot be limited so as to mean only a woman who permits acts of lewdness with those who hire her when such acts consist of ordinary sexual intercourse. We are of opinion that prostitution is proved when it is shown that a woman offers her body for purposes amounting to common lewdness in return for payment. In the present case, there is ample evidence on which the verdict of the jury can be supported, and to show that the girl did offer her body in such a way, and that the appellant, under whose control the girl was, used to demand and receive money from those who were allowed by the girl to gratify their passions. That the appellant knew quite well what the girl was doing is proved by the fact that the appellant knew she was a virgin after long indulgence in such practices.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal*; *Wontner & Sons.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

R. v. BIGGIN

[Court of Criminal Appeal (Earl of Reading, C.J., Avory and Sankey, JJ.), October 20, 1919]

[Reported [1920] 1 K.B. 213; 89 L.J.K.B. 99; 83 J.P. 293; 36 T.L.R. 17; 26 Cox, C.C. 545; 14 Cr. App. Rep. 87]

Criminal Law—Evidence—Cross-examination of prisoner as to character—Imputation on character of prosecutor—Murder—"Prosecutor"—Murdered man—Credibility of prisoners—Questions on matters not relevant to charge—Criminal Evidence Act, 1898 (61 & 62 *Vict.*, *c.* 36), *s.* 1 (*f*) (*ii*).

The appellant, when charged with the murder of one G., put forward the defence that G. made improper overtures to him and violently attacked him when he refused to comply with the suggestions, and in repelling the attack he killed G. During the cross-examination of the appellant, counsel for the prosecution was allowed to address a series of questions to him which related solely to money matters, and the appellant admitted that he had been guilty of obtaining money by false pretences. None of the questions put by counsel was relevant to the charge of murder or of manslaughter, but the judge allowed the questions on the ground that the dead man was the prosecutor in the case and the defence involved imputations on his character within s. 1 (f) (ii) of the Criminal Evidence Act, 1898, and also on the ground that the questions tested the credibility of the appellant. The appellant having been convicted of manslaughter,

Held on appeal: a dead man could not be the "prosecutor" within the meaning of s. 1 (f) (ii) of the Act of 1898, and, therefore, the questions were not admissible on the ground that they involved imputations on his character within the meaning of para. (ii); the questions were not relevant to the charge on which the appellant was being tried, and so were not admissible to test his credibility.

Notes. Considered: *R.* v. *Clark*, [1955] 3 All E.R. 29. Referred to: *R.* v. *Ratcliffe* (1919), 89 L.J.K.B. 135; *R.* v. *Turner*, [1944] 1 All E.R. 599.

As to imputations on character of prosecutor, see 10 Halsbury's Laws (3rd Edn.) 451–452; and for cases see 14 Digest (Repl.) 515 et seq. For the Criminal Evidence Act, 1898, see 9 Halsbury's Statutes (2nd Edn.) 613.

Cases referred to:

(1) *R.* v. *Hudson*, [1912] 2 K.B. 464; 81 L.J.K.B. 861; 107 L.T. 31; 76 J.P. 421; 28 T.L.R. 459; 56 Sol. Jo. 574; 23 Cox, C.C. 61; 7 Cr. App. Rep. 256, C.C.A.; 14 Digest (Repl.) 512, *4961*.

(2) *R.* v. *Preston*, [1909] 1 K.B. 568; 78 L.J.K.B. 335; 100 L.T. 303; 73 J.P. 173; 25 T.L.R. 280; 53 Sol. Jo. 322; 21 Cox, C.C. 773; 2 Cr. App. Rep. 24, C.C.A.; 14 Digest (Repl.) 517, *5007*.

Also referred to in argument:

R. v. *Ellis*, [1910] 2 K.B. 746; 79 L.J.K.B. 841; 102 L.T. 922; 74 J.P. 388; 26 T.L.R. 535; 22 Cox, C.C. 330; 5 Cr. App. Rep. 41, C.C.A.; 14 Digest (Repl.) 408, *3975*.

R. v. *Bridgwater*, [1905] 1 K.B. 131; 74 L.J.K.B. 35; 91 L.T. 838; 69 J.P. 26; 53 W.R. 415; 21 T.L.R. 69; 49 Sol. Jo. 69; 20 Cox, C.C. 737, C.C.R.; 14 Digest (Repl.) 517, *5006*.

R. v. *Westfall* (1912), 107 L.T. 463; 76 J.P. 335; 28 T.L.R. 297; 23 Cox, C.C. 185; 7 Cr. App. Rep. 176, C.C.A.; 14 Digest (Repl.) 516, *4997*.

R. v. *Rodley*, [1913] 3 K.B. 468; 82 L.J.K.B. 1070; 109 L.T. 476; 77 J.P. 465; 29 T.L.R. 700; 58 Sol. Jo. 51; 23 Cox, C.C. 574; 9 Cr. App. Rep. 69, C.C.A.; 14 Digest (Repl.) 422, *4109*.

Appeal on a point of law against a conviction for manslaughter on a charge of murder before DARLING, J., at the Central Criminal Court.

The appellant was charged with the murder of one G. at a wineshop in Hendon in July, 1919. On his arrest he made a statement to the police admitting that he had killed G., but further stating that the deceased man had made improper overtures to him, and on his refusal to comply had attacked him with great violence. At the trial he gave evidence on his own behalf, repeating what he had already stated, and was thereupon subjected to a searching cross-examination in which he admitted that he had on one occasion obtained money by false pretences. None of the questions put to him by counsel for the prosecution were relevant to the charge of murder or of manslaughter.

Section 1 (f) of the Criminal Evidence Act, 1898, provides as follows:

> "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

J. P. Valetta and *A. A. Baerlein* for the appellant.
Eustace Fulton for the Crown.

The judgment of the court was delivered by

EARL OF READING, C.J.—The appellant was charged with murder. He was convicted of manslaughter and sentenced to twelve months' imprisonment with hard labour. He appeals to this court on the ground that cross-examination was improperly addressed to him, contrary to the provisions of s. 1 of the Criminal Evidence Act, 1898.

The deceased man, Gregory, was found dead on the afternoon of July 4, 1919, in a wineshop at Hendon. The appellant, when charged with the murder of the deceased man, made a statement to the police, in which he admitted that he killed Gregory, but said that he acted in self-defence; that Gregory had made improper overtures to him, and had violently attacked him because he refused to comply with the suggestions made by Gregory. The appellant further said: "At the time I was struggling with Gregory, I felt that if I did not do him in he would do me in." The defence put forward by the appellant was in substance that he used violence in consequence of the improper overtures made by the deceased man, and to repel the attack made upon the appellant when he refused to comply with such overtures. It was quite clear, as the learned judge pointed out in the course of his summing-up to the jury, that if the appellant was placed in the dilemma that Gregory would kill him unless he killed Gregory, the jury would be justified in returning a verdict of Not Guilty. But the learned judge also pointed out that if the appellant used more violence than was necessary in resisting the attack made upon him, a verdict of manslaughter would be justified.

It is not necessary to go in detail through the facts of the case further than to say that during the cross-examination of the appellant a series of questions were addressed to him by counsel for the prosecution which had the effect of drawing an admission from the appellant that he had on one occasion been guilty of obtaining money by false pretences. A number of questions were put to the appellant in cross-examination which had no relevance whatever to the charge of murder or of manslaughter. These questions related solely to transactions by the appellant in money matters, which might properly be described as discreditable to the appellant and his answers involved admissions that he had committed a crime other than that which was the subject of the trial. The cross-examination was objected to by the appellant's counsel, but the learned judge, after hearing argument, came

A to the conclusion that the cross-examination was admissible on two grounds put forward by counsel for the Crown. The first ground was that the defence made imputations on the character of the deceased man, who was, it was said, the prosecutor in the case. The second ground was that the cross-examination was admissible as testing the credibility of the appellant.

With regard to the first ground, it was argued that the deceased man was the B prosecutor, and that the defence made imputations on his character by alleging that he had made disgraceful overtures to the appellant. The court is of opinion that a dead man cannot be a prosecutor. He has neither the will nor the intention to prosecute, nor can he take any part in the proceedings. Therefore, we are of opinion that the cross-examination was not admissible on the first ground. It was contended that the legislature must have intended to include cases like the present C one when a man was killed and the defence put forward on behalf of the person accused of the murder involves an attack on the character of the deceased man. It is enough for us to say that Parliament has not used language which would justify the court in saying that the deceased man was the prosecutor for the purposes of the Criminal Evidence Act, 1898. The court is bound by the exact words of the section, and on the construction of those words the first ground on which this D cross-examination was admitted fails. The second ground on which it was said that the questions put in cross-examination were admissible, was that they were put for the purpose of ascertaining whether the appellant was telling the truth; in other words, to test his credibility. The Crown claims the right on this ground to put questions to the appellant which have no relevance whatever to the charge on which he was being tried. This claim seems to us to be directly contrary to the E spirit and intention as well as the language of the Criminal Evidence Act, 1898, and we are clearly of opinion that in the circumstances of this case the questions put in cross-examination and the answers were not admissible against the appellant.

Our attention has been called to certain observations made by LORD ALVERSTONE, C.J., at the end of his judgment in *R.* v. *Hudson* (1), where he says:

F "We think that the words of the section 'unless the nature and conduct of the defence is such as to involve imputations, &c.,' must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily' or 'unjustifiably' or 'for purposes other than that of developing the defence' or other similar words."

G The court finds nothing in these observations inconsistent with the decision to which we are now coming. In that case the court was considering a different question, and in our view was not deciding the point now before us. In his judgment LORD ALVERSTONE, C.J., quoted a passage from the judgment of CHANNELL, J., in *R.* v. *Preston* (2), where he says, after referring to the latter half of s. 1 of the Criminal Evidence Act, 1898:

H "It appears to mean this: that if the defence is so conducted or the nature of the defence is such as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution, on the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or I makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character, with a view of showing that he has such a bad character that the jury ought not to rely on his evidence."

The decision in *R.* v. *Preston* (2) is in accordance with the views which we have just expressed.

The question remains whether the court should apply the proviso to s. 4 of the Criminal Appeal Act, 1907. After considering all the circumstances of this case, we are not satisfied that the jury would have convicted the appellant if this cross-examination had not taken place, or if the jury had been told to pay no attention

to it. On the defence put forward, namely, that the appellant killed Gregory in defence of his own life, the appellant was entitled to an acquittal. We cannot say that the jury would not have accepted the defendant's plea of "Not Guilty" if they had not heard this cross-examination. The conviction, therefore, must be quashed and the appeal allowed.

Conviction quashed.

Solicitors: *Taylor, Stanbury & Co.*, for *Branson & Son*, Sheffield; *Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

BANK LINE, LTD. *v.* ARTHUR CAPEL & CO.

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Shaw, Lord Sumner and Lord Wrenbury), November 15, 16, December 12, 1918]

[Reported [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 35 T.L.R. 150; 63 Sol. Jo. 177; 14 Asp.M.L.C. 370]

Contract—Frustration—Charterparty—Time charter—Requisition of ship by Crown—Charter for a year—Continuance of requisition for more than three months—Exception of loss or damage by restraint of princes—Right of charterers to cancel charter if ship requisitioned—Right not exercised.

By a charterparty dated Feb. 16, 1915, shipowners agreed to let and charterers agreed to hire a vessel for a term of twelve calendar months from the time when the vessel should be placed at the disposal of the charterers. By cl. 14 of the charter loss or damage by restraint of princes was excepted; by cl. 26 the vessel was to be delivered not before April 1, 1915, and if she were not delivered by April 30 the charterers had the option of cancelling the charter; and by cl. 31 the charterers had the option of cancelling the charter should the steamer be commandeered by the government during the charter. The vessel was not ready by April 30, but the charterers did not cancel the charter. On May 11, 1915, the vessel was requisitioned by the British government. She remained under requisition until September, 1915, when she was released and sold by the shipowners to third parties. In an action by the charterers for damages in respect of the owners' failure to put the ship at their disposal in accordance with the charter,

Held, by all their Lordships: (i) the doctrine of frustration applied in the case of a time charter; (ii) the application of the doctrine of frustration to the charter was not excluded by the terms of cll. 14, 26, and 31 of the charter; (iii) by Lord Finlay, L.C., Lord Shaw, Lord Sumner, and Lord Wrenbury, Viscount Haldane dissenting: the requisitioning of the ship delayed the performance of the charter for so indefinite, and probably long, a time, and rendered the return of the ship dependent on considerations beyond the control of either party, with the result that it destroyed the identity of the chartered service and made it unreasonable to require the contracting parties to go on with the adventure, which was, therefore, frustrated, and the claim of the charterers failed.

Notes. For the rights and liabilities of the parties to a frustrated contract, see Law Reform (Frustrated Contracts) Act, 1943 (4 Halsbury's Statutes (2nd Edn.) 662).

Applied: *Snia Soc. di Navigazione Industria e Commercio* v. *Suzuki* (1924), 29 Com. Cas. 284; *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] All E.R.Rep. 51. Considered: *First Russian Insurance Co.* v. *London and Lancashire Insurance Co.*, [1928] Ch. 922; *The Penelope*, [1928] P. 180; *Tatem, Ltd.* v. *Gamboa*, [1938] 3 All E.R. 135; *Court Line, Ltd.* v. *Dart and Russell Inc.*, [1939] 3 All E.R. 314; *Morgan* v. *Manser*, [1947] 2 All E.R. 666. Referred to: *Woodfield Steam Shipping Co.* v. *Thompson* (1919), 36 T.L.R. 43; *Comptoir Commercial Anversois* v. *Power*, post, page 661; *Re Badische Co., Bayer Co.*, etc., [1921] 2 Ch. 331; *Moriarty* v. *Regent's Garage Co.*, [1921] 1 K.B. 423; *Dominion Coal Co.* v. *Maskinonge S.S. Co.*, [1922] 2 K.B. 132; *Matthey* v. *Curling*, [1922] 2 A.C. 180; *Larrinaga* v. *Soc. Franco-Américaine des Phosphates de Médulla, Paris*, [1923] All E.R.Rep. 1; *Cohen* v. *Sellar*, [1926] All E.R.Rep. 312; *Hyman* v. *Hyman*, *Hughes* v. *Hughes*, [1929] P. 1; *May* v. *May*, [1929] All E.R.Rep. 484; *Bell* v. *Lever Bros., Ltd.*, [1931] All E.R.Rep. 1; *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.*, [1935] All E.R.Rep. 86; *Chandler Bros., Ltd.* v. *Boswell*, [1936] 3 All E.R. 179; *Kulukundis* v. *Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 242; *Joseph Constantine S.S. Line, Ltd.* v. *Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Denny, Mott and Dickson, Ltd.* v. *James B. Fraser & Co.*, [1944] 1 All E.R. 678; *The Steaua Romana, The Oltenia*, [1944] P. 43; *Court Line, Ltd.* v. *R.* (1945), 173 L.T. 162; *Monarch S.S. Co.* v. *A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1; *Blane Steamships, Ltd.* v. *Ministry of Transport*, [1951] 2 T.L.R. 763; *British Movietonews, Ltd.* v. *London and District Cinemas, Ltd.*, [1951] 2 All E.R. 617; *Atlantic Maritime Co., Inc.* v. *Gibbon*, [1953] 2 All E.R. 1086; *W. Young & Son (Wholesale Fish Merchants), Ltd.* v. *British Transport Commission*, [1955] 2 All E.R. 98; *Davis Contractors, Ltd.* v. *Fareham U.D.C.*, [1956] 2 All E.R. 145; *Universal Cargo Carriers Corpn.* v. *Citati*, [1957] 2 All E.R. 70; *Port Line, Ltd.* v. *Ben Line Steamers, Ltd.*, [1958] 1 All E.R. 789; *Tsakiroglou & Co., Ltd.* v. *Noblee Thorl G.m.b.H.*, [1959] 1 All E.R. 45.

As to frustration of a charterparty, see 30 HALSBURY'S LAWS (2nd Edn.) 289–291, 309, 310, 418, 419; and for cases see 12 DIGEST (Repl.) 436 et seq.

Cases referred to:

(1) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1, H.L.; 12 Digest (Repl.) 456, *3410*.

(2) *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 32 T.L.R. 677; 21 Com. Cas. 299; sub nom. *Re F. A. Tamplin Steamship Co., Ltd. and Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; 13 Asp.M.L.C. 467, H.L.; 12 Digest (Repl.) 442, *3361*.

(3) *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 12 Digest (Repl.) 420, *3249*.

(4) *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 12 Digest (Repl.) 418, *3245*.

(5) *Jackson* v. *Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch; 12 Digest (Repl.) 438, *3339*.

(6) *Horlock* v. *Beal*, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp.M.L.C. 250; 21 Com. Cas. 201, H.L.

(7) *Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.*, [1916] 1 K.B. 429; 85 L.J.K.B. 409; 114 L.T. 171; and *Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co.*, [1916] 1 K.B. 675; 85 L.J.K.B. 1181; 32 T.L.R. 234; reversed sub nom. *Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co., Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.*, [1917] 1 K.B. 222; 86 L.J.K.B. 336; 115 L.T. 812; 33 T.L.R. 70; 61 Sol. Jo. 85; 13 Asp.M.L.C. 539; 22 Com. Cas. 154, C.A.; 12 Digest (Repl.) 437, *3335*.

(8) *Lloyd Royale Belge Société Anonyme* v. *Stathatos* (1916), 33 T.L.R. 390; affirmed (1917) 34 T.L.R. 70, C.A.; 12 Digest (Repl.) 442, *3360*.

(9) *Anglo-Northern Trading Co., Ltd.* v. *Emlyn Jones and Williams*, [1917] 2 K.B. 78; 86 L.J.K.B. 778; 116 L.T. 414; sub nom. *Countess of Warwick Steamship Co.* v. *Nickel Société Anonyme*, 33 T.L.R. 291; affirmed, [1918] 1 K.B. 372; 87 L.J.K.B. 309; 118 L.T. 196; 34 T.L.R. 27; 14 Asp.M.L.C. 242, C.A.; 12 Digest (Repl.) 443, *3362*.

(10) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp.M.L.C. 392, H.L.; 41 Digest 517, *3471*.

(11) *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 46 W.R. 78; 13 T.L.R. 501; 8 Asp.M.L.C. 315; 2 Com. Cas. 238, H.L.; 29 Digest 47, *93*.

(12) *Embiricos* v. *Sydney Reid & Co.*, [1914] 3 K.B. 45; 83 L.J.K.B. 1348; 111 L.T. 291; 30 T.L.R. 451; 12 Asp.M.L.C. 513; 19 Com. Cas. 263; 12 Digest (Repl.) 441, *3355*.

(13) *Poussard* v. *Spiers and Pond* (1876), 1 Q.B.D. 410; 45 L.J.Q.B. 621; 34 L.T. 572; 40 J.P. 645; 24 W.R. 819; 12 Digest (Repl.) 426, *3279*.

(14) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, *2966*.

(15) *Bush* v. *Whitehaven Town and Harbour Trustees* (1888), 52 J.P. 392; 2 Hudson's B.C. (4th Edn.), Vol. 2, p. 118, C.A.; 12 Digest (Repl.) 435, *3326*.

(16) *Braemount Steamship Co., Ltd.* v. *Andrew Weir & Co.* (1910), 102 L.T. 73; 26 T.L.R. 248; 11 Asp.M.L.C. 345; 15 Com. Cas. 101; 41 Digest 408, *2539*.

Appeal by the defendants in the action from an order of the Court of Appeal reversing a judgment of ROWLATT, J.

The facts fully appear from the judgment of the Lord Chancellor (LORD FINLAY).

MacKinnon, K.C., and *Raeburn* for the appellants.

Leck, K.C., *Dunlop*, and *Sir Robert Aske* for the respondents.

The House took time for consideration.

Dec. 12, 1918. The following opinions were read.

LORD FINLAY, L.C.—In this case an action was brought by Messrs. Capel & Co., the respondents, against the Bank Line, Ltd., the appellants, to recover damages for failure by the defendants to put at the disposal of the plaintiffs the steamship *Quito*, which the plaintiffs had chartered from the defendants for a period of twelve months. The points of defence allege that the vessel had been requisitioned by the British government and that the charter was put an end to by such requisitioning from its date (May 11, 1915). The case was tried by ROWLATT, J., who held in favour of the defendants that the requisition had put an end to the contract. On appeal the majority of the Court of Appeal (PICKFORD and WARRINGTON, L.JJ.) reversed this decision. SCRUTTON, L.J., dissented and expressed his agreement with the conclusion arrived at by ROWLATT, J. The Bank Line, Ltd. now appeal to this House, and ask that the judgment of ROWLATT, J., should be restored.

The charter is dated Feb. 16, 1915, and was entered into between the appellants, owners of the *Quito*, and the respondents, the charterers. By the first clause the owners agreed to let, and the charterers to hire, the steamer for a term of twelve calendar months from the time the vessel should be delivered and placed at the disposal of the charterers ready to load at a coal port in the United Kingdom as ordered by the charterers, to be employed in trade between safe ports and places within the limits of the United Kingdom, France, the Bay of Biscay, Portugal, Spain, and the Mediterranean not east of Sicily during the war. By the fifth clause the charterers were to pay as hire £2,919 per calendar month, commencing from the time the steamer was placed at their disposal. By the fourteenth clause it was provided that throughout the charter losses or damages, whether in respect

of goods carried or to be carried, or in other respects, should be absolutely excepted if they arose from certain causes enumerated, among which were the act of God, perils of the sea, and arrests and restraint of princes, rulers, and peoples. The two most important clauses for the purposes of the present appeal are the twenty-sixth and the thirty-first, which run as follows:

> "26. That the steamer shall be delivered under this charter not before April 1, 1915, and, should the steamer not have been delivered latest on the 30th day of April, 1915, charterers to have the option of cancelling this charter. That, should it be proved that the steamer through unforeseen circumstances cannot be delivered by the cancelling date, charterers, if required, shall within forty-eight hours after receiving notice thereof declare whether they cancel or will take delivery of the steamer. . . . 31. Charterers to have option of cancelling this charterparty should steamer be commandeered by government during this charter."

The vessel was not ready by the cancelling date (April 30, 1915), but the respondents did not exercise their option of cancelling, nor were they invited to say whether they would cancel or not. The *Quito* went into dry dock at Hull to prepare for entering upon service under the charterparty, and while there she was on May 11 requisitioned by the British government. Efforts were made by the charterers and owners to get her released, but without success. On May 17 the charterers wrote that they had informed the owners that they would take the steamer on her original charter on the same conditions for twelve months, if tendered to the charterers any time within the next three months, but no agreement was arrived at as to this suggestion. The efforts to get the vessel released ceased early in June, 1915, and there was no further communication between the parties on the subject until Sept. 2, 1915. On this last day the charterers, who had heard that the owners were selling the *Quito*, having got the government to release her, called upon them to deliver the steamer under the charter. The owners replied on the same day that, in their view, the charter had long since become inoperative, as the owners were prevented from tendering the steamer within the exceptions in the charter, and added that the request that the owners should tender the steamer seemed to ask them to enter into an entirely new agreement, and not such as was contemplated by the charter of Feb. 16. The facts were that in July, 1915, the appellants had received from third parties an offer to purchase the *Quito*, which on Aug. 11 they accepted, subject to their being able to procure her release from the requisition. On Aug. 17 the government intimated that they would release the *Quito*, provided the owners replaced her by another vessel of theirs—the *Mansuri*—which was free of engagements, and on Sept. 2 this was carried out and the *Quito* was released.

The appellants contend that they were not liable in the action, on the ground that they were entitled to treat the charterparty as at an end owing to the requisition by the government, and the detention under it, as this amounted to a frustration of the adventure by circumstances beyond the appellants' control. The respondents urged that on the construction of the charterparty all application of the doctrine of frustration was excluded, and denied that there was in fact any frustration of the adventure. ROWLATT, J., and SCRUTTON, L.J., held that the charterparty was at an end, the adventure having been frustrated, while PICKFORD and WARRINGTON, L.JJ., held that the charterparty was still in existence and awarded the plaintiffs damages on a scale which worked out at £13,000. The doctrine that a contract may be put an end to by a vital change of circumstances has been repeatedly discussed in this House, and most recently in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1), in which a great number of cases were reviewed. I do not propose to repeat what has been said in these cases on the law of the subject, which is well settled, and proceed at once to consider the application of the doctrine to the circumstances of the present case.

The first question that falls to be determined is whether, as contended by the respondents, the doctrine of frustration of the adventure as terminating the contract is excluded by the terms of the charterparty. The clauses relied on as having this effect are cll. 26 and 31. In my opinion, neither of these clauses can have the effect of preventing the termination of the charterparty by the requisition in the present case and the detention under it. Clause 26 provides that, if the steamship should not have been delivered by the end of April, 1915, the charterers were to have the option of cancelling the charter. This option would apply if there were any delay beyond April 30, and if the delay was through unforeseen circumstances (in other words, if it was not due to the default of the owners) it was provided by the second part of the clause that the charterers might be called on to declare within forty-eight hours whether they cancelled or would take delivery of the steamship. It was urged for the respondents that this clause meant that only the charterers could cancel in case of non-delivery, and that however long the owners might have been prevented from delivering by unforeseen circumstances beyond their control, they were bound to hold the vessel at the disposal of the charterers. I cannot read this clause as having any such effect. The charter was to be for twelve months from delivery, which the owners were to make by the end of April unless prevented by unforeseen circumstances, in which case the charterers had the option of cancelling, however short the delay. If, owing to unforeseen circumstances it became impossible for the owners to deliver under the charterparty until many months after the end of April, the whole character of the adventure would be changed. A charter for twelve months from April is clearly very different from a charter for twelve months from September. In such a case the adventure contemplated by the charter is entirely frustrated and the owner when required to enter into a charter so different from that for which he had contracted, is entitled to say non hæc in fœdera veni. In other words, the owner is entitled to say that the contract is at an end on the doctrine of the frustration of the adventure as explained in *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (2). It would be quite unreasonable to construe cl. 26 as meaning that the owners are in such a case to hold the vessel at the disposal of the charterers for an unlimited period.

In the *Tamplin Steamship Case* (2) the House of Lords was divided three to two, Lord Loreburn, Lord Parker, and Lord Buckmaster, L.C. (who concurred with Lord Parker's judgment) forming the majority, while Lord Haldane and Lord Atkinson dissented. But it will be found that the principles of law enunciated by Lord Loreburn and by the two dissentients are identical, the difference between them being as to the application of these principles to the particular circumstances of the case. The concurrence of Lord Parker and of Lord Buckmaster, L.C., with Lord Loreburn, was to some extent rested on the ground that a clause in the charter providing for the case of restraint of princes would exclude the doctrine of frustration of the adventure as terminating the contract. This proposition should not, in my opinion, be regarded as forming part of the judgment of the House, and the judgment of Lord Parker, when scrutinised, will be found to treat this as only one of the circumstances which led him to the conclusion that in the case of the time charter which was in question the doctrine of frustration was excluded. Clause 31 cannot be relied on on behalf of the respondents any more than cl. 26. Clause 31 merely means that in case of the vessel being commandeered, the charterers might cancel at once without having to show that the detention was likely to last so long as to put an end to the contract within the meaning of the authorities.

The second question must, therefore, be determined—namely: Did the requisition of the vessel and the detention under it constitute a change of circumstances such as to entitle the owners to treat the charter as at an end? As events show, the release of the vessel could be procured by providing another instead, but there was no obligation on the owners to do this for the purpose of carrying out the charter. It was only after they had entered into the contract to sell the *Quito*

A conditionally on procuring her release that the owners provided a substitute to enable them to carry out their contract of sale. The entering into the contract of sale was an act showing that the owners treated the contract of charter as at an end. Were they justified in this? In my opinion, they were. They had concurred with the charterers in endeavouring to procure the release by the Admiralty of the vessel. These efforts failed and were not continued after June 8. On B Sept. 3 the charterers learned of the release which had been obtained by the substitution of the *Mansuri* in order to carry out the sale of the *Quito* and demanded delivery. In my opinion, the owners were entitled to reply, as they did, that the contract had come to an end, as the detention had lasted so long that if the vessel were delivered in September it would be on a contract differing most materially from that provided for by the original charter. For these reasons I C agree with the conclusion arrived at by ROWLATT, J., and SCRUTTON, L.J., and think that the appeal should be allowed with costs here and below.

VISCOUNT HALDANE.—In this case there are two questions: Is the doctrine of what is called frustration excluded under the circumstances by the effect of the special stipulations in the charterparty? The stipulations I refer to particularly D are that in cl. 14, excepting loss or damage by restraint of princes; that in cl. 26, providing for delivery under the charterparty by a certain date, and giving the charterers an option to cancel in the case of such delivery not taking place, and also in the case of being notified of unforeseen circumstances making delivery impossible; and cl. 31, giving the charterers an option to cancel should the steamer be commandeered during the currency of the charterparty. If this E question be answered in the negative, and it is held that the doctrine of frustration is applicable, was there in point of fact what amounted to frustration?

I do not think that there is anything in the charterparty which excludes the doctrine of frustration if the circumstances proved at the trial amount in law to so much. As to the meaning of the principle I have considered what was said by LORD ATKINSON and myself in *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-* F *Mexican Petroleum Products Co., Ltd.* (2). I see no reason to depart from what he and I agreed in stating to be the principle, and I do not think that LORD LOREBURN said anything really different. Whether, in accordance with the modern tendency, the question is treated as one of construction, and an exception is formulated as implied, or whether, as appears to have been the real ground of the judgments in *Baily* v. *De Crespigny* (3), the question is regarded rather as one of G a common mistake, consisting in the present instance in the assumption that the steamer was one which could be made available, does not matter. What is clear is that where people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject-matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has H contracted to be so. And such cases as *Geipel* v. *Smith* (4) and *Jackson* v. *Union Marine Insurance Co., Ltd.* (5) show that the application of the principle to a charterparty is not excluded by the circumstance that the contract contains an express exemption clause covering what is matter not fundamental in the same sense, loss or damage from restraint of princes.

The second question is whether in this case what happened amounted to a I complete frustration of the adventure. The contract, which was dated Feb. 16, 1915, was for the use of the steamer for twelve months, not from any particular date, but from the time when she should be delivered to and placed at the disposal of the charterers at a coal port to be designated by them under cl. 26, already referred to. The delivery was to take place not before April 1, and if it did not take place at latest on the 30th of that month the charterers were to have the right to cancel the charterparty. By cl. 31 the charterers were expressly given the option to cancel if the steamer should be commandeered by the government during the charter. I think that this shows that such commandeering was contemplated

by the parties as an event which would not necessarily put an end to the basis of their contract, but might merely delay or interrupt the employment of the vessel. In April the steamer was on a voyage from New York to Rotterdam, and was delayed beyond April 30, the date at which the charterers had an option to cancel. It was not until May 7 that she reached Hull, the port designated by the charterers under the contract, and she had to be dry docked for repairs until May 17. On the 10th of that month the Admiralty intimated that they would requisition one out of several ships belonging to the appellants. The latter indicated that the *Quito*, the steamer in question, was most readily available, but that she was under charter to the respondents. The Admiralty thereupon, on May 11, requisitioned her. The respondents then urged the Admiralty to release the *Quito* on the ground that she was to be used for supplying France with coal, and the appellants appear to have supported the application. Both parties seem to have contemplated that the requisition might not prove a prolonged one, and that the charterparty might still be capable of being put into operation.

I have read the correspondence between the parties which followed on the requisition. In accordance with a well-known rule of construction which lays down that a series of letters must be read as an entirety when it is desired to ascertain whether there was a final consensus, it is not right to pause over phrases subsequently superseded with a view to picking out an agreement while the matter is continuing in the stage of negotiation. Reading the letters with this rule in mind I think that their outcome, taken in conjunction with the oral evidence, was that although on May 17, 1915, Mr. Scott, as representing the respondents, writes to his brokers that he had informed the appellants that he would only take the steamer on her original charter on the same conditions for twelve months if she was tendered at any time within the next three months, nothing came of the suggestion. It is clear that in the subsequent correspondence the parties had in their minds that the requisition had not so far put an end to the charter. Mr. Niven, who represented the appellants, appears from his evidence, given in cross-examination, to have thought that he could have got the *Quito* released at any time by offering the Admiralty another steamer. Ultimately, in August, he succeeded in this, but he did not make a definite attempt until he found that he could sell the *Quito* to a stranger. I agree with the opinion of PICKFORD, L.J., that the parties never did take the view that the requisition had either been so long or would necessarily be so long as to put an end to the charter. It must be borne in mind that the term was twelve months, not from a definite date, but from the date when the steamer was delivered to the charterers, and that they intended to use her for the carriage of coal across the Channel, a use which they could put her to at any period that was likely to call for it. It appears that the owners never asked the charterers to say whether they would cancel under the clause in the charterparty, or would take delivery of the steamer after release by the Admiralty. Nor did they intimate that the charter was in their opinion at an end, but they left the charterers to await advice from them as to the prospect of the vessel being released. When, on Sept. 2, the *Quito* was released by the Admiralty to her owners, who had nearly a month previously sold her to an outside purchaser, the release was, it was quite true, obtained only for the purpose of the sale, and on condition of substituting another steamer to go under requisition. The appellant owners were not bound to offer such a substitution in order to carry out their bargain with the respondent charterers, but I think the character of the new transaction is relevant to the question whether at this period, or earlier, the appellants considered the requisition to be a necessarily enduring one. If not, I think that, under the terms of the charterparty, it was for the respondents to decide whether the transaction was one which they would wholly abandon or go on with.

Whether frustration has taken place is always a question which depends on the circumstances to which the principle is to be applied, rather than upon abstract considerations. I think that this is illustrated by what was decided in this House

in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1) and in the other authorities then examined. On the facts before us I am unable to come to the conclusion that the appellants have succeeded in showing that the steamer was in point of fact, or was contemplated as being, under permanent requisition of such a character as to make the terms of the charterparty wholly inapplicable. She was required by the charterers for a cross-channel coal traffic, in which she could apparently have been employed at any date, and, although the charter was a time charter, the date of its commencement was not precise. The use to which the vessel was to be put was not in point of fact a use of such a nature that it was frustrated by what happened, and I do not think that the parties at any time came to the conclusion that the prospect of such use was gone. There was therefore, in my opinion, no frustration in fact, and, having regard to the nature of the contract, no frustration in law either. I agree with the conclusions arrived at by PICKFORD and WARRINGTON, L.JJ., and I think that the appeal ought to fail.

LORD SHAW.—The facts of this case have been fully placed before the House in the address of the Lord Chancellor. The *Quito* was on May 11, 1915, requisitioned by the government, and was thus by Departmental action the legality of which was not challenged taken from the services of the parties and placed in the service of the State. The vessel was then the subject of the charterparty quoted, and that contract I view entirely from the standpoint taken by SCRUTTON, L.J. In substance she was chartered for twelve months—April, 1915, to April, 1916. When the commandeering by the government took place the charterers could there and then have cancelled the contract under s. 31, and this even although the commandeering had only been for a month. But it was a general requisition, that is to say, the ship might under it be put into the service of the government for years, and remain in it until to-day. In those circumstances the parties, nonplussed as to the effect of the action of the Crown upon their own business arrangements with regard to the ship, would naturally be desirous to pause for a little before definitely treating the contract of affreightment as at an end. In my opinion, this was exactly what they did. They agreed to wait for three months. That three months expired on Aug. 11. By that time the vessel had not been released and on that date it appears to me that both parties were free from their temporary arrangement and that their rights are to be determined on the footing that the transfer of the ship to the service of the government was for an indefinite period.

In those circumstances I will venture to cite *Horlock* v. *Beal* (6). In that case the disablement (from carrying on a contract of service by the seamen) arose from the declaration of war and the consequent detention of the ship in a foreign port. But it was strongly contended that this did not release the parties from their contract, because nobody could predict whether the interruption would be for anything more than such a short period as might allow the contract to be resumed. On that topic—the topic of frustration—if I may quote my own address, I said that ([1916] 1 A.C. at p. 507):

> "stoppage and loss having arisen from a declaration of war must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure. . . . I do not think any other rule would be in accord with law or would work. When a ship is put under detention by a declaration of war I cannot see room for a condition of affairs which would leave parties in suspense, feeling that they are bound if the war be short, but free if the war be long."

The majority of the House took this view. The case had reference to the contract of service during the performance of the contract of affreightment; a fortiori the same doctrine would apply to that contract itself, and I cite it because it appears to me that the rule of principle there set forth applies in identical terms as well to

the case of a declaration of war as to the requisition of the ship by reason of the exigencies of war for an indefinite time, as in the present case.

In the recent cases I have observed that several learned judges have expressed an opinion to the effect that, notwithstanding, the indefinite suspense to which I have referred, yet, nevertheless, the contract shall continue binding unless both the parties shall consent to the contrary. I can give no assent to such a doctrine. There are many cases in which it would be greatly to the benefit of one of the parties that he should have an indefinite and it may be a prolonged hold over the other until performance shall become possible. In my opinion, it would be contrary to all sound principles to overlay the effect of the suspense referred to by the majority without the necessity of having a consent on both sides to cancellation. I desire further to add that whether the contract of affreightment is a voyage charter or a time charter makes no difference in the application of the principle, and that I attach my special assent to the judgment of my noble friend Lord Sumner upon that topic. With these observations I beg to express my entire concurrence in the opinion and judgment just delivered from the Woolsack.

LORD SUMNER.—I think that whichever way this case is decided it is certainly a very near thing.

From the time when the *Quito* was requisitioned her owners never were in a position to put her at the charterers' disposal for any purpose, until after they had sold her. By finding a substitute for her they might possibly have induced the Admiralty to set her free, for such things had been done, but it was uncertain if such an attempt would succeed, and mere importunity proved unavailing. They had not contracted to make this special effort for the benefit of the charterers. It is true that, when they did so for their own benefit, they succeeded, and, having got possession of her, they might have been bound to place her at the charterers' disposal under the charter, if that still subsisted, the sale notwithstanding; but the question is whether the charter had previously come to an end by frustration. If it had, they were not bound to give the charterers a first chance of a new contract.

What then was the nature of the charter? It was not in form an April to April charter, but it was sufficiently so in substance. If the ship had been placed at the disposal of the charterers when released by the Admiralty, she would virtually have been in their hands for a September to September hiring. The mere change in the initial month of the actual hiring is not quite the point, for this is not the old comparison of a summer with a winter voyage. In either case she would have been on hire for each month of the twelve, and the exact cycle of the seasons would make little difference to her. What is important is this. During all the months of the *Quito*'s service for the Admiralty the charterers would not in the least know when, if ever, they would have her on their hands. They could not tell whether they might suddenly have to find employment for her, or whether they must make provision for the current necessities of their trade without counting upon her at all. In one respect they would be at an indubitable disadvantage. The postponement of the beginning of her hire at any rate brought nearer the end of the war, after which the charterers would have to pay war rates for the ship and only have the use of her in peace employment. In the latter respect the owners' position also would be one of indecision, for their business is one that requires that they should look ahead, and in doing so they could not tell when, if at all, they were to have the *Quito* once more on offer. These uncertainties in commerce are very serious. Scrutton, L.J., asked himself if the September to September employment would be in substance the same employment as that from April to April. I agree with him that it would not, and I think that the uncertainties of the intervening period in time of war both emphasise the difference between the two and add to the gravity of the lapse of time taken by itself. We find the parties themselves apparently impressed with the idea that any long suspense was intolerable and that, if the ship could not be promptly released, the engagement must be considered as at an end. Their communications with one another ceased early in June;

apparently each was waiting to see if something would turn up. So I read their correspondence. The charterers' agent actually spoke to the owners' representative in the sense that, if the *Quito* was to be released, he would be prepared to consider a new charter, and, although the brokers deprecated what he had done, it was not so much that they differed from him in thinking that the old charter was dead, as that they thought it better not to say so except without prejudice. The owners left the matter there, but presently they sold the *Quito*. They did so without communication with the charterers. It is more reasonable to infer that they also thought the old charter was dissolved than that, thinking it to be alive, they hoped to escape disputes with the charterers by trying to keep secret what they were doing.

What, then, is the legal bearing of these facts? The charter is a time charter, and the principle of frustration was originally decided on a voyage charter. For some time it was thought that the frustration rule had no application to time charters upon the ground that, if the shipowner's object is to receive chartered hire, as probably it is, he does not care how much the charterer's adventures are frustrated so long as he is able to pay. This was the view both of BAILHACHE, J., in the case of *The Auldmuir's* charter (*Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.* (7), [1916] 1 K.B. at p. 436) and of SANKEY, J., in *The Dunolly* (*Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co.* (7), [1916] 1 K.B. at p. 681), and, though the Court of Appeal reversed their decision, some colour was given to their view by the fact that the references in those charters to a "Baltic round" were treated as giving them the characteristics of a voyage charter, although they were charters for time. SANKEY, J., in terms said that the principle

> "is confined to cases when it can be inferred from the charterparty itself that it is a contract for a definite voyage or a definite object, contemplated at first by both parties."

His notion was that both must have had a common interest in an adventure and one and the same object in view when contracting. "The only object which both must have known each had in view" and "the object of common contemplation" are the expressions of BAILHACHE, J. ATKIN, J., expresses the same opinion in *Lloyd Royale Belge Société Anonyme* v. *Stathatos* (8). This way of looking at the contract fixes attention on its subjective aspect and asks what was actually in two hard bargainers' minds. Objectively the question is what does the law impute to them as fair dealers and deem to have been their meaning, which, as we constantly see in questions of construction, may be a very different thing. Again, BAILHACHE, J., says ([1916] 1 K.B. at p. 438):

> "It is impossible to apply the doctrine of frustration to a case where one of the parties is fulfilling his part of the contract according to its terms,"

either in the owner's case by letting the charterer have the ship and leaving him to find a use for her, or, in the charterer's, by paying his hire punctually. To this I think SWINFEN EADY, M.R., in *Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co.* (7) gives the sufficient answer ([1917] 1 K.B. at p. 237):

> "It is the further performance of the contract by one party which formed the consideration for the payment by the other which has become impossible, and this effects a dissolution of the contract."

LAWRENCE, J., also says (ibid. at p. 250) that in a time charter the owners' object is not only to get hire, but to afford the services which the charterer pays for, although money is their common motive. LORD PARKER OF WADDINGTON in *Tamplin's Case* (2) drew attention to the difficulties attending on the adaptation of the doctrine to a time charter of long duration, which all must recognise, but did not express the opinion that it was inapplicable to time charters as such, and it is now settled that, although the doctrine may have to be somewhat specially applied, time charters do not fall outside the rule.

Scottish Navigation Co., Ltd. v. *W. A. Souter & Co.* (7) and *Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.* (7) both reported in the Court of Appeal; *Anglo-Northern Trading Co., Ltd.* v. *Emlyn Jones and Williams* (9), on appeal sub nom. *Countess of Warwick Steamship Co.* v. *Nickel Société Anonyme, Anglo-Northern Trading Co.* v. *Emlyn Jones and Williams* (9), and, finally, *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1) are the authorities for this. All these are cases of delay arising out of the exigencies of the present war, and the length of the delay was especially dwelt on by BAILHACHE, J., in *Anglo-Northern Trading Co., Ltd.* v. *Emlyn Jones and Williams* (9). In the particular circumstances of *Tamplin's Case* (2) the main thing to be considered was the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charterparty, and I agree in the importance of this feature, though it may not be the main and certainly is not the only matter to be considered. The probabilities as to the length of the deprivation and not the certainty arrived at after the event are also material. The question must be considered at the trial as it had to be considered by the parties when they came to know of the cause and the probabilities of the delay and had to decide what to do. On this the judgments in the above cases substantially agree. Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided. That fate is dissolution or continuance, and, if the charter ought to be held to be dissolved, it cannot be revived without a new contract. The parties are free.

Again, it does not seem to be in itself a matter of crucial importance whether the performance of the charter has begun or not. The charter in *Jackson's Case* (5) has often been wrongly referred to as purely executory (e.g. per LORD WATSON in *Dahl* v. *Nelson, Donkin & Co.* (10) (6 App. Cas. at p. 62)), but the ship was on her way to load and had begun the chartered voyage, which did not begin merely at the port of loading. LORD BLACKBURN'S remarks in *Geipel* v. *Smith* (4) (L.R. 7 Q.B. at p. 413) raised a doubt which was also present to the mind of LORD PARKER OF WADDINGTON in *Tamplin's Case* (2) ([1916] 2 A.C., p. 428), but I think that *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (11) disposes of it: see *Embiricos* v. *Sydney Reid & Co.* (12). Of course it may be very material in considering the prospect of delay to know whether the ship is light or loaded. If loaded, delay is likely to be longer and more serious; but, on the other hand, the prospect of ultimate fruition from the adventure, which is at any rate begun, is thus increased. The present charter I treat as wholly executory, for although the charterers had definitely named Hull as the loading port, the hiring was not to commence till the *Quito* was placed at their disposal there, which never took place.

The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties.

> "When the contract makes provision [that is, full and complete provision, so intended] for a given contingency it is not for the court to import into the contract some other and different provision for the same contingency called by a different name":

per BAILHACHE, J., *Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.* (7) ([1916] 1 K.B. at p. 438). This is a matter of construction according to the usual rule. A contingency may be provided for, but not in such terms as to show that the provision is meant to be all the provision for it. A contingency may be provided for, but in such a way as shows that it is provided for only for the purpose of dealing with one of its effects and not with all. In the present case three clauses are relied on as express provisions for the event and consequences of an

A Admiralty requisition, delaying or preventing the placing of the *Quito* at the charterers' disposal—cll. 14, 26, and 31. When the Admiralty requisitioned her she became subject to a restraint of princes, one of the causes mentioned in cl. 14, which says "throughout this charter losses or damages, whether in respect of goods carried or to be carried, or in other respects arising or occasioned by the following causes, shall be absolutely excepted." In the first place I think this claim is not B for "loss or damage" within that clause, but in the second the meaning of such an ordinary clause of exception is well settled. It excuses breaches of the contract caused by matters which fall within its terms; it suspends the liability to pay hire without finally determining it; but relief from the liability to pay damages or hire and complete discharge from further obligation to perform the contract are different things. "Restraint of princes throughout this charterparty always ex- C cepted" and "the contract to be no longer binding if a restraint of princes frustrates its commercial object" are neither, in my opinion, mutually inconsistent clauses, nor such that the expression of the first intimates an intention that restraint of princes is not to be dealt with further and otherwise, so as to preclude any implication on the subject. The same may be said of cl. 31. It means that, if the Admiralty should requisition the ship, the charter may be forthwith cancelled D by the charterers, without waiting to see or having to show that its object is thereby frustrated. This is a separate provision from that which the appellants seek to imply, and is not inconsistent with it. As to cl. 26, the cancelling clause, I am unable to accept the construction of it, which makes it mean that after April 30, and until the ship is delivered for the chartered service, however long the interval may be, the charterers can at any moment spring on the shipowners a E cancellation of the contract and can hold them bound so long as they choose to hold their own tongues. The shipowners' option given by the second part of the clause was expressly devised to prevent a much less arbitrary use of the right to cancel, and I cannot believe that the clause, if understood as the respondents read it, could ever have become the subject of a consensus ad idem. After all it is a stipulation in the charterers' favour and cannot be given so extreme a meaning, F unless that meaning is clearly expressed. The parties never meant that the ship-owners should remain indefinitely at the charterers' mercy.

The principle of frustration is rendered difficult by some uncertainty as to the tests to be used. In what terms ought the circumstances to be defined which lead to the dissolution of the contract, and who is to apply them, the judge or the jury? There has been an unfortunate diversity in the terms used in different cases. The G expression "frustrate the commercial object of the contract" is taken from *Jackson* v. *Union Marine Insurance Co., Ltd.* (5). In *Poussard* v. *Spiers and Pond* (13) BLACKBURN, J., transferring the rule in *Jackson's Case* (5) from a steam-ship to a prima donna, says: "if the delay is so great as to go to the root of the matter, it frees the charterers from the obligation to furnish a cargo." In *Bensaude's Case* (11) LORD ESHER, M.R., speaks of delay "so long as to render H the adventure, which the charterparty was intended to cover, absolutely nugatory." In the same case in your Lordships' House each noble and learned Lord in turn employed a new and different expression for the same well-recognised thing. LORD HALSBURY speaks of an "impossibility of prosecuting the voyage within the time within which it was necessary to prosecute it"; LORD WATSON of "such delay in the prosecution of the voyage as entitled the charterers to determine the ad- I venture" (which, surely wrongly, treats the case like *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (14) as a case of the determination of a contract depending on the choice of one party instead of resulting automatically from the event), while LORD HERSCHELL says "so that the adventure cannot be completed within the time contemplated," which would make mere unexpected delay sufficient. In *Bush* v. *Whitehaven Town and Harbour Trustees* (15), LINDLEY, L.J., relies on "delay so great as not to be fairly within the terms of the contract at all; that is to say, that the delay was so great that the contract cannot apply to the state of things, to which the contractor and the defendants had imagined it did." It would not be

difficult to find other passages in more recent cases where the events which cause dissolution of the contract are diversely described. "An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted": per LORD DUNEDIN in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1), [1918] A.C. at p. 129. "An interruption so great and long as to make it unreasonable to require the parties to go on" is LORD ATKINSON'S phrase (ibid. at p. 131). The fact that delay occurs, the duration of which at the outset is uncertain, obviously is not enough to dissolve the contract: *Braemount Steamship Co., Ltd.* v. *Andrew Weir & Co.* (16). For the time being the performance of the contract must have become altogether impossible, for the consequence is dissolution of the contract altogether, and in this I agree with what BAILHACHE, J., says in *Emlyn Jones's Case* (9).

Delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure which is clearly within the contemplation of the parties, such as delay caused by ice or neaping, so much so as to be often the subject of express provision. Delays such as these may very seriously affect the commercial object of the adventure, for the ship's expenses and overhead charges are running on, and, even with the benefit of protecting and indemnity club policies, the margin of profit is quickly run off. None the less, this is not frustration; the delay is ordinary in character, and in most cases the charterer is getting the use of the chartered ship, even though it is unprofitable to him. I think, also, that the doctrine is one which ought not to be extended, though to cases that really fall within the decided rule it must be applied as a matter of course even under novel circumstances. The matter is the more important because of the part which a jury may be called on to play in deciding the question. Ultimately the frustration of an adventure depends on the facts of each case, but it is no easy matter so to direct a jury as that they will neither ask themselves what the actual parties thought of at the date of the contract, nor dispose of the case by saying that it would be unreasonable to find a verdict for the claimant, nor be governed only by their notion of what is fair between man and man nor be left in impenetrable doubt as to what the legal direction means. LORD WATSON says (6 App. Cas. at p. 59) in *Dahl* v. *Nelson, Donkin & Co.* (10), that

> "there may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and when one or other of these possibilities becomes a fact the meaning of the contract must be taken to be not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties as fair and reasonable men would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

This is an authoritative explanation of the legal theory on which the doctrine rests, but to use it as a direction to a jury is to tell them to do as they like. The phrase "goes to the root of the contract," like most metaphors, is not nearly so clear as it seems. In *Jackson's Case* (5) the jury was asked "whether the time necessary for getting the ship off and repairing her so as to be a cargo carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers," and in *Bush* v. *Whitehaven Trustees* (15) whether "the conditions of the contract were so completely changed in consequence of the defendants' inability to hand over the site of the work, as required, as to make the special provisions of the contract inapplicable." The danger in each case so put is that the jury will think that the contract is as wax in their hands. A. T. LAWRENCE, J., puts the matter very usefully thus in *Souter's Case* (7) ([1917] 1 K.B. at p. 249):

> "No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document."

For my own part, I incline to prefer the expression already quoted from my noble and learned friend LORD DUNEDIN, and substantially adopted by SCRUTTON, L.J., in the Court of Appeal.

Applying these considerations I am of opinion that the requisitioning of the *Quito* destroyed the identity of the chartered service and made the charter as a matter of business a totally different thing. It hung up the performance for a time, which was wholly indefinite and probably long. The return of the ship depended on considerations beyond the ken or control of either party. Both thought its result was to terminate their contractual relation, and, as they must have known much more about it than I do, there is no reason why I should not think so too. I should allow the appeal.

LORD WRENBURY.—I am unable to find in the charterparty the contractual year from April to April which SCRUTTON, L.J., found, and which forms the basis of his judgment. The contract, I think, was as follows. The owners agreed to let and the charterers to hire the steamer for twelve months, to commence at a date not fixed so far as cl. 1 is concerned, except that it was to be the date when she was placed at the disposal of the charterers at a coal port as ordered by them. The effect of cl. 26 is that that date may be any date not before April 1, subject to the right of the charterers to refuse her and to cancel the charter if she is tendered after April 30. During a reasonable time the owners owed to the charterers the contractual duty of tendering the vessel. If they were for reasons beyond their control unable to tender her within a reasonable time, their contractual duty in this respect I think would cease. During May and June no doubt they owed this duty. It does not follow that they owed it in September. The question to be answered, I think, is this: Did this contractual duty still rest upon the owners in September? As regards cl. 31, it seems to me that the words "during this charter" mean "during the subsistence of this contract" and not "during the time the vessel is employed under this contract"—but nothing turns upon the article, for, even if the facts would have justified the charterers in cancelling the charter by reason of the commandeering of the vessel, they did not exercise their option in this respect.

The principle of *Jackson* v. *Union Marine Insurance Co., Ltd.* (5), as reviewed in *Horlock* v. *Beal* (6) and *Tamplin's Case* (2), I understand to be that there may, under the circumstances of any particular case, be added to a contract by implication—so long as the addition is not inconsistent with any expressed term of the contract—a term that a delay for which neither party is responsible so great and so long as to make it unreasonable to require the contracting parties to go on with an adventure shall entitle either of them, at least while the contract is executory, to consider it as at an end. If in the present case such a delay had occurred, the owners were entitled to consider the whole contract, including cl. 26, as at an end, and in such case their contractual duty under cl. 26 to tender the vessel no longer existed. I doubt whether down to June 9, when the correspondence between the parties fell into silence, the owners' duty in this respect had lapsed. The interview of May 14, and the letter of May 17, no doubt support an inference that the charterers' view was that a delay of more than three months from that date would so affect the adventure that they would not be bound. However this may be, the facts are that the parties were not able to obtain the release of the vessel at that time, and the matter drops into silence until Sept. 3. Was the owner still bound to tender the vessel at that date? Or if the contract had not given the charterers an option to cancel could the owners have compelled them to take her at that date? I think not. A term cannot be implied which is inconsistent with an express term of the contract, but it is no objection that it enlarges or adds to the express terms. Every implied term does that. The express terms of this contract, relevant in this respect are only cll. 26 and 31. They are terms which entitle the charterers to cancel in certain events. There is no inconsistency in an implied term which entitles either party to treat the contract as at an end if the date of commencement

of the contractual year is by reasons beyond their control postponed beyond a reasonable time. Upon the question of fact I agree that before September that reasonable time had expired, and there no longer rested upon the owners the contractual duty to tender her. This, I think, is what SCRUTTON, L.J., intended by his judgment to convey—and if so understood I agree with him. The appeal, I think, succeeds.

Appeal allowed with costs.

Solicitors: *Holman, Fenwick & Willan*; *William C. Dawson & Lancaster.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

FOX *v.* KOOMAN

[KING'S BENCH DIVISION (Viscount Reading, C.J., Darling and Avory, JJ.), July 31, 1919]

[Reported 121 L.T. 575; 83 J.P. 239; 26 Cox, C.C. 496]

Customs—Export of prohibited goods—Leather taken aboard Dutch ship by engineer to make himself gloves—Use of leather not confined to use on board—Customs and Inland Revenue, Act, 1879 (42 *& 43 Vict., c.* 21) *s.* 8.

The respondent, a Dutchman who was an engineer on a Dutch ship trading between London and Holland, took away from the shore, aboard the ship when she was at Barking Buoys, eight new pieces of chamois leather for the purpose of making gloves for his own use. By s. 8 of the Customs and Inland Revenue Act, 1879, as amended, and a proclamation dated May 10, 1917, made under s. 8, the export of leather from the United Kingdom was prohibited and punishable by fine or imprisonment.

Held: the word "exported" in s. 8 of the Act of 1879 meant "carried out of the port"; on the evidence the respondent had carried the leather from the shore and had intended to take it off the ship and not merely to use it aboard the ship; and, therefore, he was guilty of an offence under the section.

Muller v. *Baldwin* (1), (1874), L.R. 9 Q.B. 457, applied.

Notes. As to the export of prohibited goods, see also s. 56 (1) of the Customs and Excise Act, 1952, which makes it an offence if "any goods are exported . . . and the exportation . . . would be contrary to any prohibition or restriction for the time being in force . . ."

For the Customs and Excise Act, 1952, s. 56, see 32 HALSBURY'S STATUTES (2nd Edn.) 755. For cases see 39 DIGEST 227 et seq. and 41 DIGEST 965–967.

Case referred to:

(1) *Muller* v. *Baldwin* (1874), L.R. 9 Q.B. 457; 43 L.J.Q.B. 164; 30 L.T. 864; 38 J.P. 709; 22 W.R. 909; 2 Asp.M.L.C. 304; 41 Digest 966, *8583.*

Case Stated by a metropolitan magistrate sitting at the Woolwich Police Court.

The respondent, Cornelius Kooman, appeared before the magistrate on Feb. 15, 1918, to answer an information laid by the appellant, Sidney Thomas Fox, an officer of customs and excise, for that on Feb. 5, 1918, certain leather, being goods prohibited by proclamation from being exported from the United Kingdom, was at Barking Buoys, in the parish of Woolwich, in the county of London, within the Metropolitan Police District, waterborne to be exported, contrary to the provisions of s. 8 of the Customs and Inland Revenue Act, 1879, and that the respondent was the exporter of the said goods so waterborne to be exported.

The respondent elected to be dealt with summarily, and the magistrate, after hearing the evidence, dismissed the information.

The proceedings were taken under s. 8 of the Customs and Inland Revenue Act, 1879, as amended by ss. 1 and 2 of the Exportation of Arms Act, 1900, by s. 1 of the Customs (Exportation Prohibition) Act, 1914, and by s. 2 of the Customs (Exportation Restriction) Act, 1915. By a proclamation issued by His Majesty on May 10, 1917, leather was prohibited from being exported from the United Kingdom to any destination. On the hearing of the information the following facts were proved: The appellant was an officer of customs and excise, and the respondent was a Dutch subject and the second engineer of the steamship *Leerdam*, a Dutch ship trading between London and Holland. On Feb. 5, 1918, the *Leerdam* was at Barking Buoys, and the respondent proceeded in a rowing-boat from the shore to the vessel and went on board, taking with him eight new pieces of chamois leather. The magistrates found as a fact that the said goods were "leather" within the terms of the proclamation, dated May 10, 1917, which prohibited the exportation of leather from the United Kingdom to all destinations, and that on the date charged in the information the respondent took the eight pieces of chamois leather on board for his own use for the purpose of making gloves. The respondent, on being questioned through an interpreter on Feb. 5, 1918, explained that he had taken this leather on board ship, not for the purposes of exportation, but for his own personal use, and the magistrate believed him.

On behalf of the appellant it was contended that the respondent was the "exporter" of the eight pieces of chamois leather within the meaning of s. 8 of the Customs and Inland Revenue Act, 1879. The magistrate was of opinion that upon these facts the respondent was not an "exporter" of the said goods within the meaning of the section.

By s. 8 of the Customs and Inland Revenue Act, 1879, certain specified goods "may by proclamation or Order in Council be prohibited either to be exported or carried coastwise," and ["if any goods so prohibited shall be exported or brought to any quay or other place to be shipped for exportation from the United Kingdom or carried coastwise, or be waterborne to be so exported or carried, they shall be forfeited, and the exporter or his agent or the shipper of any such goods shall be liable to the penalty of £100.] [The words in brackets were repealed by the Customs and Excise Act, 1952, of which see s. 56].

By s. 1 of the Exportation of Arms Act, 1900, "it shall be lawful for Her Majesty by proclamation to prohibit the exportation of [certain specified articles] . . . to any country or place therein named. . . ."

By s. 1 of the Customs (Exportation Prohibition) Act, 1914, and s. 1 of the Customs (Exportation Restriction) Act, 1914, the powers conferred by s. 8 of the Customs and Inland Revenue Act, 1879, and s. 1 of the Exportation of Arms Act, 1900, were extended during the continuance of the war [of 1914–18] to "all other articles of every description."

The Attorney-General (*Sir Gordon Hewart, K.C.*) (*H. M. Giveen* with him) for the appellant.

The respondent did not appear.

LORD READING, C.J.—In my opinion, this appeal should be allowed. The only point that we have to determine is whether there has been an infringement of the provisions of a proclamation which prohibited the exportation of leather. The prohibition has statutory authority by virtue of s. 8 of the Customs and Inland Revenue Act, 1879, as amended by s. 1 of the Exportation of Arms Act, 1900, and s. 1 of the Customs (Exportation Prohibition) Act, 1914, and the penalty for an infringement has been increased by s. 2 of the Customs (Exportation Restriction) Act, 1915. In substance the question is with regard to the meaning of the word "exported" in s. 8 of the Customs and Inland Revenue Act, 1879, as extended by subsequent provisions. The question in this case is whether this leather was waterborne to be exported.

The respondent is a Dutch subject, the second engineer of a ship, and he took on board with him eight new pieces of chamois leather. The magistrate has found that the respondent took them on board for his own use for the purpose of making gloves, and consequently the magistrate came to the conclusion that there was no infringement of the statutory provisions, including the prohibition under the proclamation. I am unable to agree with that view. If this were a case of a man taking a piece of chamois leather for use on board the ship for the purpose of cleaning his buttons or some similar purpose, with no intention of taking it off the ship, but merely for use on board, the case would be entirely different. But, when the respondent took on board eight pieces of chamois leather for the purpose of making gloves, it seems to me that it made no difference whatever that he required them for his own use. The magistrate's ruling appears, however, to amount to this, that, if the respondent had taken on board a sufficient number of pieces of chamois leather to make gloves for his own use for the rest of his life, there would have been no exportation. But the respondent in fact took the chamois leather away from the shore, and that is within the interpretation given to the word "exported" in *Muller* v. *Baldwin* (1) (L.R. 9 Q.B. at p. 461). The passage is as follows:

> "There is nothing in the language of the Act to show that the word 'exported' was used in any other than its ordinary sense—namely, 'carried out of the port.'"

In my opinion, that is exactly what the word "exported" means in the provisions now in question. It is not, however, to be interpreted in so narrow and rigid a sense as to prohibit a man from taking a piece of chamois leather for cleaning purposes. No one would set the law in motion for the purpose of dealing with such a case as that, and it might be treated as too trivial. In this case, however, I am satisfied that the magistrate put a wrong meaning on the word, and the case must be remitted to him for determination on the principle stated by this court.

DARLING, J.—I am of the same opinion. If the respondent had bought a piece of leather and put it round his waist as a belt and had gone aboard while wearing it, I do not think that he would have been liable to be convicted under the provisions which we are considering. But here it is obvious that the respondent was going to take the leather aboard, and, if he made it into gloves after having taken it aboard, it seems to me that it would make no difference whatever whether he or someone else was going to wear them. I, therefore, agree with my Lord.

AVORY, J.—I agree, on the assumption that the facts are as we presume them to be—namely, that this was not a case merely of a small quantity of chamois leather taken on board by the respondent for his own use while he was on the ship.

Appeal allowed and case remitted.

Solicitors: *Solicitor of Customs and Excise.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

A

THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS

[House of Lords (Lord Finlay, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), December 3, 4, 1917, January 24, 1918]

B

[Reported [1918] A.C. 221; 87 L.J.K.B. 478; 118 L.T. 418; 82 J.P. 145; 34 T.L.R. 204; 62 Sol. Jo. 266; 26 Cox, C.C. 189; 13 Cr. App. Rep. 61]

Criminal Law—Evidence—Identification—Mens rea—Gross indecency—Possession of powder puffs and photographs of naked boys.

C The appellant was convicted on a charge of committing acts of gross indecency with two boys on Mar. 16, 1917. At the trial evidence was given that on that day he told the boys to meet him "to do it again" at the same place on Mar. 19, and that the boys kept the appointment, but that the appellant then told them "he had not time that day" and they must go away, saying that a man in the vicinity was a policeman. The appellant was then D arrested. When he was searched at the police station he was found to be in possession of two powder puffs, and a drawer in one of the rooms where he lived contained photographs of naked boys. The appellant put forward the defence of an alibi on Mar. 16.

Held by Lord Finlay, L.C., Lord Parker of Waddington, Lord Sumner, and Lord Parmoor: the evidence of the possession of the powder puffs and the E photographs showed that the man who committed the offence on Mar. 16 and the appellant had the same abnormal sexual tendency, and, therefore, was admissible as evidence of identity to rebut the defence of alibi.

Held by Lord Atkinson: The evidence was admissible to show a criminal intent on the part of the appellant on Mar. 19.

Decision of Court of Criminal Appeal, [1917] 2 K.B. 630, affirmed.

F **Notes.** Applied: *R.* v. *Berg. Britt. Carré and Lummies* (1927), 20 Cr. App. Rep. 38. Distinguished: *R.* v. *Cheshire, Lucas and Bottom* (1927), 20 Cr. App. Rep. 47. Considered: *R.* v. *Tidmarsh* (1931), 23 Cr. App. Rep. 79. Applied: *R.* v. *Straffen*, [1952] 2 All E.R. 657. Referred to: *R.* v. *Twiss*, [1918] 2 K.B. 853; *R.* v. *Armstrong*, [1922] All E.R.Rep. 153; *R.* v. *Manning* (1923), 17 Cr. App. Rep. 85; *Statham* v. *Statham*, [1928] All E.R.Rep. 219; *R.* v. *Cole* (1941), 165 L.T. 125; G *Noor Mohamed* v. *R.*, [1949] A.C. 182.

As to evidence of identity and similar offences, see 10 Halsbury's Laws (3rd Edn.) 439–445; and for cases see 14 Digest (Repl.) 404 et seq.

Cases referred to:

(1) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; H 14 Digest (Repl.) 420, *4094.*

(2) *R.* v. *Oddy* (1851), 2 Den. 264; T. & M. 593; 4 New Sess. Cas. 602; 20 L.J.M.C. 198; 17 L.T.O.S. 136; 15 J.P. 308; 15 Jur. 517; 5 Cox, C.C. 210, C.C.R.; 14 Digest (Repl.) 502, *4851.*

(3) *R.* v. *Cole* (1810), 3 Russell on Crime (10th Edn.), p. 848; 14 Digest (Repl.) 410, *4008.*

I (4) *R.* v. *Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252, C.C.R.; 14 Digest (Repl.) 420, *4091.*

Appeal on the certificate of the Attorney-General under the Criminal Appeal Act, 1907, from a decision of the Court of Criminal Appeal, reported sub nom. *R.* v. *Thompson*, [1917] 2 K.B. 630, affirming the ruling of A. T. Lawrence, J., sitting at the Central Criminal Court, that certain evidence offered by the police against the accused was admissible.

The facts are fully stated in the judgment of the Lord Chancellor.

Langdon, K.C., *Huntly Jenkins*, and *E. J. Purchase* for the appellant.

The Solicitor-General (*Sir Gordon Hewart*, K.C.), *Travers Humphreys*, and *Branson* for the respondent.

Their Lordships took time for consideration.

Jan. 24, 1918. The following opinions were read.

LORD FINLAY, L.C.—This is an appeal, with the sanction of the Attorney-General, from a decision of the Court of Criminal Appeal affirming the ruling of LAWRENCE, J., that certain evidence was admissible. The facts are sufficiently stated in the following paragraphs from the judgment of LORD READING, C.J., in the Court of Criminal Appeal:

"The appellant was convicted of committing acts of gross indecency with two boys and also of assaulting a police constable. He appeals against the conviction on the grounds that (a) the judge wrongly admitted evidence which was not relevant to any of the offences charged in the indictment, and (b) the judge misdirected the jury by telling them that they might take this evidence into consideration. If the evidence was admissible no complaint can be made of the direction to the jury; therefore the sole question in this appeal is whether this evidence was or was not admissible. It was not disputed at the trial or on this appeal that offences had been committed with the boys. The defence was that the appellant was not the person who committed them, and that he was elsewhere on the day and at the time in question. For the prosecution there was a body of evidence identifying the appellant. One boy had seen him and spoken to him about a month before; both boys identified him as the man who on Mar. 16 did the acts complained of, and gave them money and told them to meet him again on the Monday, Mar. 19. Both boys went on the Monday to the appointed place and saw the appellant, who was accompanied by two other persons. He told the boys he had business that day and had no time, that they were to go away, and that the tall man was a policeman. He gave one boy 2s. to divide with the other. The police, who had been informed of the events of Mar. 16 and were present to watch on Mar. 19, then intervened. The boys thereupon told their story in the presence of the appellant, who made no reply, but struck the police officer and endeavoured to run away. At the trial the appellant and other witnesses gave evidence on his behalf to establish an alibi on Mar. 16. It was not in dispute that he saw and spoke to the boys on Mar. 19. His story was that on this day he saw the boys following him, that he went into a shop and saw them again as he left it, and that he then told them to go away, gave them a coin out of his pocket without looking at it, and told them to buy soap and get their faces washed. At the police court he said he was not guilty, and had never set eyes on the boys before his arrest. During the course of the trial evidence was tendered by the prosecution to prove that when the appellant was arrested on Mar. 19, two powder-puffs were found upon him, and that in a drawer in one of the rooms where he lived photographs of boys were found, including twelve separate photographs and ten pasted in an album, of naked boys in various attitudes. Objection was raised to the admissibility of this evidence on the ground that none of these articles was connected with any charge on the indictment and that the evidence could only serve to prove that the appellant was a person of evil character or disposition with regard to boys, and therefore was a person likely to commit the offence. After argument the learned judge admitted the evidence as tending to corroborate the evidence of identification of the appellant. The appellant by his evidence sought to explain that these photographs had come into his possession for the purpose of artistic study, that he had spent nine months in Italy studying sculpture and had acquired most of the photographs there. Having regard to the verdict

of the jury and the examination by the court of the photographs, we must take it that these photographs are not of an innocent but are of an objectionable character."

The Court of Criminal Appeal dismissed the appeal and I think they were right.

The charge on which the prisoner was tried was in respect of the offence proved to have been committed on Mar. 16. The defence of the prisoner was that these acts must have been committed by some other man as he was at another place altogether at the time when the acts were committed on the 16th. The whole question is as to the identity of the person who came to the spot on the 19th with the person who committed the acts on the 16th. What was done on the 16th shows that the person who did it was a person with abnormal propensities of this kind. The possession of the articles tends to show that the person who came on the 19th—the prisoner—had abnormal propensities of the same kind. The criminal of the 16th and the prisoner had this feature in common, and it appears to me that the evidence which is objected to afforded some evidence tending to show the probability of the truth of the boys' story as to identity. In my opinion, LAWRENCE, J., was right in admitting the evidence, and this appeal should be dismissed.

LORD DUNEDIN.—The law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth as to guilt without causing undue prejudice to the prisoner. That being so, I should hesitate long before I ventured to interfere with a unanimous judgment of a court of learned judges who are daily engaged in the practice of the criminal law; but, apart from this to me weighty consideration, I entirely agree with the reasoning contained in the judgment of the Lord Chief Justice, and I, accordingly, concur.

LORD ATKINSON.—In argument in this case it has occasionally been forgotten, I think, that the point for decision is the admissibility of these photographs in evidence on the issues raised for the decision of the jury, and not their weight as evidence. If a document be found either on the person of or in the room occupied by an accused person bearing directly on the crime charged against him, but undated, and there be no evidence to show when it came into his possession or when it was written or printed, it might be urged, as it was urged in this case, that it might have come into possession when he was young and foolish, and that even if his character was then ever so depraved or reckless, or criminal, as the possession of the documents might indicate, he may have long since repented and reformed, and become of blameless life and character. All that may be perfectly true, but that possibility goes, I think, to the weight of the evidence, not to its admissibility. Again, it seemed, sometimes, as if it was almost contended in argument that the state of a person's mind or feelings at or before the time when the crime of which he stands charged is committed can never be given in evidence against him to show not merely quo animo he did the act charged, but that in fact he did that act. In a case of homicide, for instance, evidence is admissible to prove that the accused entertained feelings of hatred towards, or a desire to be revenged upon, the deceased, in order to prove that he killed the deceased, not merely quo animo he did so; and again, in cases of robbery or embezzlement, the need of money or the greed for money may be proved in evidence to show that the accused who had that need, or entertained those feelings of greed, committed the crime. These things are not the less states of mind and feeling because they are described as motives for the commission of the crime.

It is not disputed that the general principles upon which evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment is admissible are correctly laid down in the judgment of LORD HERSCHELL in *Makin* v. *A.-G. for New South Wales* (1). This evidence may be given if it be relevant to an issue raised before the jury, and it may be relevant

if it bears upon questions whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. LORD HERSCHELL added ([1894] A.C. at p. 65):

> "The statement of these general principles is easy; but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

Several cases have been cited in argument which are little more than instances in which the difficult task alluded to by LORD HERSCHELL has been accomplished or has been failed in, and the evidence tendered has been placed upon one side or other of the line by the different courts before which the cases came. I think, however, the Solicitor-General was quite justified in contending that the admissibility in evidence of these indecent photographs of naked boys of different ages must be determined when they are taken in connection with all the facts and circumstances proved in that case. The two boys proved not only that the accused had upon Mar. 16, in the urinal near the Turnham Green Railway Station, committed the offence charged and given them one shilling each, presumably as a reward for what they had done to him, or permitted him to do to them; but also that, when leaving them after the commission of the crime, he asked them to meet him at the same place, Turnham Green Railway Station, at the same time on the following Monday, the 19th, "to do it again"; that they accordingly went to the same place, about the same time on the following Monday, and found the prisoner there talking to two men; that he made a sign to them with his head; that they followed him and waited for him when he went into a shop; that after he had parted from his friends they followed him again, when he told them to go away, and said he had not time that day (a most significant expression), but had some business to do; that he then gave them a two-shilling piece, the same amount as before, and again said: "Go away," adding: "That tall man," pointing to Sergeant Blackmore, "is a policeman" (another most significant expression). These two significant expressions tend to show that he met those boys with an intention to do something with which the police might interfere. If what he had not time to do was innocent, why should the presence of the police be feared? That the prisoner gave the two boys a two-shilling piece is admitted by him; it could not well be denied, as the gift took place almost in the presence of the detective policeman, Sergeant Weston, who, when examined, proved that on the 19th he saw the accused in company with two gentlemen near the level crossing of the railway near Turnham Green Railway Station, that he saw the boys following these gentlemen, and saw the accused turn round and make a motion of his head at the boys, that subsequently the prisoner parted from his two friends, then crossed the road to where the two boys were standing, entered into conversation with them for a few moments, and then take something from his pocket and hand it to the boys, that he then rushed up and said to the prisoner: "I am a police officer. What are you doing with these boys?" To which the prisoner replied: "I have not spoken to any boys." The boy Jones, in the presence of the prisoner and Sergeant Watson, made the following statement, to which the prisoner made no reply whatever: "He (the prisoner) gave us 2s. He said. 'It's no use to-day, that tall man (pointing to Sergeant Blackmore) is a policeman.' He had arranged to meet us at three o'clock. He took us to the urinal near the Bath Road on Friday last." On the way to the station house the prisoner said: "I did give the boys 2s.; I can give money to whom I like." At the police station Weston stated he told the prisoner he would be charged with attempting to procure these two boys to commit an act of gross indecency, and also with actually committing such an act on Mar. 16, with male persons in a public urinal, and further with assaulting Weston himself, that when the charges were being read over to him he said: "As to the first two charges I do not say anything. I do not think I struck you. I did not mean to hurt you." During the progress of the case it was suggested in cross-examination, as it was afterwards deposed by the prisoner,

A that he was not in the Turnham Green urinal on Mar. 16, and that anything which took place between him and these boys on the 19th was as far as he was concerned quite innocent. These were his defences.

Even on the evidence of the police alone, the prisoner was brought into strange, and, having regard to the giving of 2s. and his silence when Jones told his story in his presence, into most suspicious relations with these boys on Mar. 19. The B transactions of that day are so connected with those of Mar. 16, that if his intent on the 19th was to commit, or endeavour to induce the boys to commit, on that day any act of indecency with them, it would, in my view, be strong evidence to prove that he was the very man who committed the offences charged on the 16th, and that the boys were not making any mistake whatever in their identification of him. It would, indeed, be strange if one man should commit the offence C charged on the 16th, making an assignation with them to commit it again upon the 19th, and that another man should, with an intent to do the same, take up and fulfil the first man's engagement as it were, personate him, and keep the appointment the first had made. It would appear to me that evidence which goes to prove that the prisoner had in his transactions with these boys on the 19th an intent or desire to commit an indecent offence with them, if circumstances D should permit, becomes evidence to identify him as the person who actually committed on the 16th the offence for which he was indicted. Apparently, the prisoner himself fully appreciated this, for while he stated that the boys did follow him, stared into his face, waited for him while he was in the shop, and watched him through the window—yet he gave them two shillings and told them to go away as the tall man, pointing to a man, was a policeman. The tall man he E pointed to was, he said, not Sergeant Blackmore, but one of his own friends, and that he then told them they should wash their dirty faces.

The contest then narrows it down to this: Were the sets of acts deposed to in the main by each side as having taken place on the 19th done with the wicked intent the prosecution alleges, or with the innocent intent the prisoner in his defence alleged? When he is searched powder-puffs are found on his person. F It is stated that powder-puffs are some of the things with which persons who commit abominable and indecent crimes with males arm themselves for the purpose of carrying out their criminal designs. For what purpose could the prisoner carry upon him on this day the powder-puffs? He could not by them promote the cause of charity or cleanliness. He could not have carried them for such a purpose; the time had not arrived for their use, but can it be reasonably doubted that they G were carried to be used when needed? The possession of them is, in my opinion, admissible in evidence to show, when taken in connection with the facts proved, that the prisoner harboured on that day an intent to commit an act of indecency with these boys should occasion offer. Well, if these photographs of naked boys, some apparently approaching adolescence, all I think indecent in their attitude, and some apparently depraved in their suggestion, had been found on the person H of the accused, I do not see how any distinction could well have been drawn between them and the powder puffs. They, too, are, it is stated, implements for carrying out the same design. I do not know, and it is not stated, whether they are used to stimulate the depraved lusts of those given to such practices, or to corrupt the mind of those whose assistance or sufferance such people seek; but this I think is clear, that they could not be needed for the work of a hygienic enthusiast I so devoted to youthful cleanliness that he gave to two boys he had never met before and who had teased him by staring at him, 2s. to get their dirty faces washed. The fact that they were found in the prisoner's drawer and not on his person may make them less cogent evidence of a criminal intent towards these boys than if they had been found upon his person, but still, in my view, the possession of them is some evidence of the existence of a criminal intent towards these boys on Mar. 19, and, if so, some evidence of the identity of the person harbouring that intent with the person who had committed the crime charged upon Mar. 16. I think they belong to the class of evidence mentioned by LORD HERSCHELL in

Makin's Case (1), namely, evidence designed and intended to rebut a defence which would be otherwise open to the accused—in this case an alibi for Mar. 16. In my opinion, therefore, the appeal fails and should be dismissed.

LORD PARKER OF WADDINGTON.—I also have come to the conclusion, thought with some hesitation, that the evidence in question was admissible. I think, however, that it was admissible on one ground only. The real issue was the identity of the accused with the man who committed the crime of Mar. 16. If the abnormal propensity of the criminal of Mar. 16 manifested by the nature of the crime and the appointment for its repetition can be regarded as one of the indicia by which his identity can be established, the evidence is admissible as showing that the accused had the same abnormal propensity. For the reasons about to be explained by my noble and learned friend LORD SUMNER, I have come to the conclusion that it may be so regarded. But it would, in my opinion, be wrong to treat your Lordships' decision in the present case as laying down any principle capable of general application.

LORD SUMNER.—The question in this appeal is whether either the powder-puffs or the photographs or both were admissible in evidence to prove the identity of the appellant with the person who committed the offences against the Criminal Law Amendment Act, 1885, s. 11, on Mar. 16, 1917. The facts most material to be borne in mind are as follows. (i) If Maunders and Jones [the two boys in question] told the truth at all, they proved the crime up to the hilt. There was no question open as to intent or mens rea. There was no possible appearance of innocence, which might need to be rebutted. The nature and quality of the acts were unequivocal. (ii) Neither the objects in question nor any similar objects were used, produced, or mentioned on Mar. 16, nor were they or any such objects shown to have been on the person of the man who committed the crime on that day. (iii) Of these objects the judgment under appeal observes: "It is well known to those who have experience of these cases that persons who commit abominable crimes or acts of gross indecency with male persons make use of appliances such as powder and powder-puffs, and implements such as objectionable pictures for the purpose of carrying out their designs." I accept this without discussion. (iv) There were found shortly afterwards by the police in a locked drawer in the appellant's room a few ordinary portrait photographs, and along with them about a score of others, as to which it was admitted that they showed the appellant to be a person of depraved mind. All were photographs of boys. (v) After committing the offences on Mar. 16, the criminal made an appointment with the boys for Mar. 19, at the time and place where he had first met them on Mar. 16. When they kept that appointment the appellant was there or thereabouts. He had the powder-puffs with him.

No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime, but, sometimes for one reason and sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence, which, unexplained, the facts might wear. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences and sundry species of frauds such evidence is constantly and properly admitted. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of Not Guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice. No doubt, it is paradoxical that a man, whose act is so nakedly wicked as to admit of no doubt about its

character, may be better off in regard to admissibility of evidence than a man whose acts are at any rate capable of having a decent face put upon them, and that the accused can exclude evidence that would be admissible and fatal if he ran two defences, by prudently confining himself to one. Still so it is. In the present case, even before the justices it became clear that the accused made one case, and one case only, and so it has been throughout. He said that he was not the man. It has been argued that the evidence in question went to another issue than that of identity, namely, to corroboration. I think when examined this will be found to be a fallacy. Evidence to corroborate Maunders and Jones, in view of their participation in the conduct in question, was duly given and no point of this kind was raised, but it was said that the fact that the man, whom the boys identified, was a person who had in his possession these incriminating objects, tended to confirm their accuracy and to show that they had made no mistake. As it seems to me, this is only another way of saying that the possession itself goes to prove identity. That the boys should pick out as the guilty person someone who, unknown to them, possessed these objects confirms their accuracy, if such possession is one of the personal indicia of the guilty man, for it shows that they selected a man who so far corresponds to the man who was wanted. If not, it only shows that, although he may not be the right man, he is probably quite as bad. Their evidence is confirmed by the possession only if the possession is itself direct evidence of identity.

As was admitted, there was a stronger case for the admissibility of the powder-puffs than for the photographs. I think the powder-puffs were clearly admissible. The criminal made an appointment with the boys for the following Monday, and to the place of that appointment at the appointed time there came the appellant, equipped with articles recognised by the court as "used for the carrying out of their design" by persons of the class to which the criminal belonged. They are direct evidence that the appellant was keeping the criminal's appointment and was the same man. This only makes the admissibility of the photographs more critical. No jury could fail to be influenced by the discovery of them in the accused's possession, and hence the discretion given by the proviso in s. 4 of the Criminal Appeal Act, 1907, could not be exercised in respect of them. The court below did not purport to exercise that discretion; their decision was that the appeal should be dismissed. The question before your Lordships is whether that decision was right. The statute, which creates the Court of Criminal Appeal and also creates your Lordships' jurisdiction in appeal from that Court, confers no original discretion on your Lordships, but on the Court of Criminal Appeal only, and, it is not, in my opinion, open to contention, though it was suggested for the respondent, that your Lordships, even if you were minded to do so, could now say that you "consider that no substantial miscarriage of justice has actually occurred" from the trial of the appellant upon such evidence, if it be inadmissible.

The photographs thus become the turning point of the case. The principles on which the admissibility of evidence of identification rest are in no need of re-statement. Indeed, new formulæ on so trite a topic may tend to introduce qualms or doubts. The question is always not so much what is proved as what it proves. All lawyers recognise as part of their professional premisses that there is all the difference in the world between evidence proving that the accused is a bad man and evidence proving that he is *the* man. Laymen are apt to think that the difference, if any, is in favour of admitting the former. There must be something to connect the circumstance tendered in evidence, not only with the accused but with his participation in the crime. It is this something which is expressed in the judgment under appeal in the words "ordinary men do not keep indecent photographs of naked boys in their possession. Men who commit the offences charged do. . . . The man who did the acts on Mar. 16 was a man who would be likely to have such photographs in his possession. The man arrested on the 19th, in fact, had such photographs in his possession in his room." Illustrations, it is true, were employed during the argument, both at your Lordships' Bar and in the

court below and I think in one passage in the judgment, which went considerably beyond the limits of admissibility, but as applied to the facts of the case I think the meaning of the above passage may be re-stated more fully as follows: The actual criminal made an appointment to meet the same boys at the same time and place three days later and presumably for the same purpose. This tends to show that his act was not an isolated act, but was an incident in the habitual gratification of a particular propensity. The appellant, as his possession of the photographs tends to show, is a person with the same propensity. Indeed, he went to the place of the appointment with some of the outfit, and he had the rest of it at home. The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognised as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics, which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner, or a house-breaker is only a particular specimen of the genus rogue, and, though, no doubt, each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognisable mark of the individual. Persons, however, who commit the offences now under consideration, seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialised and extraordinary class, as much as if they carried on their bodies some physical peculiarity. So expanded and understood, I accept the passage, which I have quoted above, and think that the photographs, found as they were and after a short interval of time, tend to show that the accused had this recognisable propensity, which it was shown was also the propensity of the criminal of Mar. 16. It was accordingly admissible evidence of his identity with that criminal. Its weight was for the jury. No doubt, it required considerable discretion in introducing it at all and a careful direction from the learned judge, but it is admitted that this was given in unexceptionable terms.

If the person who committed the offence had, either by word or conduct, established any connection between what passed on that occasion and the photographs themselves, their admissibility, found as they were so soon afterwards, would present no difficulty. If, on the other hand, there had been nothing to show a propensity in the criminal to the practice of such acts, such as the making of the appointment, I should have thought that the photographs were merely objects going to the accused's bad character and not to his identity with the criminal in the particular case. I certainly do not think it could be held that, as a matter of course, even in the case of crimes of this class, the articles found in a man's possession, not as parts of the transaction which is being inquired into, but at a separate time and place, could, as such, be put in evidence against him merely because they were such as criminals possess or use, and in the absence of any circumstance in the crime tending to show a specific connection between it and the articles in question. If a man could be convicted of a particular burglary, in which it was clear that no tools had been used at all, merely because at another place and time burglar's implements were found on his premises, it is difficult to see what limit could be put to the admissibility of general evidence of bad character, and the fact that evidence of articles found on the premises of accused persons is constantly given without much question, though I doubt not in the vast majority of cases quite rightly, is really only misleading, unless at the same time we ask the question what exactly does this purport to prove, and by what probative nexus does it seek to prove it.

In the view I take of this case no "point of law of exceptional public importance" arises, and I cannot help regretting that it should have been thought to be "desirable in the public interest that a further appeal should be brought." The certificate of the Attorney-General, which is the condition precedent to an appeal to your

A Lordships' House from a decision of the Court of Criminal Appeal, is granted in his discretion and is the subject neither of review nor of criticism, but I hope that other persons in like position to the appellant will not be encouraged by this case to attempt to obtain such a certificate on similar grounds. The question here is and is only whether, in particular and peculiar circumstances, the finding of these articles could be given in evidence. It raises no new principle of law; it elucidates B no new aspect of familiar principles. It is a mere question of the application of the rules of evidence to this particular case. That such application often gives rise to difficulties we all know, but they have to be solved ambulando, and no discussion of them on appeal will lead to the formulation of any rule that will go beyond those in general use. I think that the evidence was admissible, and that the appellant was rightly convicted.

C

LORD PARMOOR.—It is not necessary to re-state the fact in this case. It is a recognised principle of the criminal law that, apart from special conditions, or statutory enactment, evidence is not admissible merely to prove that the person accused has a general propensity to commit a crime similar in character to that with which he is charged: *Makin* v. *A.-G. for New South Wales* (1); *R.* v. *Oddy* D (2); *R.* v. *Cole* (3); *R.* v. *Bond* (4). It is of great importance that this principle should be maintained to ensure a fair trial in criminal cases. On the other hand, such evidence is admissible if there is any connecting relationship between it and the particular crime with which a prisoner is charged. If such evidence is admissible, it cannot be excluded on the ground that it may incidentally introduce considerations which may tend to prejudice the trial of the person accused. It is E not desirable to attempt an exhaustive definition, and it has been more than once pointed out by experienced criminal judges that the difficulty arises not in the enunciation of the general principle but in its application to the circumstances of a particular trial. *Makin* v. *A.-G. for New South Wales* (1) decides that evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is admissible if it bears upon the question whether the F acts alleged to constitute the crime in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. It has been pointed out that before evidence is admissible to rebut a defence, such defence should, in some form, have been put forward on behalf of the accused, but no difficulty arises under this head in the present appeal. The defence set up was mistaken identity, and if the evidence objected to is relevant to this issue, it is G admissible. It would not be admissible on an issue whether the crime was designed or accidental, since no such issue was involved in the trial.

It was incumbent on the prosecution to prove that the acts of indecency had been committed and that the accused had committed them. Under the first head there is no question; under the second, the accused denied that he was the person who had committed the indecent acts and called evidence to prove that he was else- H where on the day and at the time in question. The question in debate is whether, in all the surrounding circumstances of the particular case, there is any connecting relationship between the evidence to which objection has been taken and the crime with which the accused was charged.

In my opinion there is a difference on the question of admissibility of evidence between the powder-puffs and the photographs. The powder-puffs were found I upon the accused when arrested, immediately after his meeting with the boys on the 19th, and corroborate the evidence of the boys that the accused was the person who, after committing the offence on the 16th, had arranged to meet them for a similar purpose on the 19th. This evidence is sufficiently connected with the crime charged in the indictment, and is not merely evidence of criminal propensity. Counsel for the appellant, however, directed his main argument, not to this point, but to the production of the photographs, and it is under this head that the difficulty arises. I do not think that this difficulty is met by a reference to analogous cases, such as burglary. It must be determined on the special circum-

stances of the particular case. If there had been no appointed meeting on the 19th, the evidence would, in my opinion, not have been admissible. The issue would then have been: Did the evidence of the boys establish the identity of the accused? The prosecution could not then competently have produced the photographs, since there was no connecting relationship of any kind with the crime charged, however much the photographs might tend to show a criminal propensity towards a crime similar to that charged against the accused. The point, however, arises whether the photographs became admissible and the necessary connection is established in consequence of the meeting on the 19th. The meeting on the 19th, following the appointment made on the 16th, implies that the person accused of the indecent acts on the 16th was a person of criminal propensity to commit such an offence as was charged in the indictment. If this is so, the person who committed the offence on the 16th may be identified as a person of criminal propensity to commit such an offence as was charged in the indictment. I accept the statement that the photographs to which objection was taken are evidence that the person in whose lodgings they were found was a person of criminal propensity to commit the offence charged in the indictment. The conclusion from these premisses is that the photographs are admissible as evidence of identification and to rebut the case set up by the accused that he was elsewhere on the day and at the time in question. I have come to the conclusion that, in the special circumstances of the case, the photographs were admissible as evidence against the accused. It is not alleged that the learned trial judge in any way misdirected the jury. The appeal should be dismissed.

Solicitors: *Harry Wilson*; *Treasury Solicitor.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

Re HEWETT. ELDRIDGE *v.* ILES

[Chancery Division (Younger, J.), January 11, 28, February 6, 1918]

[Reported [1918] 1 Ch. 458; 87 L.J.Ch. 209; 118 L.T. 524]

Will—Condition—Restraint on marriage—Condition subsequent—Condition only primâ facie void—Intention of testator—Provision for child of testator—conditional limitation—Validity.

E. H., by a codicil to his will, gave to S., who was living under his protection, an annuity of £1,200 a year with a declaration that should S. marry after his death she should be paid an annuity of £800 in lieu of the annuity of £1,200, and he directed that from and after the marriage of S. his trustees should apply the difference of £400 a year for the maintenance, education, and advancement of a son of S., of whom E. H. was the father, until the death of S. S. having married after the death of the testator,

Held: (i) the rule that a condition subsequent in a will in restraint of the marriage of a single woman was void was not absolute, but such a condition was only primâ facie void; if the intention of the testator was not to restrain marriage, but to attain some other lawful object as, e.g., to make provision, in the event of the annuitant's marriage, for a child of the testator by the annuitant, the condition could have full effect; in the present case the intention of the testator was not to prevent the marriage of S., but to make provision for his child, and, therefore, the declaration was good.

Potter v. *Richards* (1) (1855), 24 L.J.Ch. 488, applied;

(ii) the declaration was not a condition subsequent but a conditional limitation, and was good.

Webb v. *Grace* (2) (1848), 2 Ph. 701, applied.

Notes. Applied: *Re Fentem, Cockerton* v. *Fentem*, [1950] 2 All E.R. 1073. Referred to: *Re Wilkinson, Page* v. *Public Trustee*, [1926] All E.R.Rep. 357.

As to void conditions in wills, see 34 HALSBURY'S LAWS (2nd Edn.) 105–109; and for cases see 44 DIGEST 452 et seq.

Cases referred to:

(1) *Potter* v. *Richards* (1855), 24 L.J.Ch. 488; 1 Jur.N.S. 462; 3 W.R. 266; 44 Digest 455, *2772*.

(2) *Webb* v. *Grace* (1848), 2 Ph. 701; 41 E.R. 1114; sub nom. *Grace* v. *Webb*, 18 L.J.Ch. 13; 12 Jur. 987, L.C.; 44 Digest 455, *2770*.

(3) *Re Whiting's Settlement*, *Whiting* v. *De Rutzen*, [1905] 1 Ch. 96; 74 L.J.Ch. 207; 91 L.T. 821; 53 W.R. 293; 21 T.L.R. 83; 49 Sol. Jo. 83, C.A.; 44 Digest 484, *3036*.

(4) *Bellairs* v. *Bellairs* (1874), L.R. 18 Eq. 510; 43 L.J.Ch. 669; 22 W.R. 942; 44 Digest 455, *2774*.

(5) *Lowe* v. *Peers* (1770), 4 Burr. 2225; Wilm. 364; 98 E.R. 160; 12 Digest (Repl.) 278, *2131*.

(6) *Morley* v. *Rennoldson*, *Morley* v. *Linkson* (1843), 2 Hare, 570; 12 L.J.Ch. 372; 7 Jur. 938; 67 E.R. 235; 44 Digest 454, *2766*.

(7) *Stackpole* v. *Beaumont* (1796), 3 Ves. 89; 30 E.R. 909, L.C.; 44 Digest 484, *3031*.

(8) *Re Bellamy*, *Pickard* v. *Holroyd* (1883), 48 L.T. 212; 44 Digest 456, *2777*.

(9) *Scott* v. *Tyler* (1788), 2 Bro.C.C. 431; 2 Dick. 712; 29 E.R. 241, L.C.; 44 Digest 483, *3030*.

(10) *Jones* v. *Jones* (1876), 1 Q.B.D. 279; 45 L.J.Q.B. 166; 34 L.T. 243; 24 W.R. 274; 44 Digest 455, *2776*.

(11) *Marples* v. *Bainbridge* (1816), 1 Madd. 590; 56 E.R. 217; 44 Digest 454, *2765*.

(12) *Sheffield* v. *Lord Orrery* (1745), 3 Atk. 282; 26 E.R. 965, L.C.; 44 Digest 589, *4127*.

(13) *Re Machu* (1882), 21 Ch.D. 838; 47 L.T. 577; 30 W.R. 887; 44 Digest 438, *2643*.

Also referred to in argument:

Allen v. *Jackson* (1875), 1 Ch.D. 399; 45 L.J.Ch. 310; 33 L.T. 713; 40 J.P. 262; 24 W.R. 306, C.A.; 44 Digest 459, *2795*.

Newton v. *Marsden* (1862), 2 John. & H. 356; 31 L.J.Ch. 690; 6 L.T. 155; 8 Jur.N.S. 1034; 10 W.R. 438; 70 E.R. 1094;

Lloyd v. *Lloyd* (1852), 2 Sim.N.S. 255; 21 L.J.Ch. 596; 19 L.T.O.S. 84; 16 Jur. 306; 61 E.R. 338; 44 Digest 458, *2792*.

Abbott v. *Middleton*, *Ricketts* v. *Carpenter* (1858), 7 H.L.Cas. 68; 28 L.J.Ch. 110; 33 L.T.O.S. 66; 5 Jur.N.S. 717; 11 E.R. 28, H.L.; 44 Digest 557, *3735*

Grey v. *Pearson* (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 44 Digest 533, *3502*.

Monypenny v. *Monypenny* (1861), 9 H.L.Cas. 114; 31 L.J.Ch. 269; 11 E.R. 671, H.L.; 17 Digest (Repl.) 264, *684*.

Re Moore, Trafford v. *Maconochie* (1888), 39 Ch.D. 116; 57 L.J.Ch. 936; 59 L.T. 681; 52 J.P. 596; 37 W.R. 83; 4 T.L.R. 591, C.A.; 44 Digest 438, *2646*.

Adjourned Summons to determine the true construction of a codicil.

By his will, dated Nov. 8, 1912, the testator devised freehold lands and hereditaments unto and to the use of his trustees for a term of 1,000 years upon the trusts and subject to the powers and provisions thereinafter declared. The testator made two codicils which did not affect the questions raised on this summons, except that by the second codicil he gave to A.S., then living under his protection, an annuity

of £500 a year for her life without any reference to her marriage. By a third codicil, dated Mar. 24, 1915, he revoked the annuity of £500 and gave and bequeathed to A.S. during her life an annuity of £1,200 free of all duties for her separate use without power of anticipation, with a declaration that if she should marry after his death the annuity was to be reduced to £800, and he directed that from and after the marriage of A.S. his trustees should apply the sum of £400 per annum, or so much thereof as in their discretion they should think necessary, for and towards the maintenance, care, education, and advancement of a child of which A.S. was believed to be pregnant, and of which the testator was the father, until such child should attain the age of twenty-one years, with directions to accumulate the balance of the said annual sum of £400, and after such child should attain the age of twenty-one years, if A.S. should have married, he directed his trustees to pay to such child an annuity of £400 until the death of A.S., with certain further provisions as to his residuary estate. By a fourth codicil, dated Sept. 10, 1915, made after the birth to A.S. of a son called A.H., the testator revoked the said third codicil and made the following bequest:

"I give and bequeath to A.S. during her life an annuity of £1,200 free of all duties to be paid by equal quarterly payments, the first whereof shall be paid three calendar months after my death. But I hereby declare that, should the said A.S. marry after my death, from and after the time of such marriage she shall be paid an annuity of £800 in lieu of the said annuity of £1,200, and I hereby declare that the said annuity shall be for the separate use of the said A.S. without power of anticipation, and that if she shall commit, permit, or suffer any act, default, or process whereby but for this present provision the said annuity would become vested in or payable to any other person or persons the said annuity shall immediately cease and determine as if she were dead. And I further direct that from and after the marriage of the said A.S. the trustees of my will shall apply the sum of £400 per year, or so much thereof as they in their absolute discretion shall think necessary, to or towards the maintenance, care, education, and advancement in life of my son by the said A.S., named A.H., until he shall attain the age of twenty-one years, with power to apply the balance of the said sum of £400 unapplied in any year in any subsequent year."

The testator directed that his trustees should from and after the marriage of A.S. until his said son should attain twenty-one years accumulate and invest the balance of the said annuity of £400 and pay the same to his said son upon his attaining twenty-one years; and after his said son should have attained that age he directed his trustees if A.S. should be then alive and have married after the testator's death to pay to his said son an annuity of £400 until the death of A.S., and he directed his trustees during the life of A.S., after providing out of the income of his estate for the payment of the annuities bequeathed by his will and codicil to accumulate and invest the balance of such income and apply such accumulations in paying off the mortgages mentioned in his will, and after the death of A.S., after payment of the said annuities, to pay the income, profits, and annual proceeds of his estate to his said son during his life, with gifts over. The testator died on Nov. 24, 1915, and the will and four codicils were duly proved. A.S. and the infant A.H. survived the testator, and there was no other child of A.S. of which the testator was the father. A.S. married soon after the death of the testator. A.S. claimed that she was entitled to be paid the full annuity of £1,200 on the ground that the provision reducing it was a condition subsequent in restraint of marriage and void. The trustees of the will issued a summons to decide this question, and others arising in the administration of the estate which do not require a report.

E. G. Rand for the trustees.
H. Terrell, K.C., and *Chetham-Strode* for A.S.
H. Burrows for the infant.

C. J. Mathew, K.C., and *J. F. W. Galbraith* for the tenant for life.
Underhay for the next-of-kin.
J. F. Carr for the heir-at-law.

Cur. adv. vult.

Feb. 7, 1918. **YOUNGER, J.,** read the following judgment.—The question on this summons I have now to determine is whether a lady, described by the testator as "A.S.," and in this judgment referred to as "Mrs. S.," is from the date of her marriage to her present husband entitled for the rest of her life, under the fourth codicil to the testator's will, to an annuity of £1,200 per annum, or to one of £800 per annum only. The question, in other words, is whether the provision in that codicil reducing the annuity on Mrs. S.'s marriage is or is not void.

It was by his second codicil, made on July 6, 1914, that the testator first made provision for the lady. After a gift to her of a pecuniary and a specific legacy, he gave her during her life a protected annuity of £500 free of all duty, to be paid by equal quarterly payments, for her separate use without power of anticipation and unqualified by any condition as to marriage. By the third codicil to his will, dated Mar. 24, 1915, made in expectation of the birth of a child to the lady of which the testator was the father, he revoked the annuity of £500 so bequeathed by his second codicil, and, after making other provision for the lady, he proceeded as follows [HIS LORDSHIP read the provisions of the third codicil]. By the fourth codicil, dated Sept. 10, 1915, and made after the birth of the child, the testator's son and infant defendant, on July 14, 1915, the testator again revoked the bequest of the annuity of £500 bequeathed by the second codicil and, after a specific bequest, gave the lady an annuity of £1,200 with the declaration of its reduction to £800 on marriage and the bequest of an annuity of £400 for the benefit of the child. The testator died on Nov. 24, 1915, and on Mar. 4, 1916, Mrs. S. intermarried with her present husband. She had not been married before, and the question that now arises is whether the provision reducing her annuity to £800 on her marriage is or is not one that has any force or effect.

The whole matter was exhaustively explored in the argument before me and many of the numerous authorities bearing upon the point were cited and discussed. The subject is proverbially difficult. On the one hand, as VAUGHAN WILLIAMS, L.J., said in *Re Whiting's Settlement*, *Whiting* v. *De Rutzen* (3) ([1905] 1 Ch. at p. 115):

> "This branch of the law is one with which it is not very satisfactory to deal, and I cannot say that I think the mode in which it has been dealt with is very easy to weld into a consistent whole. We are told that the law on this point has been partially imported into our system of law from the Roman law, and that this was done through the ecclesiastical courts. And then we are told that the Court of Chancery did not entirely adopt the view of the law adopted by the ecclesiastical courts, just as the ecclesiastical courts did not adopt in its entirety the Roman law. And eventually, as a matter of history, we find ourselves face to face with this state of things—that the Court of Chancery had to administer rules of law which they did not think very fair or very just, and that they were constantly straining the rules, by which they yet declared they were bound, in order to escape from them."

On the other hand, you find JESSEL, M.R., in *Bellairs* v. *Bellairs* (4) saying (L.R. 18 Eq. at p. 513):

> "It is no part of my duty to make new law simply because I think the old law unreasonable; that is the province of the legislature and not of a judge. Where I find a point decided, however I may lament the result, I think I am bound to follow the decision and to construe it fairly, and not to seek to evade it or fritter it away by introducing distinctions only invented for the purpose of pronouncing another decision, which, in my opinion, would be more in conformity with reason. In the present case the law is settled thus far, that a general condition prohibiting marriage, by which a legacy is cut down is void. I consider that to be the law of the courts of equity."

In these circumstances caution is necessary, especially in a case like the present, where it is, as I think, quite apparent from the course of his testamentary bounty to this lady that the testator had no desire to penalise her merely because she might happen to marry after his death. It is, in my view, clear that when in the event contemplated in the third codicil, and realised at the date of the fourth codicil—viz., the birth of a child of his own—he substituted for the original annuity of £500 one of £1,200, his object was to make what he conceived to be an adequate provision both for the mother and his child, and that the appropriation of one-third of the annuity meant for both of them for the immediate benefit of the child, when the mother herself married, was due to no objection to a marriage of hers as such, but to his desire to make it certain that the conflict of new duties undertaken by her would at least expose his child to no risk of being inadequately maintained or improperly educated. It would be strange to find that any rule based upon public policy was broken by so admirable a counsel of prudence on the part of the child's father. Remembering, however, SIR GEORGE JESSEL'S injunction, I must be specially on my guard to see that a decision giving effect to that view is not contrary to established principle. Counsel for Mrs. S. contended that the provision of the codicil reducing the annuity on his client's marriage was void. He based his contention on the ground that here the reduction was effected by a provision which he said, on the true construction of the whole clause, was a condition subsequent; and, when the effect of such a condition is either to extinguish or to reduce on the marriage of an annuitant an annuity given to her for life, then it becomes, as he said, a rule of law that the condition is void and must be altogether rejected. It cannot be saved by any motive on the part of the testator, however laudable. Once arrive at the conclusion, as a matter of construction, that this subsisting interest is defeated by this subsequent condition, and you must reject the condition altogether. This is the proposition which has to be examined.

By the civil law all conditions restraining marriage, whether precedent or subsequent, whether there was any gift over or not, and however qualified, were absolutely void.

> "Our courts, however, have not adopted this view in its unqualified extent, but have subjected it to various modifications":

see JARMAN ON WILLS (6th Edn.), p. 1525. It is, however, necessary for the purposes of the present case to trace the course of decisions, so far as it affected one or both of the common forms of expression, by means of which testators have essayed to bring about the result which the present testator plainly had in view. The first of these common forms is to make the annuity payable to annuitants only until marriage; the second to give the annuity for life, and then by condition subsequent to forfeit or reduce it on marriage. In certain circumstances the effectiveness of such provisions has always been undoubted. For instance, in the case of the annuitant being a widow, her annuity might effectively be cut down on subsequent marriage by any appropriate form of words: even under the civil law this doctrine does not extend to widows. But at a very early period, as is shown by a long series of decisions, of which *Lowe* v. *Peers* (5), before WILMOT, C.J., in 1770, may be taken as a leading example, it became an established rule that a limitation of an annuity to an annuitant till marriage is good. In face of its undoubted influence in certain cases in checking marriage altogether, it may perhaps be doubted whether the reason justifying this rule is fully stated by WIGRAM, V.-C., in *Morley* v. *Rennoldson* (6), for his explanation would seem to overlook the considerations which led KINDERSLEY, V.-C., in *Potter* v. *Richards* (1) to point out that, merely by adopting that form of gift, a testator, if it were always to be upheld, could make effective a mere wanton restraint on marriage. And it may well be that originally, under such a limitation as that with which I am now dealing, all that the courts did was to impute to the testator an intention to provide for a person while he or she remained single, with no thought of preventing or hindering marriage. From that, the result being in entire accordance with

judicial views of what was right, it was an easy step to convert an intention, originally only imputed, into an intention assumed and ultimately irrebuttable. Counsel for Mrs. S., accepting that rule, says, by way of contrast to it, that where a testator essayed to attain the same result by means of a condition subsequent, the opposite consequence with equal certainty followed, and the condition was necessarily and always void. It is, of course, clear that the first difficulty in the way of this view is to impute to courts, who consistently objected to the rule, taking in this matter their lead from LORD LOUGHBOROUGH's judgment in *Stackpole* v. *Beaumont* (7), a somewhat unnecessary resolve to go further than they needed. I cannot, after examining the authorities, agree with the contention put forward on behalf of Mrs. S.

The better view, in my opinion, is that such a condition is, and always has been, only primâ facie void. WIGRAM, V.-C., in *Morley* v. *Rennoldson* (6), said (2 Hare, at p. 579):

> "Supposing a gift of a certain duration, and an attempt to abridge it by a condition in restraint of marriage, generally the condition is primâ facie void and the original gift remains."

It will, I think, be found that in cases where the rule has been stated in more absolute terms—e.g., by FRY, J., in *Re Bellamy*, *Pickard* v. *Holroyd* (8), or by JESSEL, M.R., in *Bellairs* v. *Bellairs* (4)—or where the condition has been held void, there were in fact to be found no such circumstances as those on which the courts have in other cases relied to rebut the undoubted presumption that it is so. For it is clear that in certain circumstances the condition may have full effect. To take one example from LORD THURLOW's judgment in *Scott* v. *Tyler* (9), where he said (2 Dick. at p. 722):

> "It seems also agreed on all hands that, when on any condition, however restrictive of marriage, the legacy is given over to pious uses, the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectionable purpose of restraining marriage."

That, in the application of the principle of the civil law, the old Court of Chancery was influenced by a gift over to other than pious uses is shown by this passage in LORD THURLOW's judgment which immediately follows:

> "As we receive the canon law, a bequest over to any purpose or person shall be interpreted in the same manner and make a conditional limitation."

The same view was thus put by Sir John Romilly as counsel in *Morley* v. *Rennoldson* (6), when arguing that the condition there was void (2 Hare, at p. 574):

> "In all cases it is always a question of intention, whether the testator truly intends on such an event the benefit of the object in whose favour the legacy is limited over or bona fide intends the simple performance of the condition, or whether his real object is to compel the celibacy of the legatee. In the former case the limitation may be good, in the latter it is invalid."

It is thus put by BLACKBURN, J., in *Jones* v. *Jones* (10), speaking with reference to *Morley* v. *Rennoldson* (6) (1 Q.B.D. at p. 281):

> "The real question seems to be whether the testator intended to discourage marriage or not."

Accordingly, in *Potter* v. *Richards* (1), already referred to, where a testator by a codicil gave to a lady an annuity during her life, provided she should remain single, in circumstances singularly like the present, KINDERSLEY, V.-C., said (24 L.J.Ch. at p. 489):

> "It is a gift of this annuity during the life of Jane Potter provided she remains single; and the reason of that proviso being inserted is explained by the testator himself in the codicil, that, if she married, her child, who was the illegitimate child of the testator, would be neglected. He therefore introduces this proviso with the object of preventing the child from being

neglected, and that condition is, I think, incorporated with the gift; and my opinion is that on that point it would be good. . . . In this case there is not a mere restraint on marriage, but the proviso is inserted expressly to protect the child of the testator."

It is true that in that case the testator expressly stated his reason for making the annuity to cease on the annuitant's marriage. If, however, by a sound construction a similar reason for the testator's action in the present case is rightly inferred from his testamentary writings, the effect ought, it would seem, to be the same as if that reason had been expressed in words. On the other hand, while in *Potter* v. *Richards* (1) there was, as here, a gift over, it was less strong for present purposes than that which we find in this codicil, for the gift over was not, as in the present case, for the benefit of the child, but of a stranger. By itself the presence of such a gift over has, in the view of the Court of Chancery, in contrast with the civil law, always been of importance in making effective the condition in such cases. In *Marples* v. *Bainbridge* (11) PLUMER, V.-C., says (1 Madd. at p. 592):

"When there is a bequest like the present of personal property upon a condition subsequent—that the legatee continue unmarried—and no bequest over on breach of the condition, the condition is considered only in terrorem and it is void."

Believing, therefore, on these grounds the true conclusion to be that such a condition subsequent is only primâ facie void, and taking the view I do of the testator's intentions in this case and of the object he had in mind, which was in no way aimed at the celibacy of Mrs. S., I hold that even if the condition be a condition subsequent, it is in the present case quite effective, and in so holding I am, as I think, giving effect to the only rational principle that can be extracted from the decisions.

But there is another, and it may be less debatable, ground on which to base my decision. In my opinion, the real effect of the gift here to Mrs. S. is that she is given an annuity of £1,200 only until she marries, with a gift over of £400, part of it, on her marriage, and she receives the residuary annuity of £800 for the rest of her life. In *Webb* v. *Grace* (2) John Webb covenanted to pay to Eliza Castle "for and during the term of her natural life, subject to the proviso hereinafter contained, an annuity of £40; provided always, that in case the said Eliza Castle shall at any time hereafter happen to marry, then from and immediately after her marriage the said annuity of £40 shall be and is hereby reduced to £20 only." LORD COTTENHAM, in a judgment often cited, said (2 Ph. at p. 702):

"The questions which have arisen as to conditions subsequent in restraint of marriage do not appear to me to apply. There can be no doubt that marriage may be made the ground of a limitation ceasing or commencing. It is unnecessary to refer to authorities for this purpose. . . . If, then, this grant is a grant of £40 per annum until marriage, and from that event happening of £20 per annum for life, there can be no doubt but that such a gift is lawful, and that after marriage there can be no demand for the £40 per annum. . . . The contract and obligation is not absolute and unqualified, but explained, qualified, and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is therefore to pay £40 per annum to her during so much of her life as she shall remain unmarried, which brings the case within the unquestioned rule of law as acted upon in the cases referred to. One of them, indeed—*Sheffield* v. *Lord Orrery* (12)—is upon this point stronger than the present, for there there was a gift for life, without any qualification in the terms of the grant, but a subsequent condition giving the property over in the event of marriage, and LORD HARDWICKE said that the gift over was to take effect on the marriage."

There seem to be only two possible grounds of distinction between that case and the present. The first is that there, but not here, the proviso is heralded by the warning in the clause of gift "subject to the proviso hereinafter contained." Counsel for Mrs. S., however, placed no reliance on that distinction, and rightly as I think: see *Re Machu* (13). The second is, that that was the case of a deed; here we are dealing with a will. In this matter, however, the rules of construction are the same, whether the instrument in question be a deed or a will: see *Re Whiting's Settlement*, *Whiting* v. *De Rutzen* (3). I would add that, in my opinion, this codicil is on this point clearly distinguishable from *Re Bellamy*, *Pickard* v. *Holroyd* (8), already cited, where the testator proposed by codicil to take away by condition subsequent the property previously given unconditionally by the will. In the result, therefore, this lady is in my opinion since the date of her marriage, and for the rest of her life, entitled to an annuity of £800 and no more.

Solicitors: *Bird & Eldridge*; *Griffith & Gardiner.*

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

LANCASHIRE AND YORKSHIRE RAIL. CO., AND OTHERS *v.* MACNICOLL

[KING'S BENCH DIVISION (A. T. Lawrence and Atkin, JJ.), February 19, 20, 1918]

[Reported 88 L.J.K.B. 601; 118 L.T. 596; 34 T.L.R. 280; 62 Sol. Jo. 365]

Conversion—Proof of intention to assert right to goods inconsistent with owner's right—Use by defendant of goods as his own—Need to prove intention to commit a wrong.

Estoppel—Estoppel by representation—Negligence—Need to prove inducement to reasonable person to act on representation.

A railway company received fourteen drums of crude phenol to be forwarded to the order of certain consignees. When the goods arrived at a station near their proper destination they were by mistake and without the authority of the consignees delivered to the defendant through his agent at the station, and the defendant appropriated six of them to his own use. He subsequently returned eight of the fourteen to the railway company. The consignees brought suit against the railway company for misdelivery of six drums of phenol and recovered £82. In an action by the railway company and the consignees against the defendant for conversion, or alternatively for money paid, the defendant proved that he was expecting creosote in casks on another order at the same time, and contended that as the railway company had misled him by delivering creosote, they were estopped from recovering damages for the conversion. A county court judge having found for the defendant,

Held: a conversion may take place although there is no intention to commit a wrong, for the tort is converting to one's own use the goods of another person without any lawful excuse; the mere fact that the railway company were negligent was not sufficient to create an estoppel, since, for that purpose, there must be proved such conduct on their part as would induce a reasonable person to act on it, i.e., in this case to convert the goods; this the defendant had failed to prove; and, therefore, the plaintiffs were entitled to succeed.

Notes. Considered: *The Nordborg, Nordborg (Owners)* v. *C. P. Sherwood & Co.*, [1939] 1 All E.R. 70. Referred to: *Oakley* v. *Lyster*, [1930] All E.R.Rep. 234.

As to acts amounting to conversion, see 33 HALSBURY'S LAWS (2nd Edn.) 52 et seq.; as to misdelivery of goods by a common carrier, see ibid., 3rd Edn., vol. 4, pp. 149, 150; and as to estoppel by representation, see ibid., vol. 15, pp. 223 et seq. For cases see 43 DIGEST 469 et seq.; 8 DIGEST (Repl.) 17, 33–35, 151; and 21 DIGEST 290 et seq.

Cases referred to:

(1) *Carr* v. *London and North-Western Rail. Co.* (1875), L.R. 10 C.P. 307; 44 L.J.C.P. 109; 31 L.T. 785; 39 J.P. 279; 23 W.R. 747; 21 Digest 288, *1020*.

(2) *Seton, Laing & Co.* v. *Lafone* (1887), 19 Q.B.D. 68; 56 L.J.Q.B. 415; 57 L.T. 547; 35 W.R. 749; 3 T.L.R. 624, C.A.; 21 Digest 137, *11*.

Also referred to in argument:

The Winkfield, [1902] P. 42; 71 L.J.P. 21; 85 L.T. 668; 50 W.R. 246; 18 T.L.R. 178; 46 Sol. Jo. 163; 9 Asp.M.L.C. 259, C.A.; 43 Digest 515, *522*.

Longchamp v. *Kenny* (1779), 1 Doug.K.B. 137; 99 E.R. 91; 12 Digest (Repl.) 614, *4740*.

Claridge v. *South Staffordshire Tramway Co.*, [1892] 1 Q.B. 422; 61 L.J.Q.B. 503; 66 L.T. 655; 56 J.P. 408; 8 T.L.R. 263, D.C.; 3 Digest (Repl.) 121, *401*.

Hollins v. *Fowler* (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73; 40 J.P. 53, H.L.; 43 Digest 471, *102*.

Consolidated Co. v. *Curtis & Son*, [1892] 1 Q.B. 495; 61 L.J.Q.B. 325; 56 J.P. 565; 40 W.R. 426; 8 T.L.R. 403; 36 Sol. Jo. 326; 3 Digest (Repl.) 50, *353*.

Spencer v. *Parry* (1835), 3 Ad. & El. 331; 1 Har. & W. 179; 4 Nev. & M.K.B. 770; 4 L.J.K.B. 186; 111 E.R. 439; 12 Digest (Repl.) 586, *4531*.

Brown v. *Hodgson* (1811), 4 Taunt, 189; 128 E.R. 301; 8 Digest (Repl.) 166, *1069*.

Moule v. *Garrett* (1872), L.R. 7 Exch. 101; 41 L.J.Ex. 62; 26 L.T. 367; 20 W.R. 416, Ex. Ch.; 31 Digest (Repl.) 458, *5846*.

Cunnington v. *Great Northern Rail. Co.* (1883), 49 L.T. 392; 48 J.P. 134, C.A.; 8 Digest (Repl.) 37, *214*.

Appeal by the plaintiffs from an order of a county court judge.

On April 24, 1916, the Lancashire and Yorkshire Rail. Co. received from a Yorkshire firm fourteen drums of crude phenol to be forwarded to Græser, Ltd., at Acrefair. The company by their agents, the London and North-Western Rail. Co., by mistake and without the authority of the consignees, delivered the phenol to the defendant through his agents at Abergele station. The defendant received them and appropriated six of them to his own use. The London and North-Western Rail. Co. were compelled to pay £82 to Græser, Ltd., as damages for misdelivery, and the two companies and Græser, Ltd., commenced the present action to recover this sum from the defendant as damages for conversion. It appeared that on April 28, 1916, another Yorkshire firm had consigned twenty-five casks of creosote to the defendant at Abergele station. The creosote was by mistake sent to Græser, Ltd., while the waggon containing the fourteen drums of phenol, being wrongly labelled, was sent to the defendant, who returned eight of them after he discovered the mistake. The six had been poured by his servants into vats on his premises. The county court judge held that the defendant was not liable for conversion and gave judgment accordingly. The plaintiffs appealed.

Disturnal, K.C., and *E. Hills* for the plaintiffs.

Artemus Jones for the defendant.

A. T. LAWRENCE, J.—The main question is that which has been fully argued namely, as to the liability of the defendant in conversion. The action was one of trover or conversion of these drums of phenol. The learned judge, after giving the case very careful hearing, decided that there was no conversion, and the decision was, in my view, erroneous. The learned judge commenced stating his view with regard to conversion by saying and holding that it was necessary to show that the

act of the defendant in converting was intentionally a wrongful act. That, I think, is wrong. A conversion may take place though there may be no intention to commit a wrong. It is converting to your own use the goods of another person without any real excuse. Here the defendant converted the goods which really belonged to Græser, Ltd., to whom this carbolic acid ought to have been conveyed. They were the goods of Græser, Ltd., and they were converted to the use of the defendant MacNicoll. MacNicoll is not in a position to say that he had any rightful ground for using those goods. That was a conversion which primâ facie gives a cause of action to these plaintiffs in this case.

The plaintiffs here were three—Græser, Ltd., the owner of the goods; the Lancashire and Yorkshire Rail. Co., who were the original carriers; and the London and North-Western Co., who completed the carriage from some junction between the Lancashire and Yorkshire and the North-Western Railway to Abergele. Those three parties were put into the plaint as plaintiffs in order to make sure that one or the other of them was entitled to recover for this conversion. There was but one conversion, and only one account for damages is recoverable by the three plaintiffs or by any one of them. It does not seem to me to be material to discuss or to consider at any length the question whether the cause of action at the time it was heard before the learned judge was in Græser, Ltd., or in the railway companies, for at that time the railway companies, who were carrying the goods as common carriers and were liable to Græser, Ltd., for having misdelivered their goods, had paid the amount of the claim, and the effect of that was to give the railway companies the right to maintain the action, not merely as bailees, but as having all the rights of Græser, Ltd., vested in them at that time. That, in my judgment, entitled the plaintiffs to recover in conversion against the defendant unless he can show that the railway companies were estopped from bringing this action by their conduct with regard to these goods when they arrived at Abergele. That is the point which has been very ably discussed by the defendants' counsel. But he has failed to convince me. He cited several authorities which I do not in the least question. It is in the application of those authorities to this case that he fails. He says that the cause—the proximate or real cause—of what the defendant did in taking this carbolic acid to his farm and using it was the conduct of the railway company's servants at Abergele station. What was that conduct? I agree with him when he says that the conduct of the railway company was negligent. No doubt, it was negligent, but that is not sufficient in order to create an estoppel. It must be such conduct on their part—such a representation intended to be acted upon—as would induce a reasonable person—a reasonable consignee—to act upon it and to convert the goods.

I do not think he has established in any degree that there was any such representation here. Both parties crave in aid or in excuse the existence of the war. No doubt, the war did operate more or less on both of them. The goods arrived at Abergele with a railway consignment note, saying that there were twenty-five casks of creosote, numbered 1 to 25, and that they were 5 tons in weight. The truck number was also given. I can find no evidence of any examination to see whether the truck ever did bear the number appearing on the railway invoice. I expect it did not, and for this reason. When I look at the railway invoice of the carbolic acid, I see that it was loaded into three trucks of different numbers, and the admission made at the hearing was that this truck which came to Abergele had been wrongfully labelled. Therefore, I suppose what happened was this, that instead of the label being put upon one of these three trucks to go to Ruabon, as it should have been, it was labelled to Abergele, so that one of the three carbolic acid trucks with fourteen drums of carbolic acid arrived at Abergele along with a railway invoice for twenty-five casks of creosote. The clerk who was there, instead of looking to see whether the truck corresponded with the invoice, just issued the advice note, "twenty-five casks, such-and-such a truck"—the same number on his invoice note—"Knottingley depot, waggon number, 35,425, number of packages twenty-five, species of goods, casks, weight 5 tons, to pay—Mr. MacNicoll."

The carter came with that and presented it. He was told: "There is the truck." He went down and examined the truck, and found, not twenty-five casks, but fourteen iron drums. Whereas the casks were 40-gallon casks, the drums were about 90-gallon iron drums. The defendant has to argue that the representation contained in that advice note, along with the representation: "There is your truck," and the invitation to the carter to go into the station office and sign a book—which he did—for twenty-five casks of creosote, was such a representation as would induce a reasonably careful man taking delivery to take away and convert to his own use the drums of carbolic acid.

I ask myself whether that can be so, and how the learned judge came to the conclusion, as he did, that there was no negligence. He said there was no negligence on the part of MacNicoll or his servants. I should have found great difficulty in dealing with that if I thought that he had directed himself properly to the question what these persons had to do in taking delivery. He seems to have thought that he had merely to see whether there was intentional wrong-doing. On the facts I should have thought that he was perfectly justified in finding there was no intentional wrong-doing. That was not the case at all. He had to ask himself whether the defendant's servants were induced by a representation of the railway company which they could as reasonable men act upon to convert this carbolic acid to their own use. I do not think he put that question to himself. Had he done so I am sure the learned judge would never have held as he did that there was no conversion. When a man goes to a railway station to take delivery of goods he is not entitled to say: "I will take anything you like to point out to me. I will ignore the fact that I have an invoice for these particular goods from my vendors." Here the consignor had sent twenty-five casks of creosote, 1,000 gallons, and he charged for the twenty-five casks on his invoice, and they were numbered one to twenty-five. No sane person with the knowledge that this was what the consignor of the goods had told him would have gone to that truck and said: "There are the twenty-five casks of creosote numbered one to twenty-five," when he could see, staring him in the face, fourteen iron drums of a very much greater content. I think it is impossible for any reasonable man to say that the carter was induced to believe that, by what the clerk or the porter said—namely: "There they are in that truck down there." It is not the conduct of a reasonable man induced by the representation made to him. It is said that both parties were perfectly careless in the matter. But that will not do. A person must act reasonably on a representation which is made and intended to be acted upon. Consequently, I take it that when these drums of carbolic acid were taken away and used at the farm it was conversion for which the defendant is liable, and in respect of which he cannot say the railway company are estopped from suing.

That leaves the simple question of the amount of damages, which does not appear to be in dispute; it is £82 7s. 2d. The only thing to be decided upon that is what arises upon the counterclaim. I think the plaintiffs are entitled to £2 10s. by way of counterclaim to cover the cost of a wasted journey and the reasonable expenses he would have been put to in communicating with the consignor. I think the appeal must be allowed and judgment entered for the plaintiffs for the amount claimed.

ATKIN, J.—I agree. The first question that arises is whether or not there was a conversion by the defendant. In dealing with that question the learned county court judge seems to have assumed that it was necessary to show something in the nature of what I might call a mens rea on the part of the defendant. He says you must have intention. He says there may be innocent conversion, but then he goes on to deal with the facts in this case and he says: "A man cannot be made liable in tort unless he is negligent," and that, in his opinion, the defendant was not guilty of negligence. It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, providing it is also established that there is an intention on the part of the defendant in so

doing to deny the owner's right or to assert a right which is inconsistent with the owner's right. But that intention is conclusively proved if the defendant has taken the goods as his own or used the goods as his own. Here there is no question but that the defendant did use the goods as his own. He poured them into his own tank or vat. The cases where the intention of the defendant becomes material are cases where the goods have come into the possession of somebody who acts as an agent or bailee, and where the dealing with the goods is a transfer of the custody from himself to somebody else, and where it may well be that the intention is not to exercise any right inconsistent with the right of the true owner. In those cases the question of intention becomes material. In a case where a man deals with goods as his own, no such question can arise.

So far, I think it is plain that the defendant in this case did convert the goods. But then it is said as against the railway company who are suing him for conversion: "It may be true that I have converted these goods as against the true owner, but you cannot be heard to say that these goods were not my goods because you have represented to me that they were, and I acted upon that representation. Therefore, you are estopped from claiming in conversion against me." It is hardly necessary to repeat what has been said so often—that estoppel is not a cause of action, but is merely one of the rules of evidence. The estoppel contended for here is based primarily upon the advice note which was sent by the railway company to the defendant in the circumstances with which my Lord has dealt. It is a consignment note dated May 2. It says:

> "The undermentioned goods consigned to you have arrived at the station. Please give instructions for their immediate removal as they remain here to your order and are now held by the company as warehousemen at owner's sole risk and subject to the company's charges. When you send for the goods please send this card duly endorsed."

Underneath there is this: "From Knottingley, number of waggon, twenty-five casks. weight 5 tons, particulars to follow, to pay." In the first place it is said that that is a representation that the goods which arrived in the waggon were the defendant's goods, and that, when he went to the station by his servants he believed that, in consequence of that representation, the goods which were in the waggon were the twenty-five casks referred to in the advice note. It appears to me that the defendant fails to establish facts which create an estoppel in his favour. The propositions as to estoppel have been read, but it is necessary to refer to them again. They were laid down in *Carr* v. *London and North-Western Rail. Co.* (1). So far as I am aware, no objection has ever been made to the statement of them by BRETT, J., in that case. He said (L.R. 10 C.P. at p. 317):

> "Another recognised proposition seems to be, that, if a man either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

The second proposition is merely a representation by conduct in the same way.

In my opinion it is impossible to suppose that the company by representing wrongfully that the twenty-five casks had arrived could have intended the person to whom that representation was made to act upon the belief that fourteen iron drums were twenty-five casks. It is a consequence which it seems to me is neither the natural nor the probable result of the representation made. In the cases where an estoppel has been found to exist, it will be found that the representation is made by a person who has a particular fact within his knowledge, which it would not be natural to expect the person to whom the representation is made to verify. In this case the statement by the railway company in the advice note is: "I have twenty-five casks of yours; come and look at them, and fetch them." If in fact the goods are not what they are stated to be, it is obvious that the man who

receives the advice note is in a position at once to form his own judgment about his own goods, and to decide whether they are his or not. Consequently it does not appear to me that it can be suggested that the railway company intended the defendant to act upon the belief that the iron drums were in fact twenty-five wooden casks.

The other proposition as to estoppel is the proposition which is stated later in the judgment of BRETT, J. It is to this effect (ibid. at p. 318):

> "There is yet another proposition as to estoppel. If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist."

It will be observed that in the actual statement of the formula or proposition the reference to intention is not expressed. But the proposition is extended by the same learned judge when he was Master of the Rolls and LORD ESHER in *Seton, Laing & Co.* v. *Lafone* (2). LORD ESHER said (19 Q.B.D. at p. 72):

> "It is not stated to be necessary by the terms of the proposition to which I have referred, and I do not think it is necessary, that the person making the statement should have intended the person to whom he made the statement to act in any particular way upon it."

But then he goes on to state what the questions are. First they are negligence, and then he says:

> "The next question is whether the statement was calculated to make him believe in a certain state of facts, and in consequence do what he did upon the strength of that belief. . . ."

Applying that test to this case it seems to me impossible to suppose that the statement that twenty-five casks have arrived is calculated to make the owner believe, when he has seen the actual goods, that the goods which have arrived, and which are not twenty-five casks, are twenty-five casks. Here it is plain that the defendant first of all sent up hauliers with the advice note to claim delivery of the twenty-five casks under the advice note. These men brought the advice note, and they were then shown the waggon. They themselves apparently could not unload. They asked the porter to have the waggon taken to a side warehouse and there they left it. A period of twenty-four hours elapsed; at any rate it was not until the next day that they went and unloaded the waggon, and it is impossible to say that two men, or four, or any number of men could unload a waggon and take out six large drums without knowing that the total number of drums altogether in that waggon was fourteen. But it does not stop there. Being mere hauliers they may be taken not to have known or not to have cared very much as to the property in these goods. But they took six of these drums to Mr. MacNicholl's own premises, and he actually has them. He knows and must have known that these six drums were not part of the consignment of casks. First of all they were drums and not casks; they were iron, not wood; they held eighty to ninety gallons instead of forty gallons; and they weighed half a ton instead of about a quarter of a ton. In those circumstances it seems to me impossible to say that the representation made by the railway company in the advice note was calculated to mislead the person who necessarily must see the goods before he acts upon the advice note. That, I think, is the second point of the case. Nor is the case to my mind advanced by relying upon any representation by the porter. The representation by the porter is a representation in reference to the advice note, and must be taken with it, and it appears to me that the same considerations apply to a representation by the porter. If he made any different representation I have the gravest doubt whether it can be properly suggested that a railway porter, in the position in which this

man was, had any authority to bind his company by a representation so as to create an estoppel against them.

My Lord reminds me that it was suggested that some further point arose in favour of the defendant to support the estoppel by reason of the fact that the defendant's servant or haulier signed a book as having received twenty-five casks. In my opinion, it is impossible that the signing of the book should carry the case any further than the actual advice note. Therefore, it appears to me there was no estoppel. If there was no estoppel I think the only question that could arise would be whether or not the plaintiffs or one of them could recover the full value of the goods. As far as that is concerned, I think it is quite plain that a bailee who has the right to the goods is entitled to claim in detinue and to recover the full value of the goods. The question of payment is a question between himself and his bailor. That is immaterial so far as the defendant is concerned. It appears to me to be possible that an estoppel insufficient to enable the defendant to say as against the plaintiff, "I have not converted," may yet operate so as to enable the defendant to say as against the plaintiff: "At any rate, you are estopped from saying that the goods are worth more than a particular sum," whatever it may be. I wish to guard myself against a suggestion that such an estoppel would not arise. But it is not necessary to consider that point in this case, because there was no representation at all as to the actual value of the goods. Therefore I think the defendant has committed a conversion, and I am of opinion that the true measure of damages, whether it be considered as a claim by a bailor—the true owner—or whether it be considered as a claim by the bailee, the railway company, is the true value of the goods, which is always the primâ facie measure of damages in a claim for conversion. As at present advised I should be inclined to think that the receipt by the true owner of a sum representing the value of the goods to him from the bailees on a contract of carriage would not prevent the bailor from recovering the true value. He might have to account for it to the bailees who had already paid it, but I think it unnecessary to consider that because it is plain that the bailees in any case would be entitled to recover the amount.

There was a further alternative claim put by the plaintiffs' counsel in respect of money paid. It is not necessary, I think, to deal at length with that because, in my judgment, the defendant is liable in conversion. As at present advised, however, I think the claim could not be supported upon that footing because it seems to me that the essence of a claim for money paid is that the plaintiff says: "I have paid the defendant's debt," and there must be something in the nature of a common liability between the plaintiff and the defendant. Here it seems to me that there would have been two independent wrongs, an act of conversion by the bailee and a separate act of conversion by the defendant; and either there was a common wrong, in which case there would be no contribution between joint tortfeasors, or there would be separate wrongs, in which case there would be no claim to be paid by the plaintiffs. The correct way of putting it, no doubt, would be to say, as my Lord reminds me, that in such a case as this there would be no request expressed or implied to the railway company to make a payment to the consignor.

The result is that the appeal must be allowed on the claim, and judgment entered for the plaintiffs on the claim with costs here and below, and that the judgment in the counterclaim must be reduced to the sum mentioned by my Lord—namely, £2 10s. with costs.

Appeal allowed.

Solicitors: *M. C. Tait*; *Porter, Amphlett & Co.*, Colwyn Bay.

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law.*]

WOODALL *v.* PEARL ASSURANCE CO., LTD.

[COURT OF APPEAL (Bankes, Warrington and Duke, L.JJ.), February 21, 25, 1919]

[Reported [1919] 1 K.B. 593; 88 L.J.K.B. 706; 120 L.T. 556; 83 J.P. 125; 63 Sol. Jo. 352; 24 Com. Cas. 237]

Insurance—Action by assured on policy—Defence—Arbitration clause—Allegation of false statement in proposal and breach of conditions of policy—Effect of repudiation of policy.

By condition 11 of an accident insurance policy: "If any question shall arise touching this policy or the liability of the company thereunder . . . the assured and all persons claiming through the assured may refer, and shall be bound, if the company so require, to refer, the same to arbitration . . . and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

Held: on its true construction, although under the condition the insurers might not require a dispute to be referred to arbitration, if they did demand arbitration, a reference was a condition precedent to any proceedings being taken by the assured on the policy.

Held, further: where, in contesting a claim by an assured under a policy containing such a clause as the above, the insurers repudiate the policy, on the ground, e.g., that the proposal contained untrue statements, and the assured brings an action on the policy, the insurers cannot in defence plead the arbitration clause, but where they merely dispute the claim and do not repudiate the policy that defence is open to them.

Jureidini v. *National British and Irish Millers' Insurance Co., Ltd.* (1), [1915] A.C. 499, distinguished.

Stebbing v. *Liverpool and London and Globe Insurance Co., Ltd.* (2), [1917] 2 K.B. 433, applied.

Notes. Applied: *Freshwater* v. *Western Australia Assurance Co., Ltd.*, [1932] All E.R.Rep. 791. Considered: *Stevens & Sons* v. *Timber and General Mutual Accident Insurance Association, Ltd.*, [1933] All E.R.Rep. 806. Approved: *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337. Referred to: *Macaura* v. *Northern Assurance Co., Ltd.*, [1925] A.C. 619.

As to arbitration clauses in policies, see 22 HALSBURY'S LAWS (3rd Edn.) 255-258; and for cases see 2 DIGEST (Repl.) 443, 444, and 29 DIGEST 54.

Cases referred to:

(1) *Jureidini* v. *National British and Irish Millers' Insurance Co., Ltd.*, [1915] A.C. 499; 84 L.J.K.B. 640; 112 L.T. 531; 31 T.L.R. 132; 59 Sol. Jo. 205, H.L.; 2 Digest (Repl.) 444, *161.*

(2) *Stebbing* v. *Liverpool and London and Globe Insurance Co., Ltd.*, [1917] 2 K.B. 433; 86 L.J.K.B. 1155; 117 L.T. 247; 33 T.L.R. 395, D.C.; 29 Digest 415, *3249.*

(3) *Scott* v. *Avery* (1856), 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest (Repl.) 465, *290.*

Also referred to in argument:

Anderson v. *Fitzgerald* (1853), 4 H.L.Cas. 484; 21 L.T.O.S. 245; 17 Jur. 995; 10 E.R. 551, H.L.; 29 Digest 354, *2859.*

Dawson v. *Fitzgerald* (1876), 1 Ex.D. 257; 45 L.J.Q.B. 893; 35 L.T. 220; 24 W.R. 773, C.A.; 2 Digest (Repl.) 475, *344.*

Johannesburg Municipal Council v. *Stewart & Co.*, 1909 S.C. (H.L.) 53; 47 Sc.L.R. 20; 2 S.L.T. 313, H.L.; 2 Digest (Repl.) 447, **124.*

Appeal by defendants from an order of SHEARMAN, J., at the trial of the action without a jury at Birmingham Assizes.

On June 22, 1911, William Woodall, the assured, filled in a proposal form for insurance against accident in which, in answer to the question what was his profession, occupation, business, or trade, he stated "haulier and contractor"; and, in answer to a further question whether he was a working master or workman, he stated "master, working." He signed the following declaration on the form:

> "I, the above-named, proposing to effect an insurance as above . . . do hereby declare that the answers given to the above questions are true; that I am in good health, and do ordinarily enjoy good health; that I am and have uniformly been of sober and temperate habits; that I am not about to engage in any hazardous undertaking, and that I have not withheld any material information; and I agree that this declaration shall be the basis of the contract to be made between me and the company whose policy, subject to the terms and conditions thereof, I agree to accept."

The policy, issued on June 26, 1911, by the defendant insurance company, recited that William Woodall,

> "haulier and contractor; master, working, caused to be delivered to the company . . . a proposal and declaration in writing . . . signed by or on behalf of the assured, dated the 22nd day of June, 1911, which proposal and declaration, warranted to be true, it is agreed shall be the basis of this contract between the assured and the company and be considered as incorporated herein, and any suppression, misrepresentation, or mis-statement of fact in such written proposal and declaration shall ipso facto render this policy null and void, and all premiums paid thereon shall be forfeited to the company."

It insured against death (inter alia) caused by accident in the sum of £500, with an increase of 5 per cent. for each complete and uninterrupted year of insurance up to the tenth year. The policy also provided that it was

> "a condition precedent to the recovery of any sum under this policy that the several conditions indorsed hereon be strictly observed."

By condition 8:

> "The policy may be renewed from year to year . . . but only upon condition that nothing has happened to increase the risk undertaken by the company. If such risk is increased, as, e.g., by the assured becoming intemperate or engaging in some other occupation or suffering from some physical defect or infirmity or otherwise howsoever, then, unless notice in writing of such increased risk is given to the company at its chief office and any extra premium that may be required paid and the policy endorsed with a notice of such increased risk under the hand of a managing director, the policy is void, and no claim can be made."

By condition 11:

> "If any question shall arise touching this policy or the liability of the company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith, then the assured and all persons claiming through the assured may refer, and shall be bound, if the company so require, to refer, the same to arbitration by one arbitrator to be agreed on or in default of agreement by two arbitrators and their umpire under the Arbitration Act, 1889, who alone shall deal with all questions, including costs . . . and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

The assured was in partnership with his father, and they owned a barge, three carts, and four horses. They did hauling both by water and by road. On Feb. 7, 1918, the assured, when passing through a lock, accidentally fell into the Birmingham Canal and was drowned. At the inquest the assured was described as a "boatman." The plaintiff, the widow and administratrix of the deceased man, claimed £625 under the policy. The defendants, who had had no notice of the

assured's death before the inquest, made inquiries, and a correspondence ensued, in the course of which the defendants stated that the deceased man was insured as a haulier and contractor, whereas he was following the occupation of a boatman at the time of his death, and no notice of change of occupation had been given to the defendants. On April 3, 1918, an interview took place between Mr. Clark, a solicitor representing the defendants, and the plaintiff's solicitor, at which Mr. Clark (according to his evidence, which SHEARMAN, J., accepted as correct) stated in substance that, if the deceased man was a boatman at the date of the policy, the statement that he was a haulier and contractor was a mis-statement of fact, and that the policy was void; that if he had changed his occupation he ought to have given notice to the company as required by condition 8, and the policy was, therefore, void; and that the company required arbitration under condition 11. Mr. Clark before the interview had made the following note for his guidance at the interview, which was produced at the trial: "Policy void by misdescription; mis-statement of material facts. Alternatively, void from change of occupation. In any event, require arbitration under cl. 11." There was further correspondence in which the defendants required the dispute to be referred to arbitration. The defendants entered a conditional appearance to the writ without prejudice to an application to set aside the writ, and the defendants thereupon took out a summons to dismiss the action on the ground that by reason of the arbitration clause in the policy there was no cause of action. The judge, affirming the order of the master, dismissed the application upon the ground that, in view of the decision in *Jureidini* v. *National British and Irish Millers' Insurance Co., Ltd.* (1), the question was not one to be dealt with under the summary procedure of the court. The action thereupon proceeded.

By their defence the defendants said (inter alia) that the claim made by the plaintiff was required by the terms of condition 11 of the policy to be referred to arbitration. The plaintiff had been requested by the company to proceed to arbitration as provided by the said condition, and the defendants would contend that on the true construction of the said condition the obtaining of an award was a condition precedent to any cause of action arising, and that the claim made was not maintainable. Further, that the deceased was not at the date of his death a "haulier and contractor; master, working"; that notice had not been given as required by condition 1; that the risk insured against was increased by the deceased engaging in an occupation other than that named in the proposal and policy—viz., by engaging in the occupation of a boatman—and that his death was thereby caused; and the defendants would in any event contend that for the reasons aforesaid they were in no way liable. By her reply the plaintiff said, in substance, that the defendants by a letter of Feb. 12, 1918, and by their defence contended that the said policy was null and void, and had repudiated the contract contained in the policy, and the defendants were estopped from relying upon condition 11 as a defence to the action, and could not be heard to say that the obtaining of an award pursuant to condition 11 was a condition precedent to any cause of action arising. SHEARMAN, J., held that the assured had not mis-stated the nature of his occupation, and that he had not altered his occupation since the date of the policy. He held, further, on the ground that he was bound by the decision in *Jureidini's Case* (1) that an award under arbitration was not a condition precedent to bringing the action. The defendants appealed.

Vachell, K.C., and *Shakespeare* for the defendants.
Disturnal, K.C., and *E. W. Cave* for the plaintiff.

BANKES, L.J.—This is an action brought by a widow, as administratrix of her deceased husband, claiming the amount which, she says, is due under a policy of assurance which her late husband took out with the defendants, Pearl Assurance Co., Ltd.

Junior counsel for the insurers contended that his clients were right on the merits of the case; and it is necessary, therefore, to say a word in reference to his

contentions. He contended that the deceased man had misdescribed his occupation, and, further, that, even if the original description of his occupation was correct, he had changed his occupation during the period covered by the policy, and that, on one or other or both of those grounds, the insurance company were entitled to escape liability. I am glad to say that I feel quite unable to accept any one of these contentions on the merits, because I think, if they were to succeed, the effect would be to turn policies of this class (which ought to be, and I hope are intended to be, a simple means of persons securing protection for themselves or their families in the event of accident) into mere traps to catch the unwary. Looking at this matter as impartially as I can, it seems to me that there is not a shadow of foundation for suggesting that there was anything in the nature of misrepresentation of this man's occupation at all, or any ground for suggesting that the company were not perfectly well aware of what the real condition of things was.

I pass now to what, no doubt, from the point of view of the insurance company, is an important question, and that is, whether they are entitled, as a defence to this action, to say that the plaintiff has no cause of action at all unless the dispute between herself and the company is first dealt with by an arbitrator and an award given. That raises two questions: (i) as to the proper construction of the policy; and (ii) on the point which has been dealt with by SHEARMAN, J., whether this case is on all fours, as he describes it, with *Jureidini* v. *National British and Irish Millers' Insurance Co., Ltd.* (1) in the House of Lords.

The question as to the construction of the policy is whether, under condition 11, the language is such as to give the same effect to this clause as was given to the clause in *Scott* v. *Avery* (3), or whether the clause is merely one in which the parties had agreed to go to arbitration, without more, in which case it would be discretionary in the court to stay any proceedings, and the fact that an action was brought would not entitle the insurance company to set up as a defence that the plaintiff had no cause of action. The clause is expressed in somewhat unusual terms. Counsel for the insurers contended that the clause was in substance the same, or ought to have the same effect given to it as was given to the clause in *Scott* v. *Avery* (3). The plaintiff, on the other hand, contended that that was not the true construction. The view I take of the clause is that, assuming the company claimed arbitration, they were not only entitled to require the other party to go to arbitration, but the clause does in terms provide that the other party shall have no cause of action except for the sum awarded under such arbitration. It is quite true that the earlier part of the clause has reference to the case where the assured may claim arbitration. That is not material to consider for the present purpose, because, in the present case, the insurance company did claim arbitration; but counsel for the plaintiff says that, even in a case where the insurance company claim arbitration, the provision in the clause is that the arbitration shall be to one arbitrator to be agreed on, or, in default of agreement, to two arbitrators and their umpire, under the Arbitration Act, 1889, and he says that those words referring to the Arbitration Act incorporate all the provisions of the Act, including s. 4, which gives the discretionary power of the court to stay proceedings, and that those words referring to the Arbitration Act ought to have such weight given to them as to prevent the latter words in the condition being read as constituting a clause equivalent to the clause in *Scott* v. *Avery* (3). I cannot take that view. In my opinion, the closing words of this condition are so plain and distinct that I think it is impossible to put that construction upon them, and that the condition must be read as providing that, in the event of the insurance company requiring arbitration, the award of the arbitrator shall be a condition precedent to any right of action in the assured. So much for the construction of the policy.

The next question is whether the learned judge was correct in his view that the case was governed by *Jureidini's Case* (1). I am not able to agree with the view which he took on that point. This part of the case, in my opinion, turns entirely upon what is the true view of the attitude of the company, taken up by their

representative, Mr. Clark, before the action was commenced. In considering this part of the case I think it very necessary to draw a clear and sharp distinction between two separate classes of case. There is the case where a person or an insurance company is repudiating a contract in the sense that it is disputing the existence of any binding contract at all. That is one class of case, and that was *Jureidini's Case* (1). The other class of case is where a person or an insurance company is repudiating any liability under a contract, but accepting the existence of the contract as a binding contract. That is the second class of case; and that is the case of which an instance may be found in *Stebbing* v. *Liverpool and London and Globe Insurance Co., Ltd.* (2).

Into which class does the present case fall? Was Mr. Clark (because he is the important person to consider from this point of view) at his interview with the plaintiff's solicitor repudiating the policy, in the sense that he was disputing the existence of any binding contract by the insurance company at all, or was he admitting the existence of the policy and disputing any liability under it upon a matter which was in dispute between the parties, and going further and saying: "There being this matter in dispute between the parties, I claim under the contract to exercise a right which is given by the contract—namely, the right to compel you to go to arbitration." The learned judge has taken the view that Mr. Clark was repudiating the contract in the sense of disputing the existence of any binding contract at all. I am not able to take that view. The conclusion at which I arrive is that the company never did repudiate the contract in the first of the two senses which I have indicated, but their position was consistently throughout the position of a company disputing that the assured had correctly described himself, but insisting upon arbitration in order that that fact might be adjudicated upon, and no doubt also indicating that, assuming the adjudication to be in their favour, the policy would be avoided. On those grounds, therefore, I am not able to take the same view as to the position of the company as was taken by SHEARMAN, J.

The next question is, how, under those circumstances, is the case affected by the two decisions to which our attention has been so closely drawn? The one is *Jureidini's Case* (1), which, I think, is a very good illustration of the first of the two classes of case to which I have referred, and which indicates the position of the parties where the existence of any binding contract is repudiated. The other is *Stebbing's Case* (2), and is a very good illustration of the other class of case, where it is a question of repudiating liability, but not repudiating the existence of a contract. In *Jureidini's Case* (1) it is material to note what the policy provided in reference to arbitration and in reference to any misdescription rendering the policy void. Clause 12 referred to a number of matters, one of which was the case of a false declaration having been made and used in support of the claim, and it provided that, in the event of the happening of any of those matters, all benefits under the policy should be forfeited. The arbitration clause provided for arbitration as to the amount of any loss or damage, and was confined to the ascertaining of the amount of loss or damage if the dispute between the parties was as to loss or damage only. What happened there was that the insurance company claimed that the policy had been forfeited. There was no dispute as to liability; they claimed boldly that the policy had been forfeited and that there was consequently no existing binding contract between the parties. Those being the circumstances, the matter proceeded, and the insurance company set up that the plaintiff had no right of action. That was the question which had to be decided and which was ultimately decided in the House of Lords. The opinions of the Law Lords do not, I think, proceed upon quite the same grounds, but the fact is made perfectly plain that the decision proceeds upon the ground that the dispute between the parties was not a matter which came within the arbitration clause at all, but that the position of the insurance company had been the position of a person who was repudiating his contract in the fullest sense and asserting that the policy had been forfeited. I do not think I need refer to the passages which have been so often

read, either from the opinion of LORD HALDANE or from that of LORD DUNEDIN or LORD ATKINSON.

I will refer to *Stebbing's Case* (2) as being a good example of the second class of case to which I have referred, and to the language which was used by LORD READING, C.J., as making that point clear. LORD READING says this ([1917] 2 K.B. at pp. 437, 438):

> "But the phrase 'avoiding the policy' is loosely used in reference to the circumstances of this case. In truth the company is relying upon a term of the policy which prevents the claimant recovering. . . . In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy."

Here, as I have said, the real dispute between these parties was, whether the deceased man did originally correctly describe himself, because, if he did not, by the terms, both of the proposal and of the policy itself, the policy would be avoided; and, secondly, whether, assuming he correctly described himself, he had afterwards changed his occupation, in which case, by condition 8 of the policy, the policy would be void and no claim could be made. That being the dispute between the parties, there is an arbitration clause which provides that: "If any question shall arise touching this policy or the liability of the company thereunder . . . then the assured and all persons claiming through the assured . . . shall be bound, if the company so require, to refer the same to arbitration . . . and no person shall be entitled "to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration." In my opinion, therefore, the company were right in their contention that in this particular case, having regard to the attitude which they took up and to the terms of the policy and the arbitration clause, they were entitled to say that this was a case which fell within the principle of *Scott* v. *Avery* (3), and that the plaintiff had no right of action unless and until the amount due to her was ascertained by arbitration.

In those circumstances, what is the right course to take? The defendants have partly succeeded and partly failed in their appeal. The appeal must be allowed, but, we think, under the circumstances, without costs. Then the question is with regard to the costs of the trial. The defendants partly failed and ought to have succeeded to a certain but unmeritorious extent, and they must have judgment with such costs as they are entitled to, but the plaintiff will have the costs of all the issues upon which she has succeeded in the courts below.

WARRINGTON, L.J.—I agree. This was an action upon a policy of accident insurance. To the plaintiff's claim the insurance company raised two defences: (i) that they were not liable under this policy because either the assured had in his proposal for the policy mis-stated the nature of his occupation, or that he had altered his occupation since the date of the policy without informing the company of that fact, or that he had been guilty of both those things; (ii) that by the terms of the policy it was a condition precedent to any action upon it that no person should be entitled to bring any action on the policy except for the sum awarded under an arbitration provided for by the policy, and that that arbitration had never taken place.

With regard to the first defence, which raised a question purely of fact, the learned judge found in favour of the plaintiff and negatived the defence. With those findings I heartily agree. I think he was perfectly right, and that if any other conclusion had been arrived at it would have been most lamentable, because to have given effect to the kind of contentions which have been raised here would, in my judgment, render these accident policies mere traps for unwary people, to whom their attractions are mostly addressed.

The second defence is one of considerable importance, and one must examine it with greater particularity. The facts with regard to it are very simple. The

assured makes the usual proposal for an insurance with, at the foot of it, a declaration stating that that declaration is to be the basis of the contract between him and the company. That is followed by the policy. The policy refers to the proposal, states that the assured warrants it to be true, that it shall be the basis of the contract,

> "and be considered as incorporated herein, and any suppression, misrepresentation, or mis-statement of fact in such written proposal and declaration shall, ipso facto, render this policy null and void, and all premiums paid hereon shall be forfeited to the company."

Then there is contained in the policy an arbitration clause:

> "If any question shall arise touching this policy or the liability of the company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith, then the assured and all persons claiming through the assured may refer and shall be bound, if the company shall so require, to refer the same to arbitration . . . under the Arbitration Act, 1889 . . . and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

The first question that arises on that is: What is the true construction of that clause as to arbitration? Arbitration clauses fall, speaking generally, under two classes. One is that in which the provision for arbitration is a mere matter of procedure with nothing in it to exclude a right of action on the contract itself, but leaving it to the party against whom such an action may be brought, if he desires, to appeal to the discretionary power of the court to stay proceedings in the courts in order that the parties may resort to that procedure which they have adopted. The other class is where the arbitration and its result is a condition precedent to any proceedings being taken at all, the proceedings being then, strictly speaking, not upon the original contract, but upon the award made by the arbitrator under the arbitration clause. Of this second class the leading example is the clause which was dealt with in *Scott* v. *Avery* (3). The question is: Is this clause one in which the provision as to arbitration is a provision merely as to a course of procedure which had been adopted for ascertaining the rights of the parties, or one in which the right to bring an action depends upon the result of the arbitration, as in *Scott* v. *Avery* (3)? In my opinion, it falls under the latter head. It is perfectly true that the insurers might, if they please, not insist upon this provision; they might allow an action to proceed without raising this particular defence. I do not think it much matters whether in that case the action proceeds by virtue of the new agreement arrived at between the parties by this waiving of the arbitration clause, or whether the action is founded on the original agreement; but when one of the persons concerned (as in this case) insists upon the arbitration clause, then it seems to me quite plain that arbitration is not a mere matter of procedure, but that the proceeding to arbitration is essential to a right of action in the assured.

If that is the true construction, there arises a further question: Is this a case in which the defendants have elected to avoid the contract altogether with everything contained in it, so as to preclude them from insisting upon the arbitration clause? That depends very much on the true inference to be drawn from the statement made by Mr. Clark, who represented the defendants, at an interview which he had with the plaintiff's country solicitor: Did he repudiate the contract altogether, or did he merely deny that the company were liable to pay the assured, but at the same time, coupled with that denial, insist on the other term of the contract—namely, the right to have their differences settled by arbitration? When one looks at Mr. Clark's evidence, which was accepted by the learned judge, I think the proper inference to be drawn from that is that he took the latter course; that he never did anything to repudiate the contract as a whole; that all that he did was to insist that there was not in fact any liability on the part of the insurance

company, but at the same time (as he put it in his evidence) in any event the question would have to be referred to arbitration.

In those circumstances it seems to me that, with all respect, the judgment of the learned judge on this point was wrong. It was said that he was bound to come to the decision that he did (in fact, he said so himself) because of the decision in *Jureidini's Case* (1). But, in my opinion, *Jureidini's Case* (1) was quite different. In the first place, there was total repudiation in *Jureidini's Case* (1); in the second place, the arbitration clause in *Jureidini's Case* (1) did not extend to questions affecting liability under the policy; it only extended to differences as to the amount payable under it. The consequence is that, if the contention of the insurance company in that case had prevailed, there would have been no means at all of deciding the question as to the liability or non-liability of the insurance company by reason of the facts which they alleged. According to them it could not have been decided by the courts, and, by the terms of the arbitration clause, it could not have been decided by arbitration. That difficulty was pointed out by LORD ATKINSON, and also by LORD PARMOOR, and I think the same difficulty occurred to LORD DUNEDIN, as appears from the passages from his judgment which have been read to us. It seems to me that the learned judge was not, and we are not, bound to decide this case by reason of the decision in *Jureidini's Case* (1), inasmuch as the two cases are distinguishable. The present case is much more like *Stebbing's Case* (2), in which it was held that what the insurance company were doing was not to repudiate the contract altogether, but to deny liability by virtue of some provision in the contract itself, and at the same time to insist upon having the question whether there was that liability or not decided by arbitration.

DUKE, L.J.—With regard to the merits of this dispute—that is, the substantial question arising as to liability at the death of the assured—I agree entirely with the conclusion of SHEARMAN, J., and I agree entirely with all the observations made by the other members of this court as to the effect of SHEARMAN, J.'s decision, and, as to the position in which the plaintiff and other insured persons would be put if another conclusion could be arrived at on facts such as exist in this case.

With regard to the matters of law upon which the decision of the court proceeds here, I have very little to add to the judgments delivered. In my opinion, the arbitration clause in this policy does set up a condition precedent to the maintenance of an action, and I think it is none the less a condition precedent that the making it a condition precedent is at the will of the insuring company. In the event that the insurers shall so decide—that is, in the event that the insurers shall require arbitration as the mode of the decision of the dispute—no action can be brought in respect of the matter involved in that dispute except upon the award of the arbitrator. That construction of the arbitration clause seems to me to bring the case within the very words of the opinion which was pronounced by LORD CAMPBELL in *Scott* v. *Avery* (3), in delivering what I think has usually been regarded as the leading judgment, from which the effect of the decision in *Scott* v. *Avery* (3) is derived. LORD CAMPBELL said that:

> "I think that the contract [of insurance of a ship] between the shipowner and the underwriters in this case is as clear as the English language could make it, that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties."

LORD CAMPBELL goes on to say that the condition precedent there relates as much to the decision of questions of liability as to the decision of questions of amount; and among the questions of liability which he enumerates as covered by the arbitration clause in that case was a condition which would have avoided the policy—namely, the question of want of seaworthiness. I, therefore, hold that the arbitration clause in this case sets up a condition precedent to the maintenance of an action and brings this case within *Scott* v. *Avery* (3).

The judgment below in this case proceeded upon the view that there had been a repudiation of the contract by the defendants. If I agreed in that view I should agree in the conclusion which follows from it. Accepting Mr. Clark's evidence, as the learned judge accepted it, I do not see my way to arrive at any other view than that the course which Mr. Clark took was to insist that the matter between the plaintiff and the defendants was a matter which must be decided by means of an arbitration, with the further declaration that the plaintiff would prove to have no claim upon the policy by reason that the policy was avoided upon grounds arising upon the terms of the policy itself. Mr. Clark founded himself upon the policy, and not upon either a repudiation or a disclaimer of the existence of the policy. As was pointed out by LORD READING, C.J., in *Stebbing's Case* (2), the material question upon this matter of repudiation is whether what is alleged by the defendants is something which gives the go-by to the contract, which arises outside the contract and exists independently of the contract and avoids the contract by its own force, or whether it is some ground of defence against the claim which arises from the contract itself. In this case the ground on which it was said the plaintiff had no claim was spelt out of the very language of the contract. I think Mr. Clark insisted upon that, and I think the defendants have always insisted upon that, and, taking that view of the matter, it seems to me that *Jureidini's Case* (1), which depended, in my view of it, entirely upon the repudiation of the contract by the defendants in that case, has no application in this dispute. I agree, therefore, that the defendants are right with regard to the question of the arbitration clause as a condition precedent, and that for that reason they must have judgment in the action.

Appeal allowed.

Solicitors: *J. M. Storer*; *Wellington Taylor*, for *Homer & Son*, Brierley Hill.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

NEW ZEALAND SHIPPING CO., LTD. *v.* SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE

[HOUSE OF LORDS (Lord Finlay, L.C., Lord Atkinson, Lord Shaw and Lord Wrenbury), March 19, 21, 25, April 25, 1918]

[Reported [1919] A.C. 1; 87 L.J.K.B. 746; 118 L.T. 731; 34 T.L.R. 400; 62 Sol. Jo. 519; 14 Asp.M.L.C. 291]

Contract—Avoidance—Avoidance on happening of specific event—Event beyond control of party asserting avoidance.

By a contract dated Mar. 6, 1913, the respondents undertook to build a steamship for the appellants. By cl. 5: "The said steamer, unless the construction thereof shall be delayed by fire, strike, or lock-out of workmen, or any other unpreventable cause . . . shall be completed ready for trial by Oct. 30, 1914." By agreement the date of completion was subsequently extended to Jan. 30, 1915. By cl. 12: "In case the builders become bankrupt or insolvent, or shall fail or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon this contract shall become void, and all moneys paid by the purchasers shall be repaid to them with interest. . . . Except only in the event of France becoming engaged in a European war, when the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in

all." The vessel was in course of construction on Aug. 2, 1914, when France became engaged in war with Germany. In an arbitration the appellants contended that the contract did not become void at the expiration of 18 months from that date, but was voidable at their option and they were entitled to require the respondents to perform it or pay damages for its breach.

Held: the stipulation as to the contract becoming void in the events mentioned in cl. 12 was a stipulation in favour of both parties, subject to the rule that the person seeking to treat the contract as void should not have himself brought about the event giving rise to the avoidance; the failure to fulfil the contract was not due to any default by the respondents, but was due to a cause beyond their control; and, therefore, the contentions of the appellants must fail.

Decision of the Court of Appeal, [1917] 2 K.B. 717, affirmed.

Notes. Considered: *Re Meyrick's Settlement*, *Meyrick* v. *Meyrick*, [1921] 1 Ch. 311. Referred to: *Re Suarez*, *Suarez* v. *Suarez*, [1918] 1 Ch. 176; *Lebeaupin* v. *Crispin*, [1920] All E.R.Rep. 353; *Quesnel Forks Gold Mining Co.* v. *Ward*, [1920] A.C. 222; *Cohen* v. *Sellar*, [1926] All E.R.Rep. 312; *Davis Contractors, Ltd.* v. *Fareham U.D.C.*, [1955] 1 All E.R. 275.

As to termination of contracts, see 8 HALSBURY'S LAWS (3rd Edn) 155–160, and cases there cited.

Cases referred to:

(1) *Roberts* v. *Wyatt* (1810), 2 Taunt. 268; 127 E.R. 1080; 40 Digest (Repl.) 90, *683.*

(2) *Rede* v. *Farr* (1817), 6 M. & S. 121; 105 E.R. 1188; sub nom. *Reid* v. *Parsons*, 2 Chit. 247; 31 Digest (Repl.) 524, *6470.*

(3) *Doe d. Bryan* v. *Bancks* (1821), 4 B. & Ald. 401; 106 E.R. 984; 31 Digest (Repl.) 524, *6471.*

(4) *Hughes* v. *Palmer* (1865), 19 C.B.N.S. 393; 34 L.J.C.P. 279; 12 L.T. 635; 11 Jur.N.S. 876; 13 W.R. 974; 144 E.R. 839; 5 Digest (Repl.) 1272, *10203.*

Appeal by the New Zealand Shipping Co., Ltd., the claimants in an arbitration, from an order of the Court of Appeal, reported [1917] 2 K.B. 717, affirming the decision of BAILHACHE, J., by which certain questions submitted for the opinion of the court in an award in the form of a Special Case were answered in favour of the respondents.

Leck, *K.C.*, and *Simey* for the appellants.

Douglas Hogg, *K.C.*, *Barrington-Ward*, and *Captain Jacques Quartier*, *E.M.A.*, French army, for the respondents.

The House took time for consideration.

Apr. 25, 1918. The following opinions were read.

LORD FINLAY, L.C.—This is an appeal from the decision of BAILHACHE, J., upon an award stated in the form of a Special Case for the opinion of the court. The appellants agreed to purchase from the respondents a steamship to be constructed for them by the respondents on the terms of a contract dated Mar. 6, 1913. The price was to be £98,450, payable by instalments. The clauses material for the purpose of this appeal are set out in the Special Case, and are as follows:

"5. The said steamer, unless the construction thereof shall be delayed by fire, strike, or lock-out of workmen, or any other unpreventable cause beyond the control of the builders (in which case a fair proportionate extension of time shall be allowed), shall be completed ready for trial by Oct. 30, 1914, and delivered afloat as usual in the port of Dunkirk free of dock and other dues as soon as such trial has been completed to the satisfaction of the purchasers or their representatives. . . . 7. In the event of the said vessel not being completed and ready for trial on or before Oct. 30, 1914 . . . the builders undertake to pay the purchasers as liquidated damages the sum of £10 per working day

for each working day during which such delivery may be delayed beyond Oct. 30, 1914, unless such delay is due to any of the causes specified in cl. 5 hereof. . . . 12. In case the builders become bankrupt or insolvent, or shall fail or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon this contract shall become void, and all moneys paid by the purchasers shall be repaid to them with interest accrued thereupon at 5 per cent., and that without it being necessary for the purchasers to take any legal action for the recovery of this money. The builders will hand to the purchasers the guarantee of a bank, who will undertake to repay this money in the event of its becoming due, as stated above. Except only in the event of France becoming engaged in a European war, when the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all."

The date Jan. 30, 1915, was subsequently substituted in the contract for Oct. 30, 1914, as the date by which the vessel was to be completed ready for trial. The vessel was in course of construction when on Aug. 2, 1914, France became engaged in the present European war. It is found as a fact in the Special Case that the builders were prevented by unpreventable causes beyond their control within the meaning of cl. 5 from completing the vessel ready for trial by Jan. 30, 1915, and had ever since been prevented by the same causes.

It was contended by the respondents (the builders) that the eighteen months mentioned in cl. 12 began to run on Jan. 30, 1915, and, therefore, expired on July 30, 1916, while the appellants (the building owners) contended that the eighteen months would not begin to run until the builders were in default on the expiry of the extension of time allowed by cl. 5 in case of delay caused by unpreventable causes. It was further contended by the respondents that in the events which have happened the contract became void on July 30, 1916, while the appellants contended that on the true construction of cl. 12 it was voidable at their option only. The umpire decided by his award that the eighteen months expired on July 30, 1916, and that the builders, in the events which have happened, are entitled to treat the contract as null and void. The questions for the opinion of the court are whether his decision on these two points was right. Bailhache, J., held that the umpire was right upon both points, and the Court of Appeal took the same view. I agree with the courts below in thinking that the umpire was right on both points.

The first point appears to me to be very clear. The words, "the date agreed by this contract," in cl. 12 (or as in the French version, "la date de livraison fixée par ce contrat"), denote in my opinion Jan. 30, 1915. That is the only date specified for completion in the contract. It is true that an extension of time beyond that date is provided for by cl. 5 in the case of delay due to fire, strikes, or lock-outs of workmen, or any other unpreventable cause beyond the control of the builders, in which case a fair proportionate extension of time was to be allowed. But neither in the English nor in the French version do the words of cl. 12 appear to be apt to denote the expiration of the extension to be allowed in respect of such unavoidable delay. Clause 5 fixes no date for the expiry of the extension, but provides that the extension is to end when the cause of delay ceases to operate. The date mentioned in cl. 12 as that for which the eight months or eighteen months were to run is obviously that specified in cl. 5, namely, Jan. 30, 1915.

Upon the second point I also agree with the umpire and with the courts below. It appears from the facts found on the Special Case that the builder was in no degree responsible for the delay which took place in completion, and that it was due entirely to causes beyond his control covered by cl. 5 in the contract. Under these circumstances I think that the builder is entitled to say that under cl. 12 the contract became void when the eighteen months expired. Clause 12 deals with four different cases: (a) bankruptcy of the builder; (b) insolvency of the builder; (c) failure of the builder to deliver; (d) inability of the builder to deliver. It seems to

me clear that the builder could not claim that the contract was void in consequence of his own bankruptcy or insolvency, as for this he would be, as between himself and the building owners, responsible, even if the bankruptcy or insolvency were entirely due to unavoidable misfortune. Nor could the builder claim to treat the contract as void in case of his failure to deliver (the word used in the French version is "refus"), and a breach of contract, whether by actual refusal or omission to perform, cannot confer any right upon the person in default. The fourth case provided for inability (in the French the word used is "impossibilité"), and might be due to failure on the part of the builder to proceed with the construction with due diligence, in which case the builder could not claim release from the contract under this clause. On the other hand, the inability may have been the result of causes beyond the control of the builder, for which he is not, under the terms of the contract, to be held liable.

It is a principle of law that no one can in such case take advantage of the existence of a state of things which he himself produced. This is illustrated by *Roberts* v. *Wyatt* (1). There the plaintiff had purchased an estate and it was provided in the contract that the vendor should make out a good title, and on or before Dec. 21, 1808, on receiving from the plaintiff the purchase-money, execute a legal conveyance of the fee simple. There was a proviso that (2 Taunt. at p. 268)

> "in case the vendors could not deduce a good and marketable title such as the purchaser or his counsel should approve or if the purchaser should not pay the purchase money on the appointed day, the agreement should be entirely void."

An abstract was sent to the plaintiff by the defendant, who was the vendor's solicitor. The abstract was sent back to the defendant for the purpose of having the title cleared up. The defendant said that the objections to the title could not be met and refused to return the abstract, claiming that the contract was void under the proviso. Sir James Mansfield, C.J., in the course of his judgment said (ibid. at p. 276):

> "Something has been argued on the construction of the proviso that in case the vendor could not make a title, the contract should be void. But in order to adapt that defence to the present case, the argument must be, that if the defendant says he cannot answer the objections, it shall be absolutely void at the choice of either party. But that is not so; the meaning is, that if the seller cannot make a good title by the time mentioned, the contract shall be void as against him, and the plaintiff has a right to be off his bargain. So e contra if the plaintiff does not pay the money, the defendant may avoid the contract: but the plaintiff cannot say, I am not ready with my money, therefore I will avoid the contract; nor can the seller say, my title is not good, therefore, I shall be off. And the word is 'if they *cannot* make," so it must appear by sufficient proof, that they cannot make a title."

Lord Ellenborough in *Rede* v. *Farr* (2) applied the same principle to a case in which it was alleged that a lease became void by the failure of the lessee to pay the rent. I may quote the following sentences from his judgment (6 M. & S. at p. 124):

> "In this case, as to this proviso, it would be contrary to a universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease which in terms is a lease for twelve years should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void. On this principle, even if it were not borne out so strongly as it is by the current of authorities, it would be sufficient to hold that the lease was only void as against the lessee, not against the lessor. In Co. Litt. 206b, it is laid down:

'If a man make a feoffment in fee, upon condition that the feoffee shall re-infeoff him before such a day, and before the day the feoffor disseise the feoffee and hold him out by force until the day be past, the estate of the feoffee is absolute; for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. And so it is if A. be bound to B. that J.S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the means that the condition could never be performed. And this is regularly true in all cases.'

If that be a principle of law, that a party shall not take advantage of his own wrong, then a lessee shall not avail himself of his own act to vacate his lease."

If it has been the case here that the builder was (to use LORD COKE's language) "himself the means" that the vessel was not completed within the eighteen months, he could not claim that the contract had thereby become void. But, as the umpire had found, the non-completion was not in any way brought about by the builder, but was the result of causes for which under the contract he is not responsible. Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or non-performance of covenants by the lessee. It has always been held that the lessee could not take advantage of his own act or default to avoid the lease, and the expression generally employed has been that such proviso makes the lease voidable by the lessor, or void at the option of the lessor. The decisions on the point are uniform and are really illustrations of the very old principle laid down by LORD COKE, that a man shall not be allowed to take advantage of a condition which he himself brought about. In the present case the builder was in no way responsible for the non-completion within eighteen months, and there is no reason why cl. 12 should not be interpreted according to the natural meaning of the words so as to render the contract void. For these reasons I agree with the decision of the Court of Appeal and think that this appeal should be dismissed with costs.

LORD ATKINSON.—I cannot but think that the contest in this case is, upon the main point, very much a contest about names. It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the 30th day after the date of the contract, the contract should be void. Then if rain did fall on that date the contract would be put an end to by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings about that event, cannot be permitted either to insist upon the stipulation himself, or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a round-about way, but in either way putting an end to the contract. The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party it is said that the contract is voidable, but that is only another way of saying that the blameable party cannot have the contract made void himself, cannot force the other party to do so, and cannot deprive the latter of his right to do so. Of course the parties may expressly or impliedly stipulate that the contract shall be voidable at the

option of any party to it. I am not dealing with such a case as that. It may well be that the question whether the particular event upon the happening of which the contract is to be void was brought about by the act or omission of either party to it may involve a determination of a question of fact.

On the first point, I think that the words "date agreed to by the contract" in cl. 12 of the agreement meant originally for all practical purposes Oct. 30, 1914, and now, by the addition which has been made to the contract, means July 30, 1916, when the further eighteen months given for the completion of it expired. I do not think it can mean the termination of the further period allowed as a fair proportionate extension for completion under cl. 5 of the agreement. That is a quite indefinite period. The parties might disagree as to its duration, and, if so, the dispute would be a matter for arbitration within cl. 13 of the agreement, since it would be a dispute "touching the completion of the steamer" and the construction of the meaning of the contract. This delay might be very prolonged. Under cl. 12 several of the events, the happening of which are to render the contract void, are clearly events for which the builders are responsible or over which they have control—namely, the event of their bankruptcy, the event of their insolvency, or the event of their refusal (refus) to deliver the steamer. The event of their inability (impossibilité) to deliver her, might be the result of the neglect of the builders to commence to build her soon enough, or to keep a sufficient staff at work upon her. In such a case the event, the happening of which is to make the contract void, would be brought about by their act or omission, and they could not avail themselves of it. But the umpire has found as a fact that the builders were prevented by unavoidable causes beyond their control from completing the vessel ready for trial on Jan. 30, 1915. The two parties, therefore, are equally blameless. By the act or omission of neither was the event brought about on the happening of which the contract was to become void. The principle that a man shall not take advantage of his own wrong does not apply, and the contract becomes null and void absolutely as its words in their natural meaning provide that it should. In my opinion, the order appealed from was right and this appeal should be dismissed with costs here and below.

LORD SHAW.—By contract and supplementary agreement of parties the respondents undertook to build a steamship for the appellants and to have her ready for trial by Jan. 30, 1915. By cl. 5 of the contract it was agreed that if the stipulation as to time for completion could not be complied with, by reason of causes beyond the control of the builders, the time should be extended in proportion to the delay so caused. By cl. 12 of the contract it was provided as follows:

> "In case the builders become bankrupt or insolvent, or shall fail or be unable to deliver the steamer [these words in the French version are ou de leur refus ou impossibilité delivrer le vapeur] within eight months from the date agreed by this contract, thereupon this contract shall become void, and all money paid by the purchasers shall be repaid to them with interest."

In this clause the following interpolation was inserted:

> "Except only [in the French version cependant] in the event of France becoming engaged in a European war, when the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all."

As to the running of time under these clauses it appears to me to be clear that both the eight months and the eighteen months ran from a fixed point—namely, Jan. 30, 1915. And I am further of opinion that, with reference to the extended period of eighteen months, the contract has definitely stated that period as the maximum of prolongation.

By reason, however, of the outbreak of the European war the building of the ship has been still further delayed, and the ship is still incomplete. A state of affairs has accordingly arisen for which neither party is responsible, and which

is covered by cl. 12 of the contract which provides: "Thereupon this contract shall become void." The learned arbitrator decided "that the builders in the events which have happened are entitled to treat the contract as null and void (except for the repayment with interest of 5 per cent. of all moneys already paid to the builders by the purchasers"). In my opinion, this judgment was right and has been properly upheld by the courts below. The attack upon these judgments was centred upon this, that the terms employed—namely, that the contract "shall become void"—must be taken to mean only that the contract was voidable at the instance of the building owner. According to the agreement that owner might say: "Although the stipulated time for delivery is and may be long exceeded, I am willing to suffer the delay, and I do not choose to found upon the stipulation; accordingly you, the builder, must, along with us, remain bound so long as I choose." The answer to the whole of this is clearly put by BAILHACHE, J., that the stipulation as to the contract becoming "void" is a stipulation in favour of both parties. This is subject only to this, that the party treating the contract as void shall not himself have brought about the event which gives rise to the condition. What I have ventured last to express appears to me to be sound in principle and to be a better and broader expression of the principle than a reference to either a party's own wrong or a party's own default. For without either definite wrong or default the action or even the situation of one of the parties may be sufficient to produce the condition. I prefer more than any other as an expression of the principle that which occurs in COKE UPON LITTLETON, 206b, and is quoted with approval by LORD ELLENBOROUGH in *Rede* v. *Farr* (2) "for that he himself is the means that the condition could never be performed." As to authority, I refer in particular to LORD ELLENBOROUGH'S judgment in *Rede* v. *Farr* (2), to *Doe d. Bryan* v. *Bancks* (3), and to *Hughes* v. *Palmer* (4).

When a contract describes an event or events which may happen, and declares that on the occurrence of any of these the contract shall become void, the results may be tabulated thus: (i) Such a contract is voidable, as said, at the instance of that party who has not by his own wrong or default brought about the event, or in COKE'S words has not been the mean that the condition could not be performed. (ii) Therefore, such a contract is voidable by (a) sometimes one party, for instance, a builder who has not been able to proceed on account of the default of the building owner say by failure to pay the stipulated instalments of price, and (b) sometimes by the other party, for instance the building owner, where the bankruptcy of the builder has prevented timeous completion or delivery. (iii) Such contracts are voidable by both or either when the impossibility to complete or deliver was something for which neither was responsible. Each party is innocent, neither is in default: the conduct of neither has brought about the event. In such a case the contract is interpreted with even and equal justice to both sides; and the law does not allow one party only to avoid while the other is held bound. If both parties go on, that is another and their own affair. But either can claim that the contract is void and then both are free. In my opinion, such an overruling and equally applicable case was brought about by the present European war, an event by reason of which the respondents are entitled to treat this ship-building contract as void. I agree that the appeal should be disallowed.

LORD WRENBURY.—Clause 5 of this contract provides that the steamer shall be completed for trial by a calendar date (which as varied is Jan. 30, 1915) "unless" something happens which has happened. In the event, therefore, that calendar date is not fixed for completion. The clause goes on to provide that in the event named "a fair proportionate extension of time shall be allowed." It is not provided in express terms that—but upon a true construction I think it results that—in the event the completion is to be achieved by the expiration of that extended time. The question, then, is as to the meaning of cl. 12. That clause is not artistic. There is, in fact, no date for delivery fixed by the contract. The calendar date is a date for completion: delivery is to follow. But nothing really turns upon this

A difference. By calendar date I subsequently mean the date after the calendar date when having regard to cl. 5 delivery is to be made.

The appellant says that "the date agreed by this contract" in cl. 12 is in the event which has happened, not the calendar date, but the expiration of the "fair proportionate extension of time." I am not of this opinion. If this were so there would be eight months (or eighteen months as the case may be) from the B expiration of the "fair proportionate extension of time." Clause 12 has, I think, explained cl. 5 by naming a period at the expiration of which both the fair proportionate extension of time and also a further allowance before the contract "shall become void" will have elapsed. For this purpose "the date agreed by this contract" is the calendar date from which the former commences to run, that is to say, the calendar date—viz., Jan. 30, 1915. Upon this point, in my judgment, C the decision under appeal is right.

The next question is as to the meaning of "shall become void" in cl. 12. Does this include "shall be voidable at the option of the builder"? In my opinion, it does. The article begins by naming certain events, four in number: In case the builders shall (i) become bankrupt, or (ii) insolvent, or (iii) shall fail, or (iv) be unable to deliver. Of these the first three are events which may be said to be the D fault of the builder; the fourth is not or may not be his fault at all. He may be unable from an unpreventable cause beyond his control. If the word "void" is to be read "voidable," it results in the fourth case that, upon principles well settled, the meaning is that the contract is to be voidable at the option of the builder. For an event is named in which through no fault of his own a contract expressed to be voidable has become impossible or commercially impossible. If E the contract be voidable at the builder's option, he has by defending this case elected to avoid it, and this appeal must fail. If, on the other hand, the word means "void" and not "voidable," it equally results that the appeal fails.

Whether the word be read "void" or be read "voidable," therefore, the appeal fails unless the appellants can maintain that it means voidable at the option of the building owner, but not at the option of the builder. He has argued that this is F the effect. In my opinion, this is not so. The rule is that in a contract "void" is to be read "voidable" if the result of reading it as "void" would be to enable a party to avail himself of his own wrong to defeat his contract. It may be stated either in the form that if one party is in default it is "void as against him," or that if one party is in default it is "voidable at the option of the other party." The two amount to the same thing. But the contract is not "void" G in favour of or "voidable at the option of" the party in default. He cannot say that it is void, and has no option to avoid it in his own wrong. Here the contract is, in my opinion, voidable at the option of either party, provided always that he is not seeking to avoid it in his own wrong. The contingency of war lasting more than eighteen months is a contingency not within the control of either party. The contract is void as against each, or, if you like so to express H it, is voidable at the option of either if the contingency occurs. I notice that the award found that the eighteen months expired on July 30, 1916. This is not strictly accurate. But nothing turns upon the fact that an allowance should have been made for time for trial trip. The appeal must, in my judgment, be dismissed with costs.

Solicitors: *William A. Crump & Son*; *Calder, Woods & Pethick.*

I

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

A

JENKINS *v.* NADEN

[King's Bench Division (Bray, A. T. Lawrence and Shearman, JJ.), March 31, 1919]

[Reported 88 L.J.K.B. 1137; 121 L.T. 142; 83 J.P. 154; 35 T.L.R. 368; 17 L.G.R. 324; 26 Cox, C.C. 410] B

Food and Drugs—Analyst's certificate—Statutory deficiency, not adulteration, charged—Deficiency stated in certificate—Constituent parts of sample not specified—Sufficiency—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.*, *c.* 63), *s.* 18, *Sch.*

N., a milk vendor, sold a quantity of milk to J. which was alleged not to be C of the nature, substance, and quality demanded by the purchaser, contrary to s. 6 of the Sale of Food and Drugs Act, 1875. The analyst gave the following certificate after making an analysis of the milk: "I am of opinion that the said sample contained the parts as under—namely, 2·5 per cent. of fat. Compared with the limit of the Board of Agriculture, it is deficient in fat to the extent of 16·67 per cent." J. preferred an information against N. On D the hearing of this information, the certificate of the analyst was tendered as evidence before the justices, but, on objection being taken to its admissibility, the justices came to the conclusion that it was bad, and could not be received in evidence because (i) it did not state the constituent parts of the sample, and the percentage of solids other than fat, and (ii) it did not contain sufficient materials to enable them to come to a conclusion whether the milk had been E adulterated, either by a certain percentage of fat having been abstracted or by water having been added. They, therefore, dismissed the charge against N.

Held: the certificate was admissible as evidence, since the charge against N. was one of statutory deficiency and not of adulteration, and the certificate clearly set out the deficiency and compared the sample with the limit prescribed by the statutory authority. F

Bakewell v. *Davis* (1) [1894] 1 Q.B. 296, and *Bayley* v. *Cook* (2) (1905), 92 L.T. 170, followed.

Notes. As to the form and contents of analyst's certificate, see 17 Halsbury's Laws (3rd Edn.) 469, para 871; and for cases see 25 Digest 76–78, 58–69.

Cases referred to: G

(1) *Bakewell* v. *Davis*, [1894] 1 Q.B. 296; 63 L.J.M.C. 93; 69 L.T. 832; 58 J.P. 228; 10 T.L.R. 40; 10 R. 617, D.C.; 25 Digest 77, *60*.

(2) *Bayley* v. *Cook* (1905), 92 L.T. 170; 69 J.P. 139; 53 W.R. 410; 21 T.L.R. 235; 3 L.G.R. 304; 20 Cox, C.C. 779, D.C.; 25 Digest 77, *67*.

Also referred to in argument:

Newby v. *Sims*, [1894] 1 Q.B. 478; 63 L.J.M.C. 228; 70 L.T. 105; 58 J.P. 263; H 10 T.L.R. 206; 38 Sol. Jo. 202; 10 R. 596, D.C.; 25 Digest 77, *61*.

Fortune v. *Hanson*, [1896] 1 Q.B. 202; 65 L.J.M.C. 71; 74 L.T. 145; 60 J.P. 88; 44 W.R. 431; 12 T.L.R. 164; 40 Sol. Jo. 240; 18 Cox, C.C. 258, D.C.; 25 Digest 77, *62*.

Bridge v. *Howard*, [1897] 1 Q.B. 80; 65 L.J.M.C. 229; 75 L.T. 300; 60 J.P. 790; 45 W.R. 78; 13 T.L.R. 5; 41 Sol. Jo. 29; 18 Cox, C.C. 421, D.C.; 25 Digest I 77, *63*.

Smithies v. *Bridge*, [1902] 2 K.B. 13; 71 L.J.K.B. 555; 87 L.T. 167; 66 J.P. 740; 50 W.R. 686; 18 T.L.R. 575; 46 Sol. Jo. 486; 20 Cox, C.C. 342, D.C.; 25 Digest 127, *491*.

Case Stated by the Macclesfield justices.

An information was preferred at a court of summary jurisdiction sitting at Macclesfield by the appellant, William Jenkins, an inspector under the Sale of Food and Drugs Act, against the respondent, Elizabeth Naden, for that she, the

respondent, on Aug. 27, 1918, at the borough of Macclesfield, unlawfully did sell to the prejudice of the appellant, the purchaser, a certain article of food, to wit, milk, which was not of the nature, substance, and quality of the article demanded by such purchaser, inasmuch as such milk contained the parts as under—namely, 2·5 per cent. of fat—and compared with the limit of the Board of Agriculture it was deficient in fat to the extent of 16·67 per cent. On the hearing before the justices on Sept. 28, 1918, it was proved or admitted that on Aug. 27, 1918, the appellant purchased from the respondent a pint of milk, and having duly complied with the requirements of the Sale of Food and Drugs Act, 1875, and the Acts amending the same, caused part of such milk to be analysed by a public analyst. The public analyst duly delivered a certificate, which was, as far as material, in the following terms:

"I am of opinion that the said sample contained the parts as under—namely, 2·5 per cent. of fat. Compared with the limit of the Board of Agriculture, it is deficient in fat to the extent of 16·67 per cent."

At the hearing of the information this certificate was tendered as evidence by the appellant, but on behalf of the respondent it was objected that it was bad and inadmissible, on the ground that it was not in the form given by the schedule to the Sale of Food and Drugs Act, 1875, because the certificate did not state the constituent parts of the sample analysed. After hearing the solicitors on both sides the justices came to the conclusion that the certificate of the analyst was bad and inadmissible on the grounds (i) that it did not state the constituent parts of the sample and particularly the percentage of solids other than fat, and (ii) that it did not contain sufficient materials to enable the justices themselves to come to a conclusion as to whether the milk had been adulterated either by a certain percentage of fat having been abstracted or by water having been added.

By the Sale of Food and Drugs Act, 1875, it is provided:

"Section 18. The certificate of the analysis shall be in the form set forth in the schedule hereto, or to the like effect.

"Section 21. At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness. . . ."

"SCHEDULE.—FORM OF CERTIFICATE.

"To (*here insert the name of the person submitting the article for analysis*).

"I, the undersigned, public analyst for the ——, do hereby certify that I received on the —— day of —— from (*here insert the name of the person delivering the sample*) a sample of —— for analysis (which then weighed ——), and have analysed the same, and declare the result of my analysis to be as follows:—

"I am of opinion that the same is a sample of genuine —— or,

"I am of opinion that the said sample contained the parts as under, or the percentage of foreign ingredients as under:

Observations.

"As witness my hand this day of

A. B., &c.

"(When the article cannot be conveniently weighed, the passage in brackets commencing 'which then weighed' may be erased, or the blank may be left unfilled.)"

Joy for the appellant.
Purchase for the respondent.

BRAY, J.—In this case the respondent was summoned for having unlawfully sold to the purchaser a certain quantity of milk which was not of the nature, substance,

and quality of the article demanded by such purchaser, as such milk contained the parts as under—namely, 2·5 per cent. of fat—and compared with the limit of the Board of Agriculture it was deficient in fat to the extent of 16·67 per cent., and the point which we are called upon to determine is whether the certificate which was given by the analyst, to whom the milk was submitted, was admissible as evidence before the justices who heard the information. The certificate tendered by the appellant was one given by the analyst under s. 21 of the Sale of Food and Drugs Act, 1875, and the objection taken to the certificate by the respondent in the present case is that it was bad and inadmissible on the ground that it was not in the form given in the schedule to the Act of 1875, because it did not state the constituent parts of the sample analysed. The whole question therefore turns on the form of the certificate which was put forward in this case—whether it was such that it could be put in evidence in order to comply with the provisions of the statute. [The learned judge then read the relevant section of the Act of 1875 and the schedule, and proceeded:] The form of the certificate deals with two things, the first of which is whether the milk is deficient in a certain particular as having been deprived of some of its constituent parts, and the second whether there has been any adulteration.

The complaint put forward as to the form of the certificate in the present case is that the figures 2·5 per cent. of fat were only one of the results of the analysis, and that no figures with regard to the other solids were given in the certificate. But the information against the respondent charged nothing except the deficiency in fat. This was the one point which the respondent was called upon to meet. She had to show that, notwithstanding the deficiency in fat, the milk was genuine, or, in the words of the statute, of the nature, substance, and quality demanded by the purchaser. The Sale of Food and Drugs Act, 1899, by s. 4, authorised the Board of Agriculture to make regulations

> "for determining what deficiency in any of the normal constituents of genuine milk, cream, butter, or cheese, or what addition of extraneous matter or proportion of water, in any sample of milk (including condensed milk), cream, butter, or cheese, shall for the purposes of the Sale of Food and Drugs Acts raise a presumption, until the contrary is proved, that the milk, cream, butter, or cheese, is not genuine or is injurious to health, and an analyst shall have regard to such regulations in certifying the result of an analysis under these Acts."

The Sale of Milk Regulations, 1901, made by the Board of Agriculture under this section, provide that:

> "(1) Where a sample of milk (not being sold as skimmed, or separated, or condensed milk) contains less than 3 per cent. of milk fat, it shall be presumed, for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899 . . . that the milk is not genuine by reason of the abstraction therefrom of milk fat, or the addition thereto of water. (2) Where a sample of milk (not being sold as skimmed, or separated, or condensed milk) contains less than 8·5 of milk solids other than milk fat, it shall be presumed, for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899 . . . that the milk is not genuine by reason of the abstraction therefrom of milk solids other than milk fat, or the addition thereto of water."

The certificate in the present case, on which the prosecution relied, states that there is a deficiency of fat, in that the milk contained only 2·5 per cent. of fat, and refers to the requirements as set forth by the Sale of Milk Regulations. The question is whether or not that certificate is sufficient evidence. Is it necessary to set out all the figures of the analysis, or is it sufficient that it should set out the figures dealing with the only matter which is charged in the information? In my opinion this point has been decided in two cases to which we have been referred in the course of the argument: *Bakewell* v. *Davis* (1) and *Bayley* v. *Cook* (2). In *Bakewell* v. *Davis* (1) the headnote is as follows ([1894] 1 Q.B. at p. 296):

"The certificate given by a public analyst of the result of an analysis made by him under the Sale of Food and Drugs Act, 1875, need not set out the constituent parts of the sample analysed, where the case is not one of adulteration; it need only state the 'result' of the analysis. The 'observations' which, in the form of certificate given in the schedule to the Act, follow after the result of the analysis are only to be made where the case is one of adulteration; but the addition, in cases where adulteration is not charged, of 'observations' amounting only to an expression of opinion on the part of the analyst and not to a finding of fact, although unauthorised and improper, will not necessarily vitiate the certificate."

The certificate in that case stated that the milk contained 22 per cent. of fat less than the natural. That stated even less than the certificate in the present case, but it was held that it was sufficient, and that the certificate need not set out the constituent parts of the sample analysed where the case is not one of adulteration; it need only state the result of the analysis. In *Bayley* v. *Cook* (2) the decision in *Bakewell* v. *Davis* (1) was followed. There the certificate given by the analyst was in the following terms:

"I am of the opinion that the sample contained the parts as under, and the percentages of foreign ingredients as under: Milk fat, 1·4 per cent.; milk solids other than milk fat, 5·6 per cent. Observations: This milk is deficient in milk solids, other than milk fat, to the extent of 2·9 per cent., which is equivalent to the addition of 34·2 per cent. of water. It is also deficient in milk fat to the extent of 53·4 per cent. of the milk fat."

It was held that the certificate was good. In giving judgment in this latter case LORD ALVERSTONE, C.J., said:

"I do not wish it to be thought that the provisions of the Sale of Food and Drugs Act, 1899, have in any way lessened the obligation of the analyst to state what he is bound to state under s. 18 of the Sale of Food and Drugs Act, 1875, and to give his certificate in the form necessary by that section. If nothing more appeared on the certificate than 'milk fat, 1·4 per cent.' I do not think that would be enough. The certificate must show that the sample of milk has been compared with some standard. It would perhaps have been more correct to state in the certificate what the proper quantity of milk fat ought to be, but upon examination that does appear on the face of the certificate, for it shows correctly how much milk fat was deficient, and, when that is compared with the 3 per cent. in rule 1 of the Sale of Milk Regulations, 1901, made under s. 4 of the Act of 1899, the standard of calculation can be gathered from the certificate itself."

The decision in these two cases are binding on us, and, when one compares the present certificate with those which were then under consideration, it seems to me that we must hold it sufficient, and that it should not have been rejected by the justices. All that is necessary, in my view, is that the certificate should state clearly the matter which is complained of, and I should have come to the conclusion that the present certificate was enough even if there had been no such decisions as those in the two cases to which I have just referred. The result is that this case must be remitted to the justices with a direction that they must admit the certificate and hear the case.

A. T. LAWRENCE, J.—I have come to the conclusion that this case must be remitted to the justices with a direction to admit the certificate of the analyst as evidence. I have not arrived at my decision without considerable hesitation and reluctance, and then only on the authority of *Bakewell* v. *Davis* (1) and *Bayley* v. *Cook* (2). I am clearly of opinion that the procedure adopted by the analyst in this case, as in the two cases to which I have referred, is a distinctly bad one. I do not see why an analyst should not be bound to state the constituent parts of the sample submitted to him for analysis, and the percentage of solids other than

fat, and what the proper quantity of milk fat ought to be. As the certificate is admissible in the ordinary course as evidence, unless the presence of the analyst is required, the certificate should state the whole truth of the matter, just as a witness is required to tell the whole truth in the witness-box. And that appears to me to be what is required by s. 18 of the Sale of Food and Drugs Act, 1875. The certificate of the analysis is to be in the form set out in the schedule to the Act, or to the like effect. The words "or to the like effect" may give a certain latitude, but I do not think that they authorise the analyst to omit altogether some of the details which he finds. In the form in the schedule there are three possible cases dealt with. The certificate may state that the article is genuine, or that the sample contains "parts as under," or that it contains "the percentage of foreign ingredients as under." Of course, if the sample is genuine, there is nothing more to be said. But if it is not, then there are matters which should be clearly stated in accordance with the form which is given in the schedule. This certificate does not take any of these three lines, and in the absence of authority I should have been of opinion that it was inadmissible as evidence. As I have said, there are the two cases which I have named and which are binding on this court, and, consequently, I must reluctantly agree that the present appeal should be allowed.

SHEARMAN, J.—I am also of opinion that this appeal should be allowed. I think that the case is difficult, but nevertheless, even in the absence of authority, I should have been prepared to hold that the certificate of the analyst was admissible as evidence. When one comes to examine the form of the certificate given in the schedule to the Act of 1875, it will be seen that what is really required is that the analyst should certify whether the article which has been submitted to him is genuine or adulterated. There is nothing requiring him to analyse the article into as many parts as possible. In the present case what was required of the analyst was that he should divide the milk into the parts consisting of fat and the parts not consisting of fat. This is what he has done by the form of his certificate, and I think that that complies with the words "contains the parts as under." Since the Sale of Food and Drugs Act, 1875, was passed, the Sale of Milk Regulations, 1901, have created what may be described as a statutory deficiency and have enacted that such a deficiency shall be primâ facie proof that the milk is not genuine.

In the present case the information that was laid against the respondent was based on statutory deficiency, and statutory deficiency alone. There was no need for the prosecution to prove adulteration. The analyst's certificate states that, on a comparison being made between the sample of milk submitted for analysis and the limit prescribed by the Board of Agriculture under the Sale of Milk Regulations, 1901, the milk which was analysed was deficient in fat to the extent of 16·67 per cent., and by that comparison the certificate set out what was the matter complained of by the prosecution. That being so, it is clear that the whole case on behalf of the prosecution, and on which the prosecutor, the present appellant, relied, was before the person summoned—namely, the respondent. What are the objections which are put forward as to the certificate? It is said that the certificate ought to show the percentages of (i) fats, (ii) non-fatty solids, and (iii) water, and that it is not possible to know from the certificate of the analyst in the form in which it is in the present case whether the milk had been adulterated by the abstraction of fat or by the addition of water. I think, however, that there is a complete answer to that argument owing to the fact that the prosecution relied entirely on statutory deficiency and not on adulteration, and the certificate is enough to raise the presumption of such deficiency. As I have said, I should have been prepared to hold that the certificate in its present form was sufficient and was, therefore, admissible as evidence even in the absence of any authority on the subject. There are, in fact, several authorities which are binding on this court and which touch the present point very closely. Of these authorities two stand out very prominently. The first is *Bakewell* v. *Davis* (1), which clearly lays down

the proposition that when the case is not one of adulteration the certificate is sufficient, even though it does not set out all the constituent parts of the article analysed, but only states the result of the analysis. The other case is the comparatively recent one of *Bayley* v. *Cook* (2). There the certificate set out much more than the certificate in the present case; but the ratio decidendi is the same —namely, that if the analyst's certificate sets out the deficiency in milk fat correctly, and compares it with the standard set up, it is unnecessary to set out the full details of the results of the analysis, because the necessary calculation can be made from the certificate itself. Other cases than the two that I have mentioned have been cited to us, but although they exhibit a tendency in the opposite direction—that is, of requiring a fuller form of certificate—the principle laid down is really not affected at all. Consequently it would not be possible to dismiss this appeal without overruling the decisions in *Bakewell* v. *Davis* (1) and *Bayley* v. *Cook* (2), and, therefore, both on principle and authority, I think that the appellant must succeed. The appeal will be allowed, and the Case remitted to the justices.

Appeal allowed and Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*; *Burton, Yeates & Hart*, for *Barclay & Co.*, Macclesfield.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

HOSACK *v.* ROBINS AND OTHERS

[COURT OF APPEAL (Swinfen Eady, M.R., Warrington and Duke, L.JJ.), July 1, 2, 1918]

[Reported [1918] 2 Ch. 339; 87 L.J.Ch. 545; 119 L.T. 522; 62 Sol. Jo. 681; [1918–19] B. & C.R. 54]

Bankruptcy—Property available for distribution—After-acquired property—Shares charged on application of judgment creditor under Judgments Act, 1838 (1 *& 2 Vict., c.* 110), *s.* 14—*Bankruptcy Act*, 1883 (46 *& 47 Vict., c.* 52), *s.* 49—*Bankruptcy Act*, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 47 (1).

A charging order absolute obtained by a judgment creditor, on an application under s. 14 of the Judgments Act, 1838, on the after-acquired property of a bankrupt consisting of shares in a company, is not a "transaction for value" within the proposition laid down in *Cohen* v. *Mitchell* (1) (1890), 25 Q.B.D. 262, and now embodied in s. 47 (1) of the Bankruptcy Act, 1914 [2 HALSBURY'S STATUTES (2nd Edn.) 321], and is, therefore, not valid and effective against the trustee in bankruptcy as a protected transaction.

Re O'Shea's Settlement, Courage v. *O'Shea* (2), [1895] 1 Ch. 325, applied.

Notes. Applied: *Re Pascoe, Ex parte Trustee in Bankruptcy and Northumberland County Council*, [1944] 1 All E.R. 281.

As to protection of bona fide transactions by a bankrupt in respect of after-acquired property, see 2 HALSBURY'S LAWS (3rd Edn.) 429–431; and for cases see 5 DIGEST (Repl.) 779 et seq.

Cases referred to:

(1) *Cohen* v. *Mitchell* (1890), 25 Q.B.D. 262; 59 L.J.Q.B. 409; 63 L.T. 206; 38 W.R. 551; 6 T.L.R. 326; 7 Morr. 207, C.A.; 5 Digest (Repl.) 787, *6675*.

(2) *Re O'Shea's Settlement, Courage* v. *O'Shea*, [1895] 1 Ch. 325; 64 L.J.Ch. 263; 71 L.T. 827; 43 W.R. 232; 39 Sol. Jo. 168; 2 Mans. 4; 12 R. 70, C.A.; 5 Digest (Repl.) 979, *7900*.

(3) *Glegg* v. *Bromley*, [1912] 3 K.B. 474; 81 L.J.K.B. 1081; 106 L.T. 825, C.A.; 12 Digest (Repl.) 239, *1794*.

(4) *Re Curtoys, Ex parte Pillers* (1881), 17 Ch.D. 653; 50 L.J.Ch. 691; 44 L.T. 691; 29 W.R. 575, C.A.; 5 Digest (Repl.) 979, *7897*.

Also referred to in argument:

Re Leavesley, [1891] 2 Ch. 1; 60 L.J.Ch. 385; 64 L.T. 269; 39 W.R. 276, C.A.; 21 Digest 649, *2280*.

Re Bennett, Ex parte Official Receiver, [1907] 1 K.B. 149; 76 L.J.K.B. 134; 95 L.T. 887; 23 T.L.R. 99; 51 Sol. Jo. 83; 14 Mans. 6; 5 Digest (Repl.) 790, *6702*.

Wild v. *Southwood*, [1897] 1 Q.B. 317; 66 L.J.Q.B. 166; 75 L.T. 388; 45 W.R. 224; 41 Sol. Jo. 67; 3 Mans. 303; 5 Digest (Repl.) 979, *7901*.

Appeal from an order of ASTBURY, J., on a summons for an account.

On Jan. 11, 1894, Hugh Haswell Shanks was adjudicated bankrupt, the official receiver being appointed trustee in the bankruptcy. While still an undischarged bankrupt, in May, 1912, the debtor, on the incorporation of the defendant company, Ayre and Kingcome, Ltd., was allotted twenty-six shares of £1 each in that company and 300 of such shares in the name of Ernest Ayre as trustee for him. On April 25, 1913, the plaintiff, Harold Heron Hosack, obtained a judgment against the bankrupt for £62 5s. and costs. Before such costs were taxed an application was made by the plaintiff under s. 14 of the Judgments Act, 1838, and s. 1 of the Judgments Act, 1840, for a charging order on the shares so held by the bankrupt in the defendant company for securing the amount of his judgment, and on May 16, 1913, an order nisi was obtained by him. In an action brought in 1913 by Henry Francis Kingcome, a director of the defendant company, against Ayre and Kingcome, Ltd., and others, H. F. Kingcome claimed on behalf of himself and all other shareholders of the company a declaration that the company had a lien on 300 of the 326 shares on the ground that such 300 shares had been purchased by the debtor with money belonging to the company. On the hearing of the application by the plaintiff to make absolute the charging order this claim by H. F. Kingcome was put forward, and in consequence, on June 13, 1913, such order was made absolute charging twenty-six shares with the payment of £62 5s. and £2 12s. 6d. the costs of that application, and the remaining 300 shares with such payment subject to any lien or charge the company might have on or claim the company might have to these shares. On Aug. 1, 1913, the action *Kingcome* v. *Ayre and Kingcome, Ltd.*, was settled on the terms, inter alia, that the bankrupt admitted his debt to Ayre and Kingcome, Ltd., of the sum of £400 and the lien of the company on the shares held by him therein. An entry was made on the share register of the company of the charging order against the shares. From the balance-sheet made up to July 31, 1915, of the company its estimated assets over its liabilities amounted to £15,706 14s. 2d. The official receiver became aware in February, 1916, that the bankrupt held these 326 shares in the defendant company, and sold them as his trustee in bankruptcy on Feb. 7, 1916, for £500 to Henry Francis Kingcome or his nominees, executing transfers of one share to the defendant Joseph Thomas Robins, twenty-five shares to the defendant Charles J. Clelland, and 300 shares to Henry Francis Kingcome. Subsequently, Henry Francis Kingcome transferred the 300 shares, as to eighty-four to the defendant Leonard William North Hickley, as to 107 of such shares to the defendant Leonard John Underwood, as to one other share to the defendant Frederick Charles Law, and as to the remaining 108 shares to the defendant Thomas Humphrey Balding. The transfers were in the usual absolute form, but by letters dated Feb. 14 and 16, 1916, the official receiver, in answer to letters from the plaintiff, informed him that the shares had been sold subject to all proper charges thereon. The transferees were aware at the time of the execution of the transfers of the bankruptcy of the debtor, the charging order obtained by the plaintiff on the shares, and the claim of the company to a lien on 300 of these shares. On June 11, 1917, the plaintiff

A obtained an order that he should be at liberty to institute proceedings for foreclosure or sale of the shares for enforcing the payment of the amount for which such shares were charged. Shortly before the present summons was taken out the bankrupt died without having obtained his discharge in bankruptcy. The defendant Charles Henry Foster was the holder of two charges on the shares in question dated subsequent to the plaintiff's charging order. The plaintiff, on June 18, 1917, B took out this summons asking for an account of what was due to him for principal, interest, and costs from the defendants or any of them under the charging order absolute of June 13, 1913, and that the 326 shares in the defendant company should be sold with the approbation of the judge, and that the proceeds should be lodged in court.

By s. 14 of the Judgments Act, 1838, it is provided that stock or shares of any C person, or any person for whom stock or shares are held in trust, against whom judgment had been entered up might be charged by order of a judge, on the application of a judgment creditor, with payment of the amount due on such judgment and interest thereon, "and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. . . ." Section 1 of the Judgments Act, 1840, D defined and extended the property of the judgment debtor to which s. 14 applied. The summons was adjourned into court and came on to be heard before ASTBURY, J., on April 25, 1918. It was decided by ASTBURY, J., that, having regard to the final wording of s. 14 of the Judgments Act, 1838, the charging order obtained under that section was valid and effective as against the trustee in bankruptcy and his assignees, as it must be inferred that such charge was made for value; and that, E therefore, this was a transaction for value within the meaning of the proposition laid down in *Cohen* v. *Mitchell* (1), the consideration being an implied request for forbearance as in *Glegg* v. *Bromley* (3); and that consequently the plaintiff was entitled to the account claimed by him. From this decision the defendants appealed.

Tomlin, K.C. (with him *P. F. Wheeler*) for the defendants.

F *Beebee* and *H. S. Simmons* for the plaintiff.

SWINFEN EADY, M.R.—This is an appeal by the defendants from the decision of ASTBURY, J. The question raised is with regard to the validity of a charging order as against the trustee in bankruptcy of the judgment debtor. Subject to the prior lien of the defendant company, Ayre and Kingcome, Ltd., on the 300 shares G the learned judge in the court below has declared that, having regard to the proviso to s. 14 of the Judgments Act, 1838, the charging order obtained by the plaintiff under that section is valid and effective as against the trustee in bankruptcy and his assignees. It is from that decision that the defendants appealed. In February, 1916, the official receiver as trustee in bankruptcy sold his interest, whatever it was, in the shares, protecting himself by inserting the words "subject to all proper H charges thereon." ASTBURY, J., has held, as I have just said, that the plaintiff's charge is valid, because it was obtained bona fide and for value or its equivalent. The bona fides is not disputed. But the question is whether the plaintiff's charge in the circumstances takes priority over the rights of the trustee in bankruptcy.

By s. 47 (1) of the Bankruptcy Act, 1914:

> "All transactions by a bankrupt with any person dealing with him bona fide I and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction."

The Act in force at the time when the bankruptcy in the present case took place and when the charging order was obtained was the Bankruptcy Act, 1883, and that statute contained no provision such as appears in the Act of 1914. Section 47 of

the present Act, however, is a statutory enactment of the rule laid down in *Cohen* v. *Mitchell* (1). The Bankruptcy Act, 1883, although protecting certain interests in respect of property of a bankrupt, does not provide for property accruing during the bankruptcy. The principle, however, was clearly laid down by the Court of Appeal in *Cohen* v. *Mitchell* (1). In that case LORD ESHER, M.R., using words which had been reduced to writing and agreed to by the other members of the court, said this (25 Q.B.D. at p. 267):

> "I am, therefore, prepared to lay down a proposition which has been agreed upon by us all, and which has been written down by my brother LOPES. It is this—until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. It will be seen, I think, from the wording of that proposition that the stress of bona fides is laid entirely and solely on the person dealing with the bankrupt; and, if he has dealt in good faith, the question of whether the bankrupt, as between himself and the creditors, is also dealing in good faith is immaterial."

That, as I have intimated, is embodied in s. 47 of the Bankruptcy Act, 1914.

Counsel for the plaintiff contended that the proposition so laid down could not be considered as exhaustive, conceding, however, that, if it was so, he could not contest the rights of the trustee in bankruptcy and support the decision of ASTBURY, J. The only class of dealings and transactions that are protected are those bona fide and for value. It was on that ground, as I have already remarked, that ASTBURY, J., sustained the validity of the charging order. Is a process of that kind in lite a dealing or transaction for value? It is a process in invitum. It is a taking in execution by process of law. In my opinion, it is no more a dealing or transaction for value than a garnishee order would be. There is no mutual dealing between the parties. I fail, therefore, to see that this interest acquired by the plaintiff is in any way protected. It is quite clear that it would not be protected by s. 47 (1) of the Bankruptcy Act, 1914, as a transaction for value. *Re Curtoys, Ex parte Pillers* (4) and *Re O'Shea's Settlement, Courage* v. *O'Shea* (2), both of which were decisions before the passing of the Bankruptcy Act, 1914—the former being decided under the Bankruptcy Act, 1869, and the latter under the Bankruptcy Act, 1883—support this view. The result is that the charging order which the plaintiff obtained on the shares cannot be sustained against the trustee in bankruptcy. It is not a proper charge; it is not a valid charge against the trustee, and when he sold all his interest in the shares he sold free from the charging order. The appeal must therefore be allowed, and the order made by ASTBURY, J., discharged in so far as it provides that the charging order ranked in priority to the defendants' title. The summons will have to be amended accordingly.

WARRINGTON, L.J.—I am of the same opinion. ASTBURY, J., has made an order that the plaintiff's charging order ranks in priority over the title of the defendants in the present case. They appeal against that decision.

The first question raised by the appellants is a short question of law. Is the charging order a "transaction entered into bona fide and value" so as to be valid as against the prior title of the trustee in bankruptcy under the Bankruptcy Act, 1883? The construction of that Act in this respect was declared by the Court of Appeal in *Cohen* v. *Mitchell* (1) in these terms (25 Ch.D. at p. 267):

> "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee."

The question, therefore, is, I repeat, whether a charging order absolute is a transaction bona fide for value. It is impossible to hold that it is a "transaction for value," even if it be properly describable as a "transaction." I will assume,

however, that it is so for the present. The case is really governed by the decision of the Court of Appeal in *Re O'Shea, Courage* v. *O'Shea* (2). It is true that that case did not refer to after-acquired property, but it was a decision that a charging order was not a "transaction" under s. 49 of the Bankruptcy Act, 1883. That section protects among other things "any contract, dealing, or transaction by or with the bankrupt for valuable consideration." The decision of the Court of Appeal in *Re O'Shea, Courage* v. *O'Shea* (2) amounts to this, that a charging order is not within that section a "contract, dealing, or transaction," and it is not "for valuable consideration." Therefore, neither on principle nor on authority is the charging order in the present case valid against the trustee in bankruptcy.

Then arises another question, which is one of fact—whether the trustee in bankruptcy limited his intervention so as not to interfere with the charging order. To my mind, it is quite plain when one looks at the letters written on his behalf that he did intervene, and sold subject only to such charges as were valid against him. In those letters he said that what was sold was sold "subject to all proper charges." That, to my mind, can only mean that he meant to intervene. It seems to me that there was a complete intervention by the trustees in bankruptcy so far as this charging order was concerned. He sold the shares with knowledge of the existence of the charging order. In my opinion, therefore, the appeal ought to be allowed.

DUKE, L.J.—I agree. The learned judge in the court below was of opinion that the plaintiff's charging order in the present case was protected by the principle laid down by the Court of Appeal in *Cohen* v. *Mitchell* (1) (25 Q.B.D. at p. 267), and it is from his decision to that effect that the defendants appeal.

What a "transaction" by a debtor is was explained by LINDLEY, L.J., in *Re O'Shea, Courage* v. *O'Shea* (2) ([1895] 1 Ch. at p. 331). It is quite true that there are cases in which it may be said that there has been a "transaction." But in the present case nothing of the kind is established. When the facts are considered what took place cannot be so regarded. The question whether the trustee in bankruptcy has intervened is made plain by the facts. I am not so much impressed by the argument that we have heard as I am by the circumstance that the legislature for the last thirty odd years, so far from relaxing the stringency of the rule, has added to it. I agree, therefore, that this appeal ought to be allowed.

Appeal allowed.

Solicitors: *Sutton, Ommanney & Oliver*; *Clowes, Hickley & Steward.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

R. *v.* VICAR AND CHURCHWARDENS OF BREDWARDINE. Ex parte BURTON-PHILLIPSON

[KING'S BENCH DIVISION (Earl of Reading, C.J., Avory and Sankey, JJ.), October 17, 1919]

[Reported [1920] 1 K.B. 47; 89 L.J.K.B. 133; 122 L.T. 96; 83 J.P. 269; 36 T.L.R. 15; 18 L.G.R. 105]

Ecclesiastical Law—Churchwarden—Qualification for election—Residence in parish.

Actual residence in the parish is a necessary qualification for election as churchwarden of the parish.

R. v. *Harding* (1) (1889), 6 T.L.R. 53, followed.

Notes. As to qualification for election as churchwarden, see 13 HALSBURY'S LAWS (3rd Edn.) 164; and for cases see 19 DIGEST 278–279.

Cases referred to:

(1) *R.* v. *Harding* (1889), 6 T.L.R. 53; 53 J.P.Jo. 755, D.C.; 19 Digest 278, *638*.

(2) *R.* v. *Cree* (1892), 67 L.T. 556; 57 J.P. 72; 37 Sol. Jo. 11, D.C.; 19 Digest 278, *639*.

(3) *R.* v. *Townson, Ex parte Broderip* (1908), 99 L.T. 472; 72 J.P. 368; 24 T.L.R. 690; 6 L.G.R. 1133, D.C.; 19 Digest 278, *643*.

Rule Nisi to the vicar and churchwardens of the parish of Bredwardine, in the county of Hereford, to show cause why a writ of mandamus should not be issued commanding them to convene a meeting in vestry of the parish and to proceed to the election of a people's churchwarden for the parish for the year ending at Easter, 1920, and take all necessary steps for that purpose according to law. The rule was moved at the instance of Miss Beatrice Jane Wilmot Burton-Phillipson, on the ground that the warden elected at the vestry meeting held on April 1, 1919, was not resident of the parish.

The applicant was a resident parishioner of the ancient parish of Bredwardine, in the diocese and county of Hereford, and served the office of people's churchwarden for the parish in the years 1916, 1917, and 1918. At the Easter vestry for the parish, held on April 21, 1919, the applicant was duly proposed for the office of people's warden for the ensuing year. Mr. John Hancox was also proposed for the office, and was elected by five votes against four. The applicant objected at the meeting that Mr. Hancox was not eligible for election, on the ground that he was not resident in the parish of Bredwardine, but in the adjoining parish of Dorstone. The objection was overruled by the Rev. H. F. B. Compston, the chairman of the meeting.

Mr. Hancox was a farmer whose farm lay, as to about half thereof, in the parish of Bredwardine and part in the parish of Dorstone. The farmhouse in which he lived was situate in the parish of Dorstone, less than twenty yards from the boundary of the parish of Bredwardine, and a workman's cottage attached to the farm and rented by Mr. Hancox was entirely within the parish of Bredwardine. The farmhouse and buildings were situate much nearer to Bredwardine church than to Dorstone church, being only about a mile and a tenth from Bredwardine church, a good road. The parish church of Dorstone was situate about a mile and three-quarters from the residence of Mr. Hancox by the nearest way, which was only a footpath over a very steep hill rising more than five hundred feet above his house, and was eight hundred and twenty-four feet above sea level. By the nearest road the distance was two miles and two-thirds, but this road was available for rough slow-moving vehicles only. Any ordinary carriage could have to proceed about seven miles via Westbrook. Mr. Hancox was and for many years had been a regular attendant and communicant at Bredwardine church. His children had attended both day and Sunday school at Bredwardine, and to all intents and

purposes his interests lay in the parish of Bredwardine. He was also a large ratepayer in the parish of Bredwardine, and he spent a very large portion of his time in the parish in cultivating his farm, and was well acquainted with all the principal inhabitants and the affairs of the parish; and, save that his farmhouse where he lived and slept was a few yards outside the boundary of the parish, the greater part of his life was spent in the parish of Bredwardine, and the greater part of the parish of Dorstone was separated from his residence by the hill above mentioned.

Charles, K.C., and *W. A. Jowitt* for the applicant, Miss Burton-Phillipson.
E. W. Hansell for the respondents, the vicar and churchwardens.

EARL OF READING, C.J.—The question in this case is whether Mr. John Hancox, who was elected to the office of people's churchwarden, was legally qualified to fill that office. The test laid down in the authorities is whether or not in fact he lived within the parish. When one applies that test, it cannot be said that Mr. Hancox lived within the parish. It is not suggested that he slept or resided there in the ordinary sense. It is true that he occupied a farm, of which the dwelling-house was in the adjoining parish and was close to the boundary of that parish and the parish of Bredwardine, but nevertheless his dwelling-house was in the adjoining parish. It is said that in the parish of Bredwardine there was a workman's cottage which was used as a residence for a workman employed by Mr. Hancox, who was rated in respect of it, and that this would be sufficient to constitute residence. On the authorities this is not sufficient. It is not suggested that Mr. Hancox is not a fit and proper person. The sole question is whether he has the legal qualifications. Counsel for the applicant has contended that living in the parish does not necessarily mean sleeping in the parish, and he has had recourse to the old law as laid down in the Ecclesiastical Courts. In my judgment we are bound in this court by the decisions of two Divisional Courts, which dealt with this precise point. In *R.* v. *Harding* (1) the same arguments that have been used by counsel for the applicant were addressed to the court, and it came to the conclusion that notwithstanding these ecclesiastical cases, of which the judges naturally spoke with the utmost respect for the judges who decided them, nevertheless the case was a common law case to be decided by the common law. LORD COLERIDGE, C.J., said that he did not think that by the common law a party not living in the parish was qualified to be elected and to serve in the office of churchwarden. That is an answer to the argument put forward by counsel for the applicant.

In *R.* v. *Cree* (2) a similar point came before MATHEW and BRUCE, JJ., and that court approved the law as laid down in *R.* v. *Harding* (1). MATHEW, J., said:

> "The general law applicable to the qualifications of churchwardens is quite clear, and is correctly laid down in *R.* v. *Harding* (1) (to which decision I was a party), viz., that a person in order to be qualified for election as churchwarden must be resident within the parish."

BRUCE, J., expressed himself as of the same opinion and said that the general law was laid down in *R.* v. *Harding* (1). He used these words:

> "A fit and proper person means a fit and proper person resident within the parish."

I know of no authority to the contrary.

In *R.* v. *Townson* (3) the court did not dissent from the proposition of common law laid down in the two previous cases but took the view that it was not established that the person in question in that case was not living in the parish, and, therefore, the court refused to interfere. In these circumstances the rule must be made absolute.

AVORY, J.—I am of the same opinion. We are bound by the decisions in *R.* v. *Harding* (1) and *R.* v. *Cree* (2). The judgment in *R.* v. *Harding* (1) appears to

be founded on the law as laid down in PRIDEAUX ON DUTIES OF CHURCHWARDENS (16th Edn.), p. 6, which states:

> "All persons inhabitants of the parish are liable to serve the office of churchwarden. . . . A churchwarden must be . . . a resident inhabitant, and not merely an outsetter, who occupieth lands in the parish but doth not dwell therein."

That appears to be the law adopted in *R.* v. *Harding* (1).

SANKEY, J.—I agree. We are bound by *R.* v. *Harding* (1). I think that the old law is to be found stated in GIBSON'S CODEX. A churchwarden must be a resident in the parish and not merely a person who does not dwell therein.

Rule absolute.

Solicitors: *Vizard, Oldham, Crowder & Cash*, for *Humfrys & Symonds*, Hereford; *Leman & Co.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

HARRISON *v.* WALKER

[KING'S BENCH DIVISION (McCardie, J.), May 6, 1919]

[Reported [1919] 2 K.B. 453; 89 L.J.K.B. 105; 121 L.T. 251]

Contract—Breach—Repudiation—Joint purchase of house by plaintiff and defendant—Joint occupation—Quarrel between parties—Threat of, but no actual, violence—Implied term of contract—Duty to act reasonably while in occupation.

In June, 1918, by a verbal arrangement between them, H. and W. jointly purchased a bungalow, the purchase money being provided by them in equal shares. H. alleged that they purchased the bungalow for the purpose of residing together in it, and that it was an implied term of the arrangement that each party, while in occupation of the bungalow, should so act as not to prejudice or prevent the ordinary occupation of the bungalow by the other party, and that he should act reasonably, having regard to the circumstances of the mutual occupation. While the parties were in joint occupation of the bungalow they had a quarrel. It arose out of a provocative remark made by H. and was quite an isolated occurrence. In the course of it W. used violent language. There was no evidence of any previous quarrel between the parties nor of any quarrelsome conduct on the part of W., and W. never denied H.'s right to occupy the bungalow. H. now claimed damages for breach of contract, alleging that W., by his threats, violence, and quarrelsome conduct, and in breach of the agreement, made it impossible for him, H., to continue in occupation of the bungalow, so that he was obliged to quit the same.

Held: the action failed since (i) the defendant's conduct did not constitute a repudiation by him of his contractual obligations; (ii) in the absence of any physical dispossession, or at least a continuing threat of violence rendering it unsafe for the plaintiff to live in the bungalow, the plaintiff had no cause of action.

Notes. Referred to: *Colley* v. *Overseas Exporters (1919), Ltd.*, [1921] All E.R.Rep. 596.

As to what constitutes a repudiation of contract, see 8 HALSBURY'S LAWS (3rd Edn.) 204; and for cases see 12 DIGEST (Repl.) 378–379. As to implied terms in

contract to render performance possible, see 8 Halsbury's Laws (3rd Edn.) 121; and for cases see 12 Digest (Repl.) 685–686.

Cases referred to:

(1) *Mackay* v. *Dick* (1881), 6 App. Cas. 251; 29 W.R. 541, H.L.; 12 Digest (Repl.) 685, *5270*.

(2) *Sprague* v. *Booth*, [1909] A.C. 576; 78 L.J.P.C. 164; 101 L.T. 211, P.C.; 12 Digest (Repl.) 639, *4946*.

(3) *Terry* v. *Moss's Empires, Ltd.* (1915), 32 T.L.R. 92, C.A.; 42 Digest 913, *83*.

(4) *Re Rubel Bronze and Metal Co., Ltd., and Vos*, [1918] 1 K.B. 315; 87 L.J.K.B. 466; 34 T.L.R. 171; sub nom. *Vos* v. *Rubel Bronze and Metal Co., Ltd.*, 118 L.T. 348; 12 Digest (Repl.) 699, *5350*.

Action tried by McCardie, J., without a jury.

The plaintiff claimed (inter alia) damages for alleged breach of contract and a declaration that he was entitled to a half share of a bungalow and appurtenances at Hampton Wick. In June, 1918, the parties jointly purchased a bungalow known as The Swamp, Trowlock Island, Hampton Wick, together with certain appurtenances and accessories, for the sum of £146 8s. 8d., half of that sum being advanced by the plaintiff and the other half by the defendant. On the morning of Tuesday, July 16, 1918, a violent quarrel occurred in the bungalow between the plaintiff and the defendant over business matters. The defendant admitted that he clenched his fists and physically threatened the plaintiff. He did not, however, proceed to carry out his threats. The plaintiff then left the bungalow but returned the same night, which he spent in the bungalow. This was an isolated occurrence and it arose out of a provocative remark made by the plaintiff. The defendant used violent language, but no quarrel had ever occurred before between them there, and there was no evidence of any quarrelsome conduct on the part of the defendant, nor did the defendant deny the plaintiff's right to occupy the bungalow. The next day, however, July 17, the plaintiff left the bungalow and resided in rooms elsewhere, incurring expenses amounting to £19 5s.

In para. 3 of his statement of claim the plaintiff alleged that he and the defendant purchased the bungalow for the purpose of residing together therein, and it was an implied term of the verbal arrangement then made that each party while in occupation of the bungalow should so act as not to prejudice or prevent the ordinary occupation thereof by the other party, and/or that he should act reasonably, having regard to and under the circumstances of the mutual occupation. He further alleged in para. 4 that from the time of purchasing the bungalow the plaintiff and defendant jointly occupied the same, but the defendant, by his threats, violence, and quarrelsome conduct, and breach of the agreement referred to, made it impossible for the plaintiff to continue in occupation of the said bungalow, and he was consequently obliged to quit the same on July 17, 1918, and was put to inconvenience and expense in residing elsewhere. By his defence the defendant traversed all the above allegations.

J. B. Matthews, K.C., and *E. F. Lever* for the plaintiff.

H. M. Giveen and *H. C. Bickmore* for the defendant.

McCARDIE, J., stated the facts, referred to the pleadings, and continued: On those facts is there a cause of action established? The action, it will be observed, is not for what is called ouster in the ordinary sense. If the defendant had totally and physically expelled the plaintiff from the possession or occupation of the bungalow, I conceive that with regard to the bungalow, as with regard to the ordinary case of land joint tenants in possession, there would have been a case of what is called ouster. The case as set out by the plaintiff does not rest on that footing. Nor do I think that it could rest on that footing, because there was not in fact any physical dispossession by the defendant of the plaintiff from the bungalow. The case, therefore, rests on a unique basis, which, so far as I am aware, has not been discussed in the courts of law: that is, on an implied contract which exists, as it is asserted, between the parties, that neither will do that which,

by diminishing the amenities of the joint residents, shall render it impossible as a matter of practice and habit for the other person to dwell therein. The plaintiff would certainly be right in asserting as a proposition of law that it is the duty of each person who is a party to a contract to do all that is reasonably necessary for the purpose of enabling that contract to be carried out. Nowhere is the matter put with greater clarity or force than by LORD BLACKBURN in *Mackay* v. *Dick* (1). LORD BLACKBURN said this (6 App. Cas. at p. 263):

> "Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing."

The statement made by LORD BLACKBURN in *Mackay* v. *Dick* (1) was adopted to the full by the Judicial Committee of the Privy Council in *Sprague* v. *Booth* (2). I need take one further illustration only with regard to this doctrine, and that is *Terry* v. *Moss's Empires, Ltd.* (3), a more recent authority, where, in connection with theatrical contracts, the Court of Appeal indicated that it was due to each party to act reasonably in the carrying out of all matters which were essential for the proper performance of the obligation.

The law cannot differ whether the contract is written or oral. In each case the obligation must be the same—namely, each must do that which is reasonably necessary for the proper carrying out of the contract between the parties. That principle of law must be ever considered in connection with the particular circumstances of the case. In the present case I am satisfied that there was, in fact, no repudiation of the contract with the defendant. This was an isolated quarrel in the bungalow. Never before the morning of Tuesday, July 16, had there been any quarrel between the parties at that place. Was there any quarrel when the plaintiff went back on the evening of Tuesday? The threat which was made by the defendant was a threat which sprang out directly a statement was made of an annoying character by the plaintiff. It was an isolated quarrel, and there is nothing before this date which would indicate any quarrelsome conduct on the part of the defendant. It will be observed that although the defendant used strong language on this occasion, and, although he did indicate a desire to project the plaintiff into the waters of the Thames, he did nothing more than that. He never said to the plaintiff, "You must not come to the bungalow again." He never denied in any way the right of the plaintiff to such enjoyment as he could gain, he being under the same tent beside the Thames with the defendant, who had made those statements to him.

It is therefore unnecessary for me to review the authorities with regard to repudiation. I had occasion so to do in *Re Rubel Bronze and Metal Co., Ltd., and Vos* (4), where I indicated the authorities as they now stand on the question of repudiation. Applying those authorities to the facts of the present case, there was then no repudiation made by the defendant of his contractual obligations. If there was no repudiation by the defendant of his contractual obligations, the able argument of counsel for the plaintiff, when analysed, comes to this: that any offensive observation, any undesirable conduct on the part of one of the parties which renders it unpleasant for the other party to remain in the joint residence, would give rise to a cause of action. I need scarcely indicate the extraordinary stretch of contractual obligation that any such doctrine would cause. In my view, no action such as the present will lie unless there be either physical dispossession or a threat, not merely on an isolated occasion, but of a continuing character, so as to render it physically unsafe for a person to continue in residence with the man who has made the threat. In the present case there is no suggestion that the defendant repeated his threat. There is no suggestion that he ever indicated that he would inflict actual physical violence in the future on the plaintiff, and my own view is that all that happened was that by reason of the extremely unpleasant verbal passages which had taken place between the two, the plaintiff, as a sensitive

individual, found it unconducive to his domestic content to continue in the same abode as the defendant. I shall not hold that a mere quarrel, accompanied by the threat of physical violence, unless accompanied by an intent to repeat acts or matters which would render residence impossible, amounts to a breach of any implied contract between the parties. My own feelings, as I said before, are that the plaintiff left because of the extremely unpleasant position between the defendant and himself with regard to business matters.

The result is that on the facts of this case the ingenious claim in paras. 3 and 4 of the statement of claim must fail. I am invited, however, to make a declaration to the effect that "the plaintiff is entitled to an undivided half share of the bungalow and appurtenances thereof." Before it makes a declaration, the court should be satisfied that there has been a real dispute between the parties as to the right of the person who claims the declaration. In the present case I cannot see the slightest ground for suggesting that the defendant ever disputed that the plaintiff was fully entitled to a half share in the bungalow and the appurtenances thereof. The only point that has been made with regard to that is, that after this unhappy antagonism had arisen between the parties the bungalow ceased to be used in the way so necessary to the plaintiff. That is quite a natural thing to do; and I certainly cannot infer from that any intention whatever on the part of the defendant to dispossess the plaintiff in any way of his rights. My view is that a declaration to the effect asked by the plaintiff is wholly unnecessary. The plaintiff's claim for damages with respect to the bungalow also fails.

Judgment for defendant.

Solicitors: *Blanckensee & Co.*; *W. H. Smith & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

DUNLOP BROS. & CO. *v.* TOWNEND

[King's Bench Division (Bailhache, J.), April 3, 4, 1919]

[Reported [1919] 2 K.B. 127; 88 L.J.K.B. 1129; 121 L.T. 159; 14 Asp.M.L.C. 517; 24 Com. Cas. 201]

Insurance—Marine insurance—Floating policy—Subject-matter designated in general terms—"Interest" intended to be covered by assured—Insurance effected by consignees on merchandise to be shipped—Failure to declare goods coming within policy, but which consignees instructed not to insure under policy—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 26 (3), *s.* 29 (3).

By s. 26 (3) of the Marine Insurance Act, 1906: "Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered."

Held: the word "interest" must be construed in its stricter sense as meaning the nature of the interest which the assured has in the subject-matter of the insurance, not in its looser sense as the subject-matter of the insurance itself, since in s. 26 (3) the word "subject-matter" and the word "interest" were used together.

The plaintiffs, who were the agents of certain firms in the East for the sale in this country of their goods, effected a Lloyd's floating policy of marine insurance against war risks only, the subject-matter of which was "produce and/or merchandise" from certain ports in the East to the United Kingdom. The interest which the plaintiffs intended to be covered by the policy was,

as consignees, in respect of their commission on selling goods in this country and advances made by them on goods coming forward from their principals in the East. The plaintiffs declared under the policy all the goods which came within its terms except such goods as they were instructed by their principals to insure under a government scheme of war risks insurance and not under the floating policy. A consignment of raisins which the plaintiffs had declared under the floating policy was lost by enemy action. On a claim by the plaintiffs the question arose whether they were justified in failing to declare under the floating policy those consignments which they were instructed not to insure under the policy, but under the government scheme, it being admitted that, if the plaintiffs were bound to declare under the policy all the goods consigned to them which came within the policy, irrespective of the shippers' instructions, the policy had run off and the claim failed.

Held: (i) as the subject-matter insured by the floating policy was designated in general terms, under s. 26 (3) of the Marine Insurance Act, 1906, the interest of the plaintiffs covered by the policy was the interest which they had originally intended to insure, and that interest was in no way affected or limited by the instructions given to the plaintiffs to insure certain goods under the government scheme; but (ii) as the goods which the plaintiffs were instructed not to insure under the floating policy were goods which came within the terms of that policy and to which the interest of the plaintiffs attached, the plaintiffs were bound by s. 29 (3) of the Marine Insurance Act, 1906, to make declarations of these goods under the policy and since they had not done so the policy had run off.

Notes. As to the subject-matter insured in a policy of marine insurance and as to floating policies, see 22 HALSBURY'S LAWS (3rd Edn.) 50 et seq. For cases on floating policies, see 29 DIGEST 99 et seq. For the Marine Insurance Act, 1906, s. 26, s. 29, see 13 HALSBURY'S STATUTES (2nd Edn.) 28, 29.

Cases referred to:

(1) *Stephens* v. *Australasian Insurance Co.* (1872), L.R. 8 C.P. 18; 42 L.J.C.P. 12; 27 L.T. 585; 21 W.R. 228; 1 Asp.M.L.C. 458; 29 Digest 104, *617*.

(2) *Scott* v. *Globe Marine Insurance Co., Ltd.* (1896), 1 Com. Cas. 370; 29 Digest 101, *586*.

Also referred to in argument:

Reliance Marine Insurance Co. v. *Duder*, [1913] 1 K.B. 265; 81 L.J.K.B. 870; 106 L.T. 936; 28 T.L.R. 469; 12 Asp.M.L.C. 223; 17 Com. Cas. 24, 227, C.A.; 29 Digest 119, *725*.

Preliminary Point of Law.

The plaintiffs, Dunlop Brothers & Co., sued the defendant, an underwriter on a floating policy of marine insurance dated June, 1916, underwritten by the defendant and other underwriters, to recover from him his proportion of the sum of £1,665 in respect of the loss of a number of cases of raisins. The policy effected by the plaintiffs was a Lloyd's floating policy for £2,000 upon produce and/or merchandise to be thereafter declared and valued as per marine policy from certain ports in the East to any ports in the United Kingdom, and was against war risks only. The plaintiffs delivered particulars of the interest intended to be covered by the floating policy as follows: "The plaintiffs' interest was as consignees for sale in respect of selling commission, advances made or to be made and drafts accepted or to be accepted against shipments (within the terms of the policy) advised or made to them from time to time, save as to such shipments as the plaintiffs should be instructed by the shippers (whose instructions, if given, they were bound to carry out) to insure under the government scheme of war risks insurance." The plaintiffs declared under the floating policy all the goods which came within the terms of the policy except such goods as they were instructed by their principals to insure against war risks under the government scheme of war risks

insurance, and not under the policy. On Oct. 27, 1917, they duly declared against the policy a shipment of 770 cases of raisins from Bombay for Liverpool per steamship *Karema* the proportion of the value thereof attaching to the policy being £1,665. The *Karema* was sunk by enemy action in November while on a voyage to Liverpool, and the raisins were lost.

The defendant by his defence did not admit that the plaintiffs were interested in the policy as alleged, or that the insurance was intended to cover such alleged interest. He also alleged that there were many other consignments covered by the policy which should have been declared thereon and which if they had been declared would have exhausted the policy. The question of law to be determined was whether the plaintiffs were justified in failing to make declarations under the floating policy in respect of those consignments which they were instructed by their principals to insure against war risks under the government scheme of war risk insurance. This question was ordered to be tried as a preliminary question of law.

Leck, *K.C.*, and *Raeburn* for the plaintiffs.
R. A. Wright, *K.C.*, and *Simey* for the defendants.

BAILHACHE, J.—In this case the plaintiffs sue an underwriter upon a floating policy of marine insurance, dated June 10, 1916, in respect of the loss of a number of cases of raisins. The policy describes the subject-matter of the insurance to be "produce and/or merchandise," and it is insured from certain ports in the East to the United Kingdom against war risks only. The reason for that is that the marine risks were covered on the other side; but it was not convenient to cover the war risks in the East, so that was done in London.

The case comes before me upon a question of law, on the assumption that certain particulars delivered by the plaintiffs in this case are correct. Those particulars are as follows: "The plaintiff's interest was as consignees for sale in respect of selling commission, advances made or to be made and drafts accepted or to be accepted against shipments (within the terms of the policy), advised or made to them from time to time, save as to such shipments as the plaintiffs should be instructed by the shippers (whose instructions, if given, they were bound to carry out) to insure under the government scheme of war risks insurance." The point to be determined really turns on the last words, "save as to such shipments as the plaintiffs should be instructed by the shippers (whose instructions if given they were bound to carry out) to insure under the government scheme of war risks insurance." It arises in this way. The plaintiffs are the agents of certain people in the East for the sale of their goods in this country. The goods are shipped to the plaintiffs, who made advances from time to time in respect of the goods, and therefore the plaintiffs were interested in their safe arrival by reason of the selling commission which they would make if they arrived, and of the advances which they made against them before arrival. The plaintiffs took out this floating policy with reference to those goods. They declared under this floating policy all the goods which came within the terms of the policy except such goods as they were instructed by their principals in the East to insure against war risks under the government scheme of war risks insurance and not under this policy. The question to be determined is whether the plaintiffs were justified in failing to make declarations under this floating policy in respect of those consignments which they were instructed by their principals to insure against war risks under the government scheme, that arrangement not having been communicated to the underwriters of this policy. It is agreed that if the plaintiffs were bound to make declarations of all the goods which came forward to them as consignees irrespective of whether they were instructed to insure them under the government scheme or not the floating policy had run off and the claim fails. Those are the assumptions and the circumstances in which the case comes before me to be tried.

When a floating policy on goods is taken out the assured contemplates that goods will be coming forward in which he or the person on whose behalf he takes out the floating policy will, at any rate at the time of the loss, have an insurable interest. The floating policy might be taken out because of the insurable interest of other persons on whose behalf the floating policy is taken out. There are many kinds of insurable interest. The most obvious and most complete is the insurable interest of an owner in goods, but from that full and complete interest down to the smallest that can be covered by insurance there are many varying degrees of insurable interest. It is sufficient that the person on whose behalf the policy is taken out has some pecuniary interest which would be safeguarded by the safe arrival of the goods, and be injured by the failure of the goods covered by the floating policy to arrive. Under the Marine Insurance Act, 1906, it is not necessary that the interest which the assured intends to insure should be declared to the underwriter. That is provided by s. 26 (2), which is in these terms:

> "The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy."

Subsection (3) of the same section provides that

> "Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered."

Subsection (3) has been the subject of a good deal of judicial criticism on the ground that it is difficult to understand. I think the chief difficulty about it is due to the fact that the word "interest" is very often used in marine insurance in two senses. It is very often used to mean the nature of the interest which the assured has in the subject-matter of the insurance, and it is also often used in the looser sense to indicate the subject-matter of the insurance itself. When, however, the same section of an Act of Parliament contains the word "subject-matter" and the word "interest" used together it seems to me quite clear that the word "interest" must be construed in its stricter and proper sense. I think that sub-s. (3) means that where the policy designates the subject-matter insured in general terms, as, for instance, in this case, merchandise, it shall be construed to apply to the interest—that is to say, the pecuniary or insurable interest which the assured intended should be covered, whether that interest be that of the owner or whether it be that of a person who has made advances, or of a person who is interested in the safe arrival of the goods by reason of the commission which he shall get on the sale, and, of course, the policy applies to a case where a person takes out a floating policy not to cover any pecuniary interest of his own, but to cover the liabilities and interest of persons on whose behalf he is instructed to insure.

That interest need not be declared, but the law is that the policy shall only cover the interest which it is intended to cover. An illustration of the extent to which a floating policy with no declared interest may be extended to cover the interest intended to be covered is to be found in *Stephens* v. *Australasian Insurance Co.* (1). An illustration, showing how strictly a policy in general terms is limited to the interest which it was originally intended should be covered by the assured, is to be found in *Scott* v. *Globe Marine Insurance Co., Ltd.* (2). That was a case in which a carrier took out a floating policy to cover the goods of such of his consignees as should instruct him to insure against the risks of carriage. It so happened that there was a loss of goods in respect of which he was personally liable, and he endeavoured to make a declaration under that policy, which he had not taken out on his own behalf or to cover any interest of his own, for that loss, and it was held that inasmuch as that was not the interest which he had originally intended to cover, he could not do that. Here the interest which the plaintiffs intended to cover was their interest as persons selling goods on commission, in respect of their commission and advances on goods coming forward from their principals in the East. The subject-matter is wide enough to cover all the

declarations which it is said ought to have been made, and the interest also is wide enough to cover the declarations which ought to have been made. It is, however, suggested that the interest may be limited because the principals from time to time gave instructions to the plaintiffs not to insure particular goods which came forward in the ordinary way with these underwriters, but to insure them with the war risk underwriters. In my opinion, that is not a limitation of the interest at all. The interest of the plaintiffs was precisely the interest which they had originally intended to insure under this policy, and these instructions to them by their principals in no way affected or limited their interest or altered it in the slightest degree. They were merely instructions that instead of insuring with A. the plaintiffs should insure precisely the same interest with B.

As I understand the working of floating policies it is an essential principle that declarations must be made of all goods which come within the terms of the policy to which the interest intended to be covered at the time the floating policy is taken out attaches: see Marine Insurance Act, 1906, s. 29 (3). The goods about which the question arises in this case were goods which came within the terms of the policy. They were goods to which the interest of the plaintiffs attached, but they were goods in respect of which the plaintiffs had instructions to insure with somebody else. The fact that they had instructions to insure these goods with somebody else seems to me to be wholly immaterial. It in no way affects their interest, and they could no more act on these instructions, to the detriment of the defendant, than they could select for themselves what goods they would declare and what goods they would not declare under the policy. It seems to me that this is really quite a plain case, and upon the true construction of ss. 26 and 29 of the Marine Insurance Act, 1906, the plaintiffs ought to have made those declarations which the defendant says should have been made on this policy. If this is right then upon the facts which are admitted the policy has run off. In the result there must be judgment for the defendant.

Judgment for the defendant.

Solicitors: *R. Greening & Co.*; *Thomas Cooper & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

BOWYER, PHILPOTT AND PAYNE, LTD. *v.* MATHER

[KING'S BENCH DIVISION (Darling, Avory and Salter, JJ.), December 11, 1918]

[Reported [1919] 1 K.B. 419; 88 L.J.K.B. 377; 120 L.T. 346; 83 J.P. 50; 17 L.G.R. 222]

Local Authority—Legal proceedings—Appearance by officer—Authorisation—Need for authorisation before proceedings begun—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 259.

By s. 253 of the Public Health Act, 1875, proceedings for the recovery of a penalty under the Act could be taken by a local authority. By s. 259 of the Act the local authority was empowered to "appear before any court, or in any legal proceeding . . . by any officer or member authorised generally or in respect of any special proceeding by resolution of such authority, and . . . any officer or member so authorised shall be at liberty to institute and carry on any proceedings which the local authority is authorised to institute and carry on under this Act."

Held: the authority required by s. 259 had to be given by the local authority to its officer before the proceedings were instituted by the officer, and sub-

sequent confirmation of an officer's action in commencing proceedings was not sufficient to satisfy the requirement.

On May 17, 1918, the respondent, the inspector of nuisances of Trowbridge Urban District Council, acting under the Public Health Act, 1875, seized an unsound pig's carcase which he had found on the appellant's premises and had it taken before a justice who ordered it to be destroyed. On the same day the respondent laid an information against the appellant for the recovery of a penalty under the Act of 1875 in respect of the exposure for sale of unsound meat. On May 22, 1918, before the information came on for hearing, the urban district council passed a resolution approving and confirming the respondent's action in laying the information. No general authority to bring proceedings under the Act of 1875 had ever been conferred on the respondent by the urban district council. On May 23, 1918, the information was heard and the appellant was convicted and a penalty imposed.

Held: the conviction must be quashed since at the time when he laid the information the respondent had neither general nor special authority from the urban district council to institute the proceedings.

Notes. Section 259 of the Public Health Act, 1875, was repealed by the Local Government Act, 1933, and replaced by s. 277 of the Act of 1933 which contains substantially the same words as s. 259. By s. 109 of the Food and Drugs Act, 1955, a local authority may institute proceedings under any section of the Act of 1955, including s. 8 of the Act in respect of the sale of food unfit for human consumption.

As to the power of a local authority generally to take legal proceedings, see 24 HALSBURY'S LAWS (3rd Edn.) 630, and in relation to offences against the Food and Drugs Act, 1955, see 17 HALSBURY'S LAWS (3rd Edn.) 590. For cases on legal proceedings by a local authority see 33 DIGEST 23. For the Local Government Act, 1933, s. 277, see 14 HALSBURY'S STATUTES (2nd Edn.) 497.

Cases referred to:

(1) *R.* v. *Chapman, Ex parte Arlidge*, [1918] 2 K.B. 298; 87 L.J.K.B. 1142; 119 L.T. 59; 82 J.P. 229; 16 L.G.R. 525, D.C.; 36 Digest (Repl.) 337, *795.*

(2) *St. Leonard Vestry* v. *Holmes* (1885), 50 J.P. 132, D.C.; 36 Digest (Repl.) 337, *794.*

Also referred to in argument:

Thorpe v. *Priestnall*, [1897] 1 Q.B. 159; 66 L.J.Q.B. 248; 60 J.P. 821; 45 W.R. 223; 13 T.L.R. 95, D.C.; 14 Digest (Repl.) 169, *1321.*

Firth v. *Staines*, [1897] 2 Q.B. 70; 66 L.J.Q.B. 510; 76 L.T. 496; 61 J.P. 452; 45 W.R. 575; 13 T.L.R. 394; 41 Sol. Jo. 494; 1 Digest 403, *1033.*

Beardsley v. *Giddings*, [1904] 1 K.B. 847; 73 L.J.K.B. 378; 90 L.T. 651; 68 J.P. 222; 53 W.R. 78; 20 T.L.R. 315; 48 Sol. Jo. 352; 20 Cox, C.C. 645; 2 L.G.R. 719, D.C.; 14 Digest (Repl.) 169, *1323.*

Case Stated by justices of the county of Wilts.

An information was preferred against the appellants by the respondent under the Public Health Act, 1875, for the recovery of a penalty in connection with the exposure for sale of unsound meat by the appellants. At the hearing of the information it was proved or admitted that the respondent was, on May 17, 1918, the inspector of nuisances of the Trowbridge Urban District Council. On the said May 17, 1918, the carcase of a pig was deposited on the premises of the appellants for the purpose of preparation for sale, and was intended for the food of man and was unsound. On the said May 17, 1918, the respondent visited the appellants' premises and inspected and examined the carcase. As the carcase appeared to be unsound to the respondent he seized and carried it away by himself or by an assistant in order to have it dealt with by a justice. The justice before whom the carcase was brought pronounced the same to be unsound and ordered it to be destroyed. The respondent laid the information in question against the

A appellants on the said May 17, 1918. On May 22, 1918, a meeting of the appropriate committee of the Trowbridge Urban Council was held, and at that meeting the action of the respondent in laying the said information was approved and confirmed. Evidence was submitted at the hearing on behalf of the respondent that the practice of the Bath Corporation some sixteen years previously was for the inspector of nuisances to institute proceedings on his own initiative and to obtain B confirmation of his action from the sanitary authority or the appropriate committee.

On behalf of appellants it was contended (a) that the respondent had no authority to institute the proceedings; (b) that the evidence of the practice in the city of Bath was inadmissible; (c) that the summons comprised two offences—namely, the exposure for sale and deposit for the purpose of preparation for sale—and that the respondent did not elect in respect of which offence he would proceed; and C (d) that the confirmation of the action of the respondent at the meeting held on May 22, 1918, did not cure the defect alleged. With regard to the third of the above contentions on the part of the appellants, the respondent, after his case had been closed, and before any evidence was adduced for the defence, applied to have the summons amended, and the justices ordered the summons to be amended by striking out the words charging the appellant with exposure for sale. On behalf D of the respondent it was contended, (a) that the authority of the inspector to take proceedings could not be challenged at the time when the question was raised; (b) that the proceedings were in reality instituted at the time when the clerk to the council took charge of the prosecution; (c) that if there was any technical initial defect in the institution of the proceedings such defect had been cured by the approval and confirmation of the committee at their meeting on May 22, 1918; E (d) that the evidence as to the practice at Bath, which was in a neighbouring district, was admissible for the guidance of the justices; and (e) that the defect created by the alleged erroneous inclusion of two offences in one summons had been cured by the amendment under which one of the offences had been dropped.

The justices were of opinion that the respondent, as an officer of the Trowbridge Urban District Council, had authority to institute the proceedings, and that, in F any event, the defect, if any, in their institution had been cured by the approval and confirmation of the committee on May 22, 1918. They were further of opinion that they were at liberty to receive the evidence as to the practice at Bath, which had been tendered, and that they were justified in amending the summons in the manner in which it had been amended. They therefore imposed upon the appellants a penalty of £20 and six guineas costs.

G By the Public Health Act, 1875:

> "Section 116. Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for H sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk appears to such medical officer or inspector to be diseased or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same I himself or by an assistant, in order to have the same dealt with by a justice.
>
> "Section 117. If it appears to the justice that any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk so seized is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed, or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal,

carcase, or fish, or piece of meat, flesh, or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread, or flour, or for the milk so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months. The justice who, under this section, is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place.

"Section 253. Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent of the Attorney-General: provided that such consent shall not be required to proceedings which are by the provisions of this Act relating to nuisances or offensive trades authorised to be taken by a local authority in respect of any act or default committed or taking place without their district, or in respect of any house, building, manufactory, or place situated without their district.

"Section 259. Any local authority may appear before any court, or in any legal proceedings by their clerk, or by any officer or member authorised generally or in respect of any special proceeding by resolution of such authority, and their clerk, or any officer or member so authorised shall be at liberty to institute and carry on any proceeding which the local authority is authorised to institute or carry on under this Act."

Bartley for the appellants.
The respondent did not appear.

DARLING, J.—In this case the respondent, the inspector of nuisances of the Trowbridge Urban District Council, visited the premises of the appellant and found there a carcase of a pig which was intended for the food of man, and which was unsound. Acting within the powers conferred by the Public Health Act, 1875, he seized the carcase and had it taken before a justice who condemned it as unwholesome and ordered it to be destroyed. So far everything was in order, but something more was done. The inspector of nuisances, the respondent, commenced proceedings for the recovery of penalties against the appellants. The Public Health Act, 1875, permits of this being done, but under s. 253 of the Act there is provision made that

"proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General."

By virtue of that section, therefore, the local authority had power to institute these proceedings, and might have done so. And then, under s. 259 of the Act, the local authority is empowered to

"appear before any court, or in any legal proceedings by their clerk, or by any officer or member authorised generally or in respect of any special proceeding by resolution of such authority, and their clerk, or any officer or member so authorised shall be at liberty to institute and carry on any proceedings which the local authority is authorised to institute and carry on under this Act."

The effect of these two sections is that the local authority can institute proceedings or authorise their clerk or some other person, generally or in respect of any special proceeding by resolution to institute proceedings. At the date when these proceedings were instituted, namely, on May 17, 1918, nobody had been authorised to institute them. The local authority did not act themselves, and their inspector, the present respondent, is not shown to have had any authority,

general or special, before the institution of the proceedings to take the same. The condition precedent, therefore, of s. 259 was never fulfilled. It is quite true that while the proceedings were pending, namely, between May 17, 1918, when the respondent laid the complaint, and May 23, 1918, when the summons was heard, a committee of the local authority met and passed a resolution approving and confirming what the respondent had done. The meeting was held on May 22, 1918. It was also given in evidence that this method of procedure had been in vogue some sixteen years previously at Bath. In my view the resolution of the committee was not sufficient to authorise the continuance of the proceedings which had already been instituted. There never was such an authorisation of the institution of the proceedings as is required by s. 259 of the Act, and it seems to me that no subsequent confirmation of what has been already done can be sufficient to satisfy the language of that section. If it was possible to confirm proceedings in this manner the result might be curious. The proceedings might fail, and then the local authority would not confirm them; but on the other hand they might succeed, and then the local authority might desire to confirm them and proceed to enforce payment of the costs.

In my opinion, for purposes contemplated under the Public Health Act, 1875, the local authority must, either specially or generally, authorise their officer designated by them for the work beforehand with regard to any proceedings which they may desire to take. There is no difficulty in the matter, because they can give their officer a general authority to institute proceedings. The appeal must be allowed.

AVORY, J.—I am of the same opinion. It is a matter for regret that there has been no appearance for the respondent, and we are consequently left to infer, from the way in which the case is stated, a certain fact which may be important. The fact to which I refer is that there is nothing to show that there was any authority of any kind conferred upon the respondent. But nevertheless, I think that we are thoroughly justified in inferring that there never was any general authority conferred upon the respondent. If there had been, there would not have been the contentions raised on behalf of the respondent before the justices, especially as to the practice which prevailed in the city of Bath some sixteen years ago. It is impossible to imagine that any reliance would have been placed upon evidence of that character if the respondent had had any better point to rely upon. I repeat, therefore, that it appears to be quite certain that there was no authority conferred upon the respondent to take proceedings by the local authority. That being so, the proceedings were not instituted by virtue of the authority contemplated by s. 259 of the Public Health Act, 1875, and the conviction by the justices cannot be upheld. It is important to notice that the effect of s. 253 is that the authority to institute proceedings is only required when it is a question of the recovery of a penalty. There is no interference with the jurisdiction of the inspector to seize unwholesome food.

Various cases have been cited to us, and much reliance was placed upon the decision in *R.* v. *Chapman, Ex parte Arlidge* (1). I think, however, that *St Leonard Vestry* v. *Holmes* (2) is the one which is most in point, and I will refer to a passage in the judgment of DAY, J., in that case. The learned judge said (50 J.P. at p. 134):

> "I think in this case the magistrate was quite right, and that the notice given by the inspector was utterly bad. There is nothing to show that the vestry ever gave any authority to order these particular works to be done, so as to comply with s. 81 of the Act. It is important that the vestry should exercise a discretion in each case, and it is not enough that the inspector does what he pleases and then relies on his acts being afterwards approved by the vestry."

These words are applicable to the present case, having regard to the particular ss. 253 and 259 of the Act of 1875, and the meeting of the committee of the local

authority on May 22, 1918, and their approval and confirmation of what had been done by the inspector on May 17, 1918, did not regularise proceedings which were originally unauthorised.

SALTER, J.—I agree. Section 253 shows a very clear intention that proceedings for penalties are not to be lightly instituted. When one reads s. 253 in conjunction with s. 259, the words "so authorised" in the latter section must be confined to an antecedent authority.

Conviction quashed.

Solicitors: *Gedge, Fiske & Gedge*, for *Beaven & Compton*, Bradford-on-Avon.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

Re ARBITRATION BETWEEN L. M. FISCHEL & CO. & MANN AND COOK

[KING'S BENCH DIVISION (Avory and Salter, JJ.), May 22, 1919]

[Reported [1919] 2 K.B. 431; 88 L.J.K.B. 1173; 121 L.T. 275]

Arbitration—Setting aside award—Misconduct—Refusal of umpire to state Case for opinion of court—Refusal to delay making award until summons for order requiring umpire to state Case heard by court.

A contract entered into between buyers and sellers of goods was in the form issued by the General Produce Brokers' Association of London and incorporated the rules of the association, including the rule relating to arbitration, r. 7. By r. 7, where a dispute was referred to the association, each party was required to appoint an arbitrator, and the arbitrators were required to appoint an umpire in case of their disagreement. Rule 7 also provided that the award of the umpire should be final and binding on the parties unless within three days of receiving the award either party lodged an appeal with the secretary of the association. A dispute between the buyers and the sellers having arisen under the contract and been referred to duly appointed arbitrators who failed to agree on the award, an umpire was appointed. The umpire was requested by the buyers to state a Case for the opinion of the court on questions of law arising in the arbitration. The request was made in good faith and the questions of law were not frivolous. The umpire refused to state a Case and said that, if he was pressed to do so, he would withdraw from the arbitration. The arbitration was then adjourned and correspondence followed between the buyers' solicitors and the umpire in which the solicitors maintained the buyers' request for a Case to be stated on questions of law. Eventually, the buyers took out a summons asking the court to order the umpire to state a Case, and their solicitors wrote to the umpire formally requesting him not to make his award until the summons had been heard and determined. In spite of this request the umpire proceeded with the arbitration and made his award.

Held: the umpire in failing to state a Case when asked by the buyers to do so and in making his award before the buyers had applied to the court for an order that a Special Case be stated by him was guilty of misconduct which, per SALTER, J., was more than mere technical misconduct, and, on that ground and having regard to the umpire's attitude, the court would exercise its discretion to set the award aside rather than remit it to the umpire.

Notes. The Arbitration Act, 1950, consolidated, without amendment, the Arbitration Acts, 1889 to 1934. As to the statement of a Special Case by an arbitrator or umpire, see s. 21 of the Act of 1950. For the court's power to remit the award or set it aside, see s. 22 and s. 23 of the Act of 1950, respectively.

As to a Special Case for the opinion of the court, see 2 HALSBURY'S LAWS (3rd Edn.) 38 et seq.; and as to the power of the court to remit or set aside the award, see ibid., 55 et seq. For cases on statement of the award in the form of a Special Case see 2 DIGEST (Repl.) 584 et seq., and for cases on grounds for setting aside the award, see ibid., 678 et seq. For the Arbitration Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 89.

Motion to set aside award.

By a contract dated Oct. 11, 1918, partly in print and partly in writing, the applicants (referred to hereafter as "the buyers"), Mann and Cook, bought, and the respondents (referred to hereafter as "the sellers"), L. M. Fischel & Co., sold, 5 tons of dry hen yolk at a price c.i.f. London, payment against documents, shipment from certain ports being provided for as follows: August, October, provisionally declared shipped by steamship *Iyo Maru*, declaration with full particulars to be made with due dispatch. The contract was in the form issued by the General Produce Brokers' Association of London. It provided that the name of vessel or vessels, marks, and full particulars should be declared to the buyers in writing with due dispatch, and incorporated the rules of the General Produce Brokers' Association of London, including r. 7 relating to arbitrations, which rule appeared on the back of the contract. Rule 7 of the General Produce Brokers' Association provided that the committee of the association should have power, when called upon, to settle matters in dispute between members of the association in connection with their business transactions, and that certain regulations should apply to all references to arbitration under the rules of the association. Those regulations provided (inter alia) that each disputant should appoint in writing as arbitrator from the register of arbitrators a member thereof and that:

> "(b) Such arbitrators shall before entering on the arbitration appoint an umpire from the register of arbitrators, and in the event of the arbitrators being unable to agree upon an award they shall refer the dispute to the umpire. If the arbitrators shall neglect to appoint an umpire with seven days from their appointment, the acting president [of the association], at the request of either arbitrator, shall appoint an umpire from the register of arbitrators. The arbitrators and umpire shall have power to obtain, call for, receive, and act upon any such oral or documentary evidence or information (whether the same be strictly admissible as evidence or not), and to conduct the arbitration in such manner in all respects as they or he may think fit. The arbitrators and umpire shall proceed with the arbitration in the absence of the parties unless either of the parties shall have given written notice to his arbitrator at the time of his appointment of his desire to be present, and (or) to adduce evidence. Any party so giving notice shall be entitled at the same time to nominate a commercial man in London to represent him for all the purposes of the arbitration. (c) The award of such arbitrators, or umpire (as the case may be), shall be final and binding on the parties unless within three clear days after receipt of the award an appeal with a fee of £5, or such higher fee as may in special cases be fixed by the acting president, be lodged by either disputant with the secretary of the association. All awards must be signed by the arbitrators or umpire in their own names. (d) Any appeal shall be decided by the committee of the association, or, in the discretion of the committee, by a council of appeal. . . . (e) The fees for arbitration or appeal and award . . . shall be paid by the losing party unless otherwise awarded."

On Oct. 28, 1918, the sellers made provisional declaration by cable of shipment by *Iyo Maru*. This was cancelled on Nov. 8, 1918, by the sellers, and also on cable advice *Shidzuako Maru* was provisionally declared by the sellers subject to

confirmation by mail, and on Jan. 1, 1919, this was confirmed without qualification, but bill of lading date was not given and the buyers made reserves as to bill of lading date being in order. On Jan. 7, 1919, this last declaration was withdrawn by the sellers and the *Aki Maru* substituted. The bill of lading was stated to be dated Oct. 31, 1918. On Jan. 27, 1919, documents were presented and the bill of lading merely showed that the goods on Oct. 31, 1918, had been received for shipment per *Akang Maru* to be transhipped on *Aki Maru*. The buyers alleged that the documents were not in accordance with the contracts and refused to accept them or to make payment. The parties then proceeded to appoint arbitrators, but the arbitrators originally appointed by the sellers and the buyers each refused to act on learning that the buyers would require a case to be stated for the opinion of the court on questions of law. The sellers thereupon requested the buyers that they should withdraw their request that a case should be stated in the arbitration for the opinion of the court. The buyers, by a letter to the sellers dated Feb. 11, 1919, declined to do so, but stated their willingness to agree to the appointment of a suitable legal sole arbitrator. That offer was not accepted. Ultimately other arbitrators were appointed by the buyers and sellers, and the arbitrators so appointed failed to agree upon an umpire. An umpire was appointed by the acting president of the association. The umpire was supplied by the arbitrators with a statement of points of law upon which it was desired that the opinion of the court should be taken. The statement was as follows:

> "(a) That declaration per *Aki Maru* was not made with due dispatch. It should have been made provisionally on cable advices as sellers' own printed documents show. (b) That firm's declaration per *Shidzuako Maru* having been made on Jan. 4, 1919, no other declaration could be made at that late date, more than two months after latest date for shipment. (c) That, even assuming the declaration per *Aki Maru* to have been in time, the documents presented were not in accord with the declaration as they did not purport to show any shipment on that vessel (or, indeed, any vessel) on or before Oct. 31, 1918. (d) That the so-called bill of lading is not a bill of lading at all within the meaning of the contract, but a mere receipt for goods which are said to be intended to be shipped. The buyers contend there must be an actual shipment on the vessel declared on or before Oct. 31, 1918, to satisfy the contract. The receipt on its face shows there was no such shipment. It does not even show there was a shipment on any vessel within the material time. (e) If there was a shipment within the contract time on the *Tachang Maru* at Hankow it was not a shipment for London or Liverpool direct and/or indirect, with liberty to call and/or tranship, &c., but a shipment by a coasting steamer for Shanghai and not for London or Liverpool, but in the contrary direction. (f) That the contract contemplates shipment on an ocean steamer for the required destination, not upon a river or coasting vessel."

A meeting of the arbitrators and the umpire took place on or about Mar. 12, 1919, and shortly afterwards the umpire was asked for a case to be stated upon the question of law arising on the above statement. In reply to this request the umpire said that he would not state a case, and that if the point was pressed he would withdraw from the arbitration. The arbitration was adjourned till Mar. 21. Correspondence ensued between the buyers' solicitors and the umpire in which the buyers and their solicitors maintained the request which had been made on the buyers' behalf that a case should be stated upon the question of law for the opinion of the court, and, in consequence of the attitude taken up by the umpire, a summons was taken out by the buyers' solicitors asking for an order requiring the umpire to state a case for the opinion of the court. The solicitors wrote to the umpire formally requesting him not to make his award until the summons had been heard and decided. Notwithstanding this request the umpire proceeded with the arbitration and made his award, and on Mar. 21 wrote to the buyers informing them that the award was ready and would be given up on payment of

£16 16s. The summons came on for hearing on Mar. 25, when, it appearing that the umpire had already made his award, the summons was adjourned with liberty to restore the same. On Mar. 25 a letter was received by the buyers from the umpire stating that, owing to the trouble he was having by legal proceedings, he had raised the fees for the award to fifty guineas. The sellers, however, by letter dated Mar. 26, 1919, sent to the buyers a copy of the award. By it the umpire purported to award that the buyers were to take up the documents, paying for them with interest at 5 per cent. per annum from Feb. 15. By an invoice delivered by the sellers to the buyers, dated Mar. 26, 1919, the amount claimed thereunder was £2,526 18s. 8d.

The buyers now moved (i) for an order that the award made in the said arbitration by the umpire be set aside on the ground of the misconduct of the umpire in the arbitration (a) in failing upon the request of the buyers to state a case for the opinion of the court upon questions of law arising herein, and in proceeding with the arbitration and making the award in spite of the request and with the knowledge that the buyers were about to apply for an order that the umpire should state a case; (b) in refusing to hear the buyers on the arbitration by their solicitors or counsel. (ii) For an order to revoke the submission to the said umpire upon the ground set out above and on the ground that by reason of his having been requested to state a case as aforesaid he demanded from the buyers payment of arbitration fees of £52 10s. although he had already made his award with the fees stated thereon of £16 16s. (iii) Alternatively, for an order that the said umpire do state a case for the opinion of the court upon the said questions and for an order that the sellers do pay the costs of the motion.

Stuart Bevan, K.C., and *T. S. Wilding* for the buyers, the applicants.
W. N. Raeburn, K.C., and *L. F. C. Darby* for the sellers, the respondents.

AVORY, J.—This is an application for an order that an award made in this arbitration by the umpire should be set aside on the ground of the misconduct of the umpire in failing, upon the request of the applicants, the buyers, to state a case for the opinion of the court upon questions of law arising therein and in proceeding with the arbitration and in making the award in spite of the request and with the knowledge that the buyers were about to apply for an order that the umpire should state a case. That there are questions or that there is a question of law, fit subject for a special case, I entertain no doubt—that is to say, that it cannot fairly be said that the application in this case, which was going to be made for a special case, was a frivolous application. It may be that counsel for the respondents would succeed upon the argument of that point of law as a point of law. This court is not called upon to determine that, or to express any opinion upon its merits. The point in this case—the complaint against the umpire—is that by his action he has deprived the party to the arbitration of his right to make an application to this court for the statement of a special case by the umpire, and that, knowing that this application was going to be made, he has made his award, and so deprived the party of his right, and he has deprived this court of the opportunity of exercising its discretion as to whether they should make an order for a case to be stated. There is no doubt upon the authorities that that amounts to legal misconduct on the part of the umpire, and legal misconduct on the part of the umpire is a ground upon which the court may set aside the award. It is suggested by counsel for the respondents that instead of setting it aside we should remit it to the same gentleman and leave him to state a special case, and that there may be a saving of expense by adopting that course. I am not prepared to adopt that view, having regard to the attitude which this gentleman has taken up throughout, and which I think is an unmistakable attitude of opposition to any interference by a court of law with his proceeding. I do not want to put it higher than is necessary or to express any view about his conduct beyond that, but I say I am satisfied that his conduct throughout has been actuated by—it may be a perfectly honest view—but by a view that the court of law ought not to be

allowed to interfere at all with the exercise of his powers as umpire. Having regard to that attitude, I can foresee that considerable trouble might ensue to the parties if the matter were again to go before him for him to state a special case upon any point of law. Therefore, upon the whole, I have come to the conclusion that the proper order to make is that this award be set aside.

SALTER, J.—I entirely agree. It is admitted that there was misconduct on the part of the umpire, and I feel constrained to say in this case to be misconduct which was more than merely technical. It is admitted, further, that the jurisdiction of this court to deal with the matter has been in no way ousted. It becomes, therefore, a matter for the discretion of this court either to leave the award standing, or to remit the matter, or to set the award aside. It is argued, first, that the application to make the award in the form of a Special Case was premature, before what one may call the court of first instance. The parties who put arbitration clauses in their agreements elect a tribunal which has its advantages and its disadvantages. Its advantages in rapidity and familiarity with the business are apparent, and its disadvantages equally apparent, namely, that matters of law which are bound to arise cannot be decided with as much precision as in a court of law. In view of that, I think it is of the utmost importance that the right given by law to the parties in an arbitration, not only to the parties, but to the arbitration tribunal, to have the assistance of the opinion of this court upon any question of law at any stage of the proceedings shall be fully enforced, and, so far as I can see, the sooner the points of law which are raised in good faith are decided, the better it is for the ultimate and correct decision of the dispute. With regard to the point that there is no substance in the points of law suggested, I, certainly, am not in any way satisfied that those points of law, looked at as one group, in any way are unfounded or frivolous. The umpire, if he has considered them at all, has overruled them. He may be right, but the parties are entitled to the opinion of the court upon them, not only to the opinion of the umpire. I think this is certainly not a case in which it appears that no injury in substance can be done to the buyers if this award stands. As to whether the matter should be remitted, or the award set aside, s. 10 of the Arbitration Act, 1889, gives a general power to remit at all stages, but s. 11, which deals with misconduct, provides for the complete setting aside of the award, and on that ground, and also on the ground, I must say, that the conduct of the umpire in this case has been such as to make it undesirable that it should go back to him again, I agree that the award should be set aside.

Award set aside.

Solicitors: *William A. Crump & Son*; *Parker, Garrett & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

MUSGROVE *v.* PANDELIS

[Court of Appeal (Bankes, Warrington and Duke, L.JJ.), March 6, 7, 1919]

[Reported [1919] 2 K.B. 43; 88 L.J.K.B. 915; 120 L.T. 601; 35 T.L.R. 299; 63 Sol. Jo. 353]

Negligence—Fire—Petrol in carburettor of car in garage accidentally ignited—Petrol not turned off from tank—Spread of fire from car destroying garage and premises above it.

By s. 86 of the Fires Prevention (Metropolis) Act, 1774: ". . . no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . accidentally begin. . . ."

The plaintiff was the lessee of an hotel to which was attached a garage with furnished rooms over it. He re-let the garage to his lessor who permitted the defendant to garage his motor car in a portion of it. The defendant sent his servant, who was unskilled in the use of motor cars, to clean his car in the plaintiff's garage. Finding that the car had been pushed against a wall, the servant, in order to move it so as to be able to clean it, started the engine and the petrol in the carburettor caught fire. If he had turned off the tap of the pipe leading from the petrol tank to the carburettor, he would have stopped the flow of petrol, the small quantity of petrol in the carburettor would have burnt itself out, and no damage would have been caused to the premises. He neglected to do this, and as a result the petrol continued to flow from the tank into the carburettor, the fire spread to the body of the car, and eventually the garage caught fire and the whole building was burnt, including the plaintiff's rooms above the garage which contained a quantity of furniture. In an action by the plaintiff claiming damages for the loss of his premises and their contents the defendant disclaimed liability on the ground, inter alia, that the fire was "accidentally begun" within s. 86 of the Act of 1774.

Held: the defendant was liable to the plaintiff because the car with its petrol tank partially filled with petrol was a potentially dangerous thing for the defendant to bring into the garage; and also because the fire which caused the damage was not the fire which occurred in the carburettor, but was the fire which spread to the car and thence to the building, and that fire did not begin "accidentally" within the meaning of s. 86, but was the result of the negligence of the defendant's servant in not stopping the further flow of petrol into the carburettor.

Principle in *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, applied.

Notes. Considered: *Job Edwards, Ltd.* v. *Birmingham Navigations Co. Proprietors*, [1924] 1 K.B. 341; *Collingwood* v. *Home and Colonial Stores, Ltd.*, [1936] 3 All E.R. 200. Applied: *Balfour* v. *Barty-King*, [1956] 2 All E.R. 555; *Balfour* v. *Barty-King* (*Hyder & Sons* (*Builders*), *Ltd.*), [1957] 1 All E.R. 156. Referred to: *Denholme* v. *Shipping Controller* (1920), 124 L.T. 378; *Jefferson* v. *Derbyshire Farmers*, [1920] All E.R.Rep. 129; *Mulholland and Tedd, Ltd.* v. *Baker*, [1939] 3 All E.R. 253; *Read* v. *Lyons & Co.*, [1946] 2 All E.R. 471; *Perry* v. *Kendricks Transport, Ltd.*, [1956] 1 All E.R. 154.

As to liability in regard to fire, see 28 Halsbury's Laws (3rd Edn.) 52; and as to rule in *Rylands* v. *Fletcher* see ibid., pp. 145 et seq.; and for cases see 36 Digest (Repl.) 76, 77, 282 et seq. For the Fires Prevention (Metropolis) Act, 1774, s. 86, see 18 Halsbury's Statutes (2nd Edn.) 10.

Cases referred to:

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(2) *Filliter* v. *Phippard* (1847), 11 Q.B. 347; 17 L.J.Q.B. 89; 10 L.T.O.S. 225; 11 J.P. 903; 12 Jur. 202; 116 E.R. 506; 36 Digest (Repl.) 76, *407*. A

(3) *Vaughan* v. *Menlove* (1837), 3 Bing.N.C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L.J.C.P. 92; 1 Jur. 215; 132 E.R. 490; 36 Digest (Repl.) 29, *126*.

(4) *Turbervill* v. *Stamp* (1697), 1 Com. 32; Carth. 425; Comb, 459; Holt, K.B. 9; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; Skin. 681; 92 E.R. 944; 36 Digest (Repl.) 164, *870*. B

Also referred to in argument:

Jones v. *Boyce* (1816), 1 Stark. 493, N.P.; 36 Digest (Repl.) 23, *101*.

The Bywell Castle (1879), 4 P.D. 219; 41 L.T. 747; 28 W.R. 293; 4 Asp.M.L.C. 207, C.A.; 36 Digest (Repl.) 190, *1006*.

Appeal from an order of LUSH, J., in an action tried by him without a jury. C

The plaintiff's claim was for damages for the negligence of a chauffeur employed by the defendant. The plaintiff alleged that the chauffeur's negligence caused a fire in a garage and the plaintiff's premises were destroyed. The plaintiff kept an hotel, and had attached thereto a garage with living rooms over it. The defendant housed his motor car in the plaintiff's garage with the plaintiff's permission. The plaintiff alleged that a chauffeur, a man named Coumis, employed by the defendant, had struck a match and had thereby caused the fire which damaged the plaintiff's premises. Coumis, who was entirely unskilled in the use of motor cars, was sent by the defendant to clean the defendant's motor car in the plaintiff's garage, and while he was doing so the fire broke out. The motor car had been pushed back against the wall of the garage and Coumis could not get round it to clean it without moving it. Being unable to move it himself, he turned the handle and started the engine. When he was turning the handle the petrol in the carburettor caught fire. Coumis ought at once to have done what a prudent person ought to have done—namely, to have turned off the tap of the pipe leading from the petrol tank to the carburettor, and so have stopped the flow of petrol to prevent the fire from spreading. Had that been done, the evidence showed that the small quantity of petrol in the carburettor would soon have burnt itself out and no damage would have been caused to the premises. The plaintiff alleged that Coumis was negligent in not turning off the tap to prevent the flow of the petrol and that it was his negligence which caused the fire which ultimately destroyed the plaintiff's garage and the rooms over it and their contents. The defendant relied on the Fires Prevention (Metropolis) Act, 1774, s. 86, which provides that no action shall be maintained against any person "in whose house, chamber . . . or other building, or on whose estate a fire shall accidentally begin." This defence was raised after the trial had commenced, and the learned judge gave leave to both parties to amend the pleadings to enable the defendant to rely on the statute. The argument proceeded on the assumption that the garage was the defendant's garage within the meaning of the statute, as no objection was taken that the defendant was only a licensee.. LUSH, J., held that the defendant was not protected by s. 86 of the above Act as in his view (i) the case fell within the principle of *Rylands* v. *Fletcher* (1); (ii) the fire which caused the damage did not begin accidentally, but was the direct consequence of the negligence of Coumis in not turning off the flow of petrol from the tank to the carburettor, and he gave judgment for the plaintiff. The defendant appealed. D E F G H

Hawke, *K.C.*, and *C. Zeffertt* for the defendant. I

J. B. Matthews, *K.C.*, and *Moyses*, for the plaintiff, were not called on to argue.

BANKES, L.J. (stated the facts, and continued).—The plaintiff alleges that the fire was caused by Coumis's negligence. The negligence finally relied on was that he did not at once turn off the petrol tap and so stop the further flow of petrol into the carburettor. If that had been done, according to the evidence which LUSH, J., accepted, the fire would have exhausted itself without doing any damage. The defendant's main defence, apart from disputing the negligence, was based on

s. 86 of the Fires Prevention (Metropolis) Act, 1774, and the argument has been chiefly directed to the construction of that section. LUSH, J., came to the conclusion that the section did not apply at all; and I agree. He also held that, if that view was not correct, the fire which caused the damage had not an accidental beginning within the meaning of the Act. And there also I agree.

Section 86 of the Act was passed to take the place of a section in almost the same words of the Act of 6 Anne, c. 31, s. 6. In order to see what alteration these statutes effected, it is material to consider the state of the law before the earlier statute was passed. A man was liable at common law for damage done by fire originating on his own property (i) for the mere escape of the fire; (ii) if the fire was caused by the negligence of himself or his servants, or by his own wilful act; (iii) upon the principle of *Rylands* v. *Fletcher* (1). This principle was not then known by that name, because *Rylands* v. *Fletcher* (1) was not then decided; but it was an existing principle of the common law. The alteration which those statutes effected was to give protection in cases falling under the first heading of liability mentioned above. It is thus stated by LORD DENMAN, C.J., in *Filliter* v. *Phippard* (2) (11 Q.B. at p. 354):

> "The ancient law, or rather custom of England, appears to have been, that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss."

That was the principle of the common law to which the statutes were directed. They altered the law so as to exclude the liability of a

> "person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . accidentally begin."

It is plain that the statutes did not touch the other heads of liability at common law. The second head is not within the protection; that was decided by *Filliter* v. *Phippard* (2), where it was held that the Act of Geo. 3 did not apply to a fire which was caused either deliberately or negligently. Why, if that is the law as to the second head of liability, should it be otherwise as to the third head, the liability on the principle of *Rylands* v. *Fletcher* (1)? If that liability existed, there is no reason why the statute should alter it and yet leave untouched the liability for fire caused by negligence or design. That the principle of *Rylands* v. *Fletcher* (1) existed long before that case was decided is plain. In *Vaughan* v. *Menlove* (3) TINDAL, C.J., says (3 Bing.N.C. at p. 474): "There is a rule of law which says you must so enjoy your own property as not to injure that of another." PARK, J., says (ibid. at p. 476): "Although the facts in this case are new in specie, they fall within a principle long established, that a man must so use his own property as not to injure that of others." *Rylands* v. *Fletcher* (1) is merely an illustration of that old principle, and in my opinion LUSH, J., was right in saying that this case, if it falls within that principle, is not within the protection of the statute. The question then is whether this motor car, with its petrol tank full or partially filled with petrol, was a dangerous thing to bring into the garage within the principle of *Rylands* v. *Fletcher* (1). Counsel for the defendant says a motor car is not a dangerous thing unless it is in such a condition that an accident is to be apprehended. But the expectation of danger is not the basis of the principle of *Rylands* v. *Fletcher* (1). A thing may be dangerous although the danger is unexpected. I agree with LUSH, J., that this motor car was dangerous within that principle. The defendant brought it, or caused it to be brought, upon his premises, and he is responsible for the fire which resulted, and is not within the protection of the statute.

The other point is the meaning of the fire to which the statute refers when it speaks of a person in whose house, chamber, stable, &c., "any fire shall . . . accidentally begin." The section is dealing with a fire which occasions damage, and it is in reference to that fire that it says no action shall be maintained nor shall any recompense be made by such person for any damage suffered or occasioned

thereby. No more can be said as matter of law than that the fire contemplated by the Act is the fire which causes the damage, and so it is necessary in each case to consider what that fire was in view of the facts of the particular case. In this case it is impossible to say that the spark which ignited the petrol, though no doubt it was the original cause of the fire, was the fire which caused the damage. As well might it be said that a housemaid lighting a match makes a fire which, becoming ignited from the grate, ultimately consumes the house. In this case the fire which caused the damage began when the flaming petrol acquired such volume as to become a source of danger. So long as the fire was merely the ignition of a small amount of petrol, which if left to itself would have burnt itself out in the carburettor, it was like the housemaid's match; but when it became a raging fire supplied from the petrol tank so that it spread to parts of the car and from them to the property, this was the fire which caused the damage. It did not accidentally begin. It was the direct consequence of Coumis's negligence in not turning off the petrol tap. This was the view of LUSH, J., and I agree with him.

The defendant's counsel contended that negligence ought not to be imputed to Coumis; that he was placed in a difficult position, and cannot be blamed for not having taken the best possible course on the first possible opportunity. That is a point of much weight which was properly pressed upon the court below and in this court; but it was open to LUSH, J., to take the view that the real cause of the disaster was the meddling with a motor car by a man who had no more than an elementary knowledge of its construction, and did not recognise that in the circumstances the only thing to do was to turn off the tap. Whether the damage was caused by Coumis's negligence, for which the defendant is responsible, or by the defendant's own negligence in employing a man with so little knowledge, in either case the judgment must stand and the appeal must be dismissed.

WARRINGTON, L.J.—I agree. On the first point I should like to add that the principle of *Fletcher* v. *Rylands* (1) is further stated by PARK, J., in *Vaughan* v. *Menlove* (3) in these words:

> "In *Turbervill* v. *Stamp* (4), which was 'an action on the case upon the custom of the realm, quare negligenter custodivit ignem suum in clauso suo, ita quod per flammas blada Quer. in quodam clauso ipsius Quer. combusta fuerunt; after verdict pro Quer. it was objected that the custom extended only to fire in his house, or curtilage (like goods of guests) which were in his power: Non alloc. For the fire in his field was his fire as well as that in his house; he made it, and must see that it did no harm, and must answer the damage if he did. Every man must use his own so as not to hurt another; but if a sudden storm had arisen which he could not stop, it was matter of evidence and he should have shown it. . . .' "

If this motor car with the petrol in its tank was potentially dangerous, such as a man's own fire, then it was the defendant's duty to see that the potential danger did not become an actual danger causing damage to his neighbour. The Act of Geo. 3 is no protection against that liability.

Then what is the fire referred to in s. 86 of that Act? When did that fire begin, and did it accidentally begin? To state the facts shortly, the chauffeur turned the starting handle of the car after having admitted petrol into the carburettor by using the pressure pump. Unfortunately ignition, instead of confining itself to the cylinder, extended to the petrol in the carburettor. So far no great harm was done. There was but little petrol in the carburettor and there were ready means of preventing any further flow. If the chauffeur had resorted to those means the fire would have burnt itself out without doing any harm. But as the result of not turning off the petrol tap, the carburettor was being constantly supplied with petrol and the fire was constantly increasing in volume and intensity till the man could not reach the tap without burning his hand, and in the end the car and the garage were involved in a conflagration. Now, what is the fire to

which the Act refers? Obviously that fire which, but for the section, exposes to an action the person on whose premises it originates; in other words, the fire which causes the damage for which the action lies. It cannot intend a fire in a domestic hearth. Such a fire is innocuous so long as it remains there; but if a live coal falls upon the floor and there comes in contact with inflammable material and sets it on fire and so causes damage, then it becomes a fire within the intention of the Act. In the present case what fire caused the damage? Not the fire in the carburettor while it was harmless and might have been stopped, but that which caught the inflammable parts of the car and then the garage. When did that fire begin? Not when the petrol caught fire in the carburettor, but when that fire assumed such proportions that it enveloped the inflammable portions of the car. Did that fire begin accidentally? No; the learned judge has found that Coumis was negligent in not preventing the outbreak of that fire. He could have prevented it by stopping the further flow of petrol vapour into the carburettor. If he had done so there would have been no fire. As it was, the fire began not accidentally, but by the negligence of Coumis.

DUKE, L.J.—I am of the same opinion. I do not see by what process of argument this case can be taken out of the principle which is laid down in *Fletcher* v. *Rylands* (1), which was stated in the House of Lords by LORD CAIRNS, L.C., in the ultimate appeal there in the very words in which it had been stated by BLACKBURN, J.:

> "The true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril;"

and the exceptions which are stated there—namely, by showing that the escape was due to the plaintiff's default, or perhaps was the consequence of vis major or the act of God. In the present case there was upon the premises petrol which was easily converted into an inflammable vapour; there was the apparatus for producing a spark, and added to those, in the view which the learned judge took, there was a person sent to deal with those combustibles who was entirely inexpert in dealing with them. Whether you take the presence of the petrol upon the premises, or the production of the evaporised petrol, the inflammable gas, or the combination of the presence there of those combustibles and of the inexpert person, it seems to me it is impossible to say that the defendant in this case does not come within the principle which BLACKBURN, J., laid down. That was not any new principle; I do not know that there is any new principle of common law—certainly there is nothing you can trace it by, so far as there is any record of the common law. It is summed up in the doctrine usually expressed in Latin, but found in the cases to which my brethren have referred (*Filliter's Case* (2) and *Vaughan's Case* (3)) that a man must so use his own property that he does not hurt the property of his neighbour. That would seem to me to dispose of this case.

However, it has been very forcibly pressed upon us that there is an exception from liability which might arise in such case by reason of the enactment in the statute of Geo. 3. The terms of the enactment are singularly lacking in the definiteness which would or might relieve the defendant in such a case as this, because the fire in respect of which liability is excluded from the common law rule is a fire which shall accidentally begin. I have the utmost possible doubt whether this fire accidentally began at any stage of it. If, as counsel for the defendant says, it was all one fire, it clearly did not accidentally begin. If the progressive stages of it may be regarded, it was not a fire which began accidentally without negligence at the stage at which it became a conflagration involving chattels and premises. It is an academic discussion whether the fire upon the domestic hearth, if there should be by some means an extension so as to involve destruction of premises or property, is a fire which accidentally begins. I do not envy the task of the advocate who has to maintain that it does. Some day that question

may arise, but it does not arise in this case. Here was a case where the fire, so far as it was a means of mischief, resulted from a negligent omission on the part of the servant of the defendant—namely, the omission to turn off a stop-cock which would have prevented the flow of petrol whereby the whole of the mischief was caused. It was said that there was no case of negligence to be considered by the learned judge. Looking through the evidence here, one sees that the witnesses—I think all of them who had any experience of these matters—drew a clear distinction between the occurrence of fire in a carburettor or that on some occasions where the vapour of petrol had casually ignited, and where it was usually instantly put out, and the occurrence of such a fire as this, and they seem to have said by common consent that if you cut off the petrol, there is an end of the danger. Now this servant Coumis failed to cut off the petrol; the learned judge in the court below says that he was negligent; it was in not taking obvious precautions, and I cannot differ from the learned judge in that view, and whatever protection the statute of Geo 3 might have given in some of the nice cases to which reference has been made, all one can say is with regard to those cases that the facts of this case clearly take it outside any possible protection of that statute.

Appeal dismissed.

Solicitors: *Howard Lawrance*; *E. O'Connor & Co.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

CHARLES P. KINNELL & CO. LTD. *v.* HARDING, WACE & CO.

[Court of Appeal (Swinfen Eady and Warrington, L.JJ.), January 21, 28, 1918]

[Reported [1918] 1 K.B. 405; 87 L.J.K.B. 342; 118 L.T. 429; 34 T.L.R. 217; 62 Sol. Jo. 267]

County Court—Company—Right to institute proceedings by agent other than a solicitor—Right to be represented in court by person other than counsel or solicitor—Discretion of judge—County Courts Act, 1886 (51 & 52 *Vict.*, *c.* 43), *s.* 72.

A limited company may employ an agent who is not a solicitor to institute proceedings in the county court and file the necessary præcipe on its behalf. The common law rule that a corporation aggregate, having no physical existence, can only appear by attorney, which involved an appointment under the seal of the corporation, does not apply to a limited company, since such a company is able to comply with all the requisite conditions provided for by the county court rules without appointing an attorney under its common seal to do those acts for it. When appearing in court as plaintiff or defendant, the company, since from its nature it cannot appear in person, must appear by solicitor or counsel, but the judge has an absolute discretion to allow some other person to appear instead of the company to conduct the case.

County Court—Setting aside judgment—Irregularity—Need to apply within reasonable time—Effect of fresh step taken in action after notice of irregularity—County Court Rules, 1903–1917, *Ord.* 54, *r.* 25.

Order 54, r. 25, of the County Court Rules, 1903–1917 [see now Ord. 37, r. 4 (2) of the County Court Rules, 1936], provides: "No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

On April 23, 1917, the plaintiffs issued a default summons under s. 86 of the County Courts Act, 1886, against the defendants which showed on its face that it was issued by the plaintiffs without the intervention of a solicitor. The defendants made no objection to this procedure, but took a step in the action by returning to the registrar of the county court, within the time limited for that purpose by the summons, the notice of their intention to defend the action duly signed by them on their behalf. On June 5, the day appointed for the trial, the defendants failed to appear and the plaintiffs obtained judgment against them. On June 9 the defendants applied to the plaintiffs for time within which to pay the debt and time was allowed them. They paid the first half of the judgment debt to the plaintiffs within the time agreed, but, instead of paying the balance of the debt, they paid the money into court, and applied to the county court to set aside the judgment on the ground that the plaintiffs, being a limited company, could sue only by employing a solicitor and they had not done so.

Held: even if the application had been well founded, it must be dismissed since it was not made within a reasonable time after knowledge of the alleged irregularity, and moreover, the defendants had taken a fresh step in the action after such knowledge.

Notes. The County Courts Act, 1888, was repealed by the County Courts Act, 1934, which is now replaced by the County Courts Act, 1959, ss. 89, 196 of which replace s. 72 of the 1888 Act. The county court rules now in force are the County Court Rules, 1936, as amended, Ord. 37, r. 4 (2), of which replaces Ord. 54, r. 25, of the 1903 rules.

As to the initiation of proceedings, see 9 HALSBURY'S LAWS (3rd Edn.) 93–95, 179–180, and ibid., vol. 6, p. 451; as to persons entitled to address the court, see ibid., vol. 9, pp. 137, 138; as to setting aside judgment on the ground of irregularity, see ibid., p. 269; and for cases see 13 DIGEST (Repl.) 424, 379, 9 DIGEST (Repl.) 726, DIGEST (Practice) 973 et seq. For the County Courts Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 102.

Cases referred to:

(1) *Thames Haven Dock and Rail. Co.* v. *Hall* (1843), 5 Man. & G. 274; 3 Ry. & Can. Cas. 441; 6 Scott, N.R. 342; 134 E.R. 568; sub nom. *Thames Haven Dock Co.* v. *Hall, Same* v. *Price*, 7 Jur. 238.

(2) *Bird* v. *Pegg* (1822), 5 B. & Ald. 418.

(3) *Oake* v. *Moorecroft* (1869), L.R. 5 Q.B. 76; 10 B. & S. 848; 18 W.R. 115; sub nom. *Oake* v. *Morecroft*, 39 L.J.Q.B. 15; Digest (Practice) 378, *861.*

(4) *Re Ainsworth, Ex parte Law Society*, [1905] 2 K.B. 103; 74 L.J.K.B. 462; 92 L.T. 652; 53 W.R. 533; 49 Sol. Jo. 403, D.C.; Digest (Practice) 379, *866.*

Also referred to in argument:

Scriven v. *Jescott* (*Leeds*), *Ltd.* (1908), 53 Sol. Jo. 101; 9 Digest (Repl.) 726, *4821.*

Re L.C.C. and London Tramways Co. (1897), 13 T.L.R. 254, D.C.; 9 Digest (Repl.) 726, *4817.*

Bird v. *Orms* (1611), Cro. Jac. 289.

Jones v. *James* (1850), 1 L.M. & P. 65; Cox, M. & H. 290; Rob.L. & W. 197; 19 L.J.Q.B. 257; 14 L.T.O.S. 424; 13 Digest (Repl.) 494, *1225.*

Anlaby v. *Prætorius* (1888), 20 Q.B.D. 764; 57 L.J.Q.B. 287; 58 L.T. 671; 36 W.R. 487; 4 T.L.R. 439, C.A.; Digest (Practice) 972, *5065.*

Sutton's Hospital Case (1612), 10 Co. Rep. 1 a; Jenk. 270; 77 E.R. 937, Ex. Ch.; 13 Digest (Repl.) 182, *3.*

Appeal by the defendants from an order of the Divisional Court (A. T. LAWRENCE and SHEARMAN, JJ.), reported [1918] 1 K.B. 155.

The facts appear from the judgments.

Rigby Swift, K.C., and *H. J. Wallington* for the defendants. A
J. B. Matthews, K.C. (with him *F. L. Hinde*), for the plaintiffs.

Cur. adv. vult.

Jan. 28, 1918. The following judgments were read.

SWINFEN EADY, L.J.—The plaintiffs recovered judgment in the Southwark County Court against the defendants on June 5, 1917, for the sum of £63 1s. 2d., B which was a debt, and the costs of the plaint and the hearing fee, also 7s. 6d. representing the expenses of a witness, the defendants not appearing at the trial. On July 16 the defendants filed a notice that they intended to apply on July 19 for an order to set aside the judgment and all subsequent proceedings and for a new trial. The ground of the application was that the plaintiffs, being a limited company, could only validly commence and carry on proceedings in the county court C by a solicitor, and that, not having employed any solicitor, the proceedings were null and void ab initio, and should be set aside. The county court judge dismissed the application, and on appeal the Divisional Court took the same view and dismissed the appeal. It is from this order of the Divisional Court that the present appeal is brought, with the leave of that court.

It is now necessary to state some further facts. The plaintiffs, on April 23, 1917, D issued a "default summons," under s. 86 of the County Courts Act, 1888, against the defendants to recover their claim. This summons showed upon the face of it that it was issued by the plaintiffs without the intervention of any solicitor. The defendants raised no objection to this procedure, but took a step in the action by returning to the registrar of the county court, within the time limited for that purpose by the summons, the notice of their intention to defend the action duly E signed by them on their behalf. They gained time by so doing, and prevented the plaintiff from obtaining immediate judgment. June 5, 1917, was then appointed for the trial of the action, but the defendants did not appear, and the plaintiffs obtained judgment against them. On June 9 the defendants applied to the plaintiffs for time within which to pay the debt, and time was allowed them. The first half of the judgment debt was paid to the plaintiffs, but the second half was not F paid to them at the extended date agreed upon. Instead of paying the balance of the debt to the plaintiffs the defendants paid it into court, and then applied to the county court to set aside the judgment, on the ground that the plaintiffs could only sue by employing a solicitor. In my opinion, that application (if otherwise well founded) was altogether too late, and was properly dismissed. It is provided by C.C.R. Ord. 54, r. 25, as follows: G

> "No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

The application by the defendants was not made within a reasonable time after knowledge of the alleged irregularity, and moreover they had certainly taken a H fresh step after such knowledge. Even if their application was otherwise well founded, it should have been refused on these grounds. The same rule obtains in the superior courts that a person complaining of an irregularity must come promptly and raise the point. In *Thames Haven Dock and Rail. Co.* v. *Hall* (1), which was an action by a company for calls on shares, the defendant applied to set aside the proceedings on the ground (inter alia) that the plaintiffs although purporting to I sue by attorney had not duly appointed the attorney and therefore that the proceedings were irregular. The action had been set down for trial, but the trial had not been reached. The Court of Common Pleas held that the objection was made too late. TINDAL, C.J., there said that the first ground on which the application failed was that it was "too stale," adding (5 Man. & G. at p. 287):

> "I cannot understand why the defendant should lie by till the cause is ready for trial—and would indeed have been tried before now but for an accident—and then come with the present application. It clearly appears from the

affidavits that he was aware of all the circumstances long ago, and he ought to have made his application immediately upon the facts coming to his knowledge. And this applies with greater force to the objection as to the want of an appointment of the attorney under seal."

The court thus refused to interfere in a summary manner, and later (ibid., p. 290) refused to allow the matter to be raised on the record, by an amendment of the pleadings. The maxim applies—Quod fieri non debet, factum valet (see also *Bird* v. *Pegg* (2)).

This would be sufficient to dispose of the present appeal. But as the general question of the right of a company to take proceedings in a county court without the intervention of a solicitor has been raised and fully argued, and as we are told that the matter is one frequently arising, I am of opinion that it would be right for the court to express its opinion upon it. The question has been argued only with reference to companies formed under or governed by the Companies (Consolidation) Act, 1908, suing or defending in county courts without the intervention of a solicitor. An action in the county court is commenced by the plaintiff filing at the office of the registrar a præcipe for that purpose containing the particulars set forth in Ord. 5, r. 4. This præcipe may be taken to the office by a person authorised by the plaintiff so to do. There is nothing in the county court rules requiring a plaintiff to attend in person at the office with the præcipe. Even in the superior courts where a defendant appears in person, his personal attendance at the office is not necessary. It was decided in *Oake* v. *Moorecroft* (3) that the memorandum of appearance required by s. 31 of the Common Law Procedure Act, 1852, may be conveyed and delivered to the officer by a person authorised by defendant to do it. And the same rule obtains under the present practice (*Re Ainsworth, Ex parte Law Society* (4)). If a plaintiff in a county court desires to enter a plaint in a court within the district of which he does not reside or carry on business, he may do so by post, on complying with the provisions of Ord. 5, r. 12. If he does so, the rule provides that the registrar "shall . . . enter the plaint and issue the summons": see County Courts Act, 1888, s. 73. Now the plaintiff company can comply with the forms required by Ord. 5 to which I have referred. Any person authorised to do so by the company, may fill up and sign these forms on behalf of the company and leave them with or post them to the registrar. No law requires that an authority to do these acts must be under the seal of the company. Even contracts, not by law required to be under seal, may be duly entered into on behalf of a company in this manner: see Companies (Consolidation) Act, 1908, s. 76 (previously Companies Act, 1867, s. 37) [see now Companies Act, 1948, s. 32; 3 HALSBURY'S STATUTES (2nd Edn.) 485].

If, therefore, a company can in fact comply with all the forms necessary for bringing proceedings in the county court without the intervention of a solicitor, what prevents it from availing itself of this mode of proceeding? It is urged that there exists a rule of the common law that a corporation aggregate can only appear by attorney, and in support is quoted Co. Litt. (66b) and other authorities. The passage from Co. Litt. cited is as follows:

"But no corporation aggregate of many persons capable, be the same ecclesiastical or temporal, can do homage as a dean and chapter, mayor and commonalty, and such like; albeit they be seised in fee of lands holden by homage, yet shall not they do homage. And the reason is because that homage must be done in person, and a corporation aggregate of many cannot appear in person; for albeit the bodies natural, whereupon the politic consists, may be seen, yet the body politic or corporate itself cannot be seen, nor do any act but by attorney, and homage must ever be done in person, &c."

However true in LORD COKE'S time that the corporations then known to the law could not do any act (except as to small matters) but by attorney, it is not true now with regard to joint stock companies whose powers are regulated by statute. They engage in trade and manufacture, have clerks and workmen, give credit, and

obtain credit in the same manner as trading firms and individuals. In my opinion, the ancient rule that a corporation can only act by attorney (which involved an appointment under the seal of the corporation) does not extend to prevent joint stock companies from issuing process in the county court as ordinary individuals can do, seeing that they are able to comply with all the requisite conditions provided for by the county court rules and without appointing any attorney under their common seal to do these acts for them.

There remains, however, the question how such a body may appear in court either as plaintiff or defendant. This is provided for by the County Courts Act, 1888, s. 72. As from its nature a company cannot appear in person, not having as a legal entity any visible person, it must appear by counsel or solicitor, or by leave of the judge some other person may be allowed to appear instead of the company to address the court, which includes the examination of the witnesses and generally conducting the case. There is no limit or restriction imposed upon the judge as to the persons whom he may allow, or as to the nature of the cases in which he may allow, some other persons to address him instead of counsel or solicitor for the company. It is left to his discretion. But except under special circumstances he would doubtless only sanction some director or officer or regular employee of the company from so appearing instead of the company, and would limit his permission to cases which he thought might properly be disposed of before him, without the assistance of either counsel or solicitor. It must be borne in mind that s. 72 provides that:

> "No person other than a solicitor of the Supreme Court shall be entitled to have or recover any fee or reward for appearing or acting on behalf of any other party in any proceeding in the court."

It follows from what I have said that although this appeal would fail on the merits, apart from any special circumstances, yet that the circumstances under which it is made are alone sufficient to require that it be dismissed with costs.

WARRINGTON, L.J., stated the facts and continued: The substantial question for decision is whether in proceedings in a county court a company incorporated under the Companies (Consolidation) Act, 1908, is entitled to institute and conduct proceedings and to appear at the trial or on an application for judgment by an ordinary agent or can only do so by a solicitor or counsel. A company incorporated under the Companies (Consolidation) Act, 1908, can appoint an agent either by writing signed by a person acting under its authority or by parol by any such person: see s. 76 [see now Companies Act, 1948, s. 32; 3 HALSBURY'S STATUTES (2nd Edn.) 485]. No question is raised as to the authority of the agent who in the present case signed on behalf of the plaintiff company the præcipe for entry of the plaint, and caused the same to be filed and the judgment summons to be issued on which the judgment was obtained. Nor is any such question raised as to the authority of the agent who appeared at the hearing when the judgment was obtained by default of the defendants. Such agent was allowed by the judge to appear instead of the plaintiff company, who, of course, being a corporation could not appear in person. By s. 72 of the County Courts Act, 1888, omitting immaterial parts, it is provided that

> "it shall be lawful for any party to an action or matter . . . or by leave of the judge, for any other person allowed by the judge, to appear instead of any party to address the court";

and, further, that

> "no person other than a solicitor of the Supreme Court shall be entitled to have or recover any fee or reward for appearing or acting on behalf of any other party in any proceeding in the court."

It is to my mind clear that this section contemplates that an agent not being a solicitor may be employed not only to address the court but to act on behalf of the

party in any proceeding in the court. Proceedings are commenced by the entry by the registrar in the proper book of a plaint, the particulars of which are stated on a præcipe which may either be filed by the person desirous to bring the action, or, if he does not reside or carry on business in the district, may be sent by him by post to the registrar (see s. 73 and Ord. 5, rr. 4, 12). It is provided by Ord. 54, r. 1, that:

> "Where by these rules any act may be done by any party, such act may be done either in person or by his solicitor or by an agent, where it can legally be done by an agent."

In my opinion, in the case of an ordinary person there is no ground for the suggestion that it would be illegal for an agent on his behalf to sign the præcipe or to attend on his behalf to file it, or to send it by post to the registrar. As to attending before the judge, there can be no possible question that an agent may lawfully appear and address the court if the judge allows him to do so. I can see no distinction in these respects between an ordinary person and a company incorporated under the Companies Act. Indeed, the County Courts Act, 1888, expressly provides in s. 186 that "person," where used in the Act, includes a body corporate or politic.

The argument in the present case is a purely technical one depending on the common law doctrine that a corporation aggregate having no physical existence cannot sue or be sued except by an attorney. This doctrine, in my judgment, has no application where, as is the case in the county courts, an agent may appear or act on behalf of a party and that party is a body which has power under statute to appoint an agent in the same way as an ordinary person may appoint one. It was suggested that the words in s. 72, "instead of any party," are not applicable to the case of a party incapable by reason of its constitution from appearing in person. I fail to see any ground for this suggestion. On the other hand, I agree with SWINFEN EADY, L.J., that the application to the county court judge, if otherwise well founded, ought to have been dismissed as having been made not within a reasonable time and after the defendants had taken a step in the proceedings. On the whole I think the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Cohn & Co.*; *Morton & Patterson.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

HUGH STEVENSON & SONS, LTD. *v.* AKTIENGESELLSCHAFT FÜR CARTONAGEN-INDUSTRIE

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Parmoor), November 2, 5, 1917, January 25, 1918]

[Reported [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 34 T.L.R. 206; 62 Sol. Jo. 290]

Partnership—Dissolution—Partner becoming enemy alien—Partnership business carried on by British partner—Right of enemy partner to share of profits.

Where a partnership between a British subject and an alien is dissolved by reason of the alien becoming an enemy owing to the outbreak of war between Great Britain and the country to which the alien belongs the share of the enemy partner in the partnership property is not confiscated, but, if the partnership is continued by the British partner, the partnership assets, e.g., machinery, being used to earn profits, the British partner carries on the business as trustee for the enemy partner who is entitled, on the conclusion of the state of war, to such a share in the profits of the business as is not attributable to the skill and industry of the British partner, but is attributable to the use of the enemy partner's share of the partnership property.

Decision of the Court of Appeal, [1917] 1 K.B. 842, affirmed.

Notes. Considered: *Rodriguez* v. *Speyer Bros.*, [1919] A.C. 59; *Simpson* v. *Maurice's Executors* (1929), 14 Tax Cas. 580; *V/O Sovfracht* v. *Gebr. Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] 1 All E.R. 76; *Schering, Ltd.* v. *Stockholms Enskilda Bank Aktielbolag*, [1946] 1 All E.R. 36. Referred to: *Ertel Bieber & Co.* v. *Rio Tinto Co., Ltd.*, ante p. 127; *Naylor, Benzon & Co., Ltd.* v. *Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; *Fried Krupp Akt.* v. *Orconera Iron Ore, Ltd.* (1919), 88 L.J.Ch. 304; *Re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107; *Re Rush, Warre* v. *Rush*, [1923] 1 Ch. 56; *Ledeboer and Van Der Held's Textielhandel* v. *Hibbert* (1947), 63 T.L.R. 334; *Arab Bank, Ltd.* v. *Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263; *Nordisk Insulinlaboratorium* v. *C. L. Bencard (1934), Ltd.*, [1953] 1 All E.R. 986; *Bank Voor Handel en Scheepvaart N.V.* v. *Hungarian Property Administrator*, [1954] 1 All E.R. 969; *Gordon* v. *Gonda* (1954), 71 R.P.C. 121; *Maerkle* v. *British and Continental Fur Co.*, [1954] 3 All E.R. 50; *Boston Deep Sea Fishing and Ice Co.* v. *Farnham (Inspector of Taxes)*, [1957] 3 All E.R. 205.

As to dissolution of partnership on partner becoming enemy alien, see 28 Halsbury's Laws (3rd Edn.) 497, 498, 575, 576, and cases there cited.

Cases referred to:

(1) *Hoare* v. *Allen* (1789), 2 Dall. 102.

(2) *Brown* v. *Hiatts* (1872), 15 Wall. 177.

(3) *Wolff* v. *Oxholm* (1817), 6 M. & S. 92; 105 E.R. 1177; 2 Digest (Repl.) 248, *495.*

(4) *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Gt. Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 2 Digest (Repl.) 219, *315.*

(5) *Knox* v. *Gye* (1872), L.R. 5 H.L. 656; 42 L.J.Ch. 234, H.L.; 43 Digest 664, *966.*

(6) *Cassels* v. *Stewart* (1881), 6 App. Cas. 64; 29 W.R. 636, H.L.; 36 Digest (Repl.) 547, *1084.*

(7) *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298; 34 E.R. 115; 36 Digest (Repl.) 606, *1667.*

(8) *Vyse* v. *Foster* (1874), L.R. 7 H.L. 318; 44 L.J.Ch. 37; 31 L.T. 177; 23 W.R. 355, H.L.; 36 Digest (Repl.) 559, *1178.*

(9) *Darby* v. *Darby* (1856), 3 Drew. 495; 25 L.J.Ch. 371; 27 L.T.O.S. 39; 2 Jur.N.S. 271; 4 W.R. 413; 61 E.R. 992; 36 Digest (Repl.) 544, *1050.*

(10) *Crawshay* v. *Collins* (1808), 15 Ves. 218; 33 E.R. 736, L.C.; 36 Digest (Repl.) 541, *1024.*

(11) *Syers* v. *Syers* (1876), 1 App. Cas. 174; 35 L.T. 101; 24 W.R. 970, H.L.; 36 Digest (Repl.) 428, *46.*

(12) *Du Belloix* v. *Lord Waterpark* (1822), 1 Dow. & Ry.K.B. 16; 35 Digest 177, *65.*

Also referred to in argument:

Janson v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 277, *646.*

Appeal from a decision of the majority of the Court of Appeal (Swinfen Eady and Bankes, L.JJ., A. T. Lawrence, J., dissenting), reported [1917] 1 K.B. 842.

Leslie Scott, K.C., and *H. E. Wright* (for *G. F. Spear*, serving with His Majesty's forces) for the appellants.

Schiller, K.C., and *Cecil W. Lilley* for the respondents.

Their Lordships took time for consideration.

Jan. 25, 1918. The following opinions were read.

LORD FINLAY, L.C.—The appellants are a limited company incorporated under English law, and the respondents are a German trading corporation. The two companies traded in England in partnership and carried on a business described as a clamp factory. It consisted in the manufacture and sale of metal edges for securing cardboard boxes. The partnership business was carried on under an agreement in writing, dated Nov. 22, 1906. Clause 2 provided for its remaining in force for five years from Jan. 1, 1907, and thereafter till the expiration of six months' notice by either party. Clauses 3, 4, 5, 6, and 7 related to an agency business quite distinct from the partnership business with which alone the present case is concerned. The partnership business was regulated by cll. 8 to 15. Nothing turns on the details of these arrangements, and it is only necessary to observe that cl. 12 as to the sale of the machinery on dissolution has no application in the present case, as the operation of that clause is confined to dissolution by effluxion of time or notice under cl. 2. The remaining provisions of the agreement are for the present purpose immaterial.

On Aug. 4, 1914, war broke out between this country and Germany, and it is admitted that the effect of the war was to dissolve the partnership at once. The dispute in the present case turns on the question: What is to be done in respect of the respondents' share in the machinery belonging to the partnership and used in carrying it on? The appellants continued to carry on the business which had been that of the partnership and used the machinery for the manufacture of the clamps. On June 21, 1915, the appellants commenced an action under the Legal Proceedings against Enemies Act, 1915 [repealed] asking for a declaration that the plaintiffs should account for the machinery at the price at which it stood in the books of the partnership on Aug. 4, 1914, or, alternatively, at its value on that date. The case was tried by Atkin, J., on Feb. 8, 1916. He gave judgment, making the following declaration with regard to the partnership:

> "That the partnership constituted by the said contract was dissolved on the said Aug. 4, 1914, that the defendants are entitled to the value of their share in the said partnership, including the goodwill (if any), as of the date of Aug. 4, 1914, that cl. 12 of the said contract is not applicable, and that the defendants are not entitled to any of the profits of or interest in the capital of the partnership since Aug. 4, 1914."

The effect of Atkin, J.'s judgment was that he held that the respondents were entitled to the value of their share in the property of the partnership as on Aug. 4, 1914, but were not entitled to any of the profits of or interest in the capital of the partnership since Aug. 4, 1914. In other words, he held that the English company were entitled to use the machinery for the purposes of the business

without making any allowance to the German partner for the use of his interest therein. The German partner is, of course, not entitled to any payment so long as the war lasts, but the declaration of ATKIN, J., if it stands, would prevent his getting, on the conclusion of peace, anything beyond the capital value of his interest in the machinery at the date of dissolution. The Court of Appeal were divided in opinion. A. T. LAWRENCE, J., agreed with ATKIN, J., while SWINFEN EADY and BANKES, L.JJ., held that the right to some allowance in respect of the use by the plaintiff of the German company's interest in the machinery should not be excluded altogether. The Court of Appeal accordingly reversed ATKIN, J.'s judgment and substituted for the declaration made by him, and just quoted by me, the following:

> "That the partnership constituted by the said contract was dissolved on the said Aug. 4, 1914; that the defendants are entitled to their share in the said partnership, including the goodwill (if any); and that cl. 12 of the said contract is not applicable."

From that decision the present appeal has been brought.

In my opinion, the decision of the majority of the Court of Appeal is right. It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime. The question to be determined in the present case does not depend upon any contract, but on the rights of property which both partners have in the assets of the firm. The enemy partner was entitled to the value of his share in the machinery. If that amount had been ascertained on Aug. 4, 1914, it would have been retained in custody, and if it had been invested, as in the ordinary course it would have been, the enemy partner would on the conclusion of peace have been entitled to the principal with any interest or dividends which had accrued in the meantime. What took place here was that the English partner continued the business, using the machinery to earn profits. The German partner is, of course, not entitled to any share of the profits attributable to the skill or industry of the English partner, but some portion of the profits may be attributable to the machinery used, and the enemy partner would be entitled to some allowance in respect of his interest therein. Or to put the matter in another way, some allowance may be made in lieu of interest on its value in respect of the use by the English partner of the German share in the machinery.

This appears to me to follow from the principle that the property of an enemy is not confiscated, though his right to have it back is suspended during war. It was strenuously contended that in the case of a debt to a foreigner bearing interest no interest could accrue during the existence of hostilities between the countries of the debtor and creditor, and in support of this proposition two American cases were cited—*Hoare* v. *Allen* (1) and *Brown* v. *Hiatts* (2), the latter a decision of the Supreme Court of the United States. These decisions seem to me not to be in conformity with English law. The rule of international law on this point, in the view of the courts of this country, does not appear to have formed the subject of any express decision in England. The judgment of LORD ELLENBOROUGH, however, in *Wolff* v. *Oxholm* (3) appears to me to imply that, in the view of LORD ELLENBOROUGH, interest on such a debt would not cease to run during the continuance of the war, but the point does not appear to have been argued. It is difficult to see on what principle the interest is to be forfeited if private property is to be respected. But in any case, even if these American decisions were right, the consequences contended for by the appellants would not, in my opinion, follow. The question here is not one of contract, but one of property and what is equitable as between two partners in respect of the property of the firm. If the English partner uses the machinery which was in part the property of the enemy partner, why should not he in justice make some allowance in respect of this use? The

price representing the value of the interest of the machinery has not been paid, and I do not think that it would be in accordance with law to allow a declaration to stand which would bar all right to share in any profits which may be found to be attributable to the use of the machinery or some allowance by way of interest on the value of the German partner's share in it. I agree with the reasons given by the majority of the Court of Appeal, and think that this appeal should be dismissed with costs.

VISCOUNT HALDANE (read by Lord Sumner).—In this appeal the question which arises is whether, upon the dissolution of a contract of partnership between the appellants and the respondents, by reason of the respondents having become, on Aug. 4, 1914, alien enemies, the latter can be declared entitled to their share as on an ordinary dissolution, or whether the assets of the partnership should be valued as at the date of the dissolution, and the respondents declared entitled neither to subsequently accrued profits, nor to interest as representing such profits, on the footing that the usual rule, as expressed in s. 42 of the Partnership Act, 1890, does not apply. A majority of the Court of Appeal have decided for the former alternative. I agree with that decision, and I have only a few observations to add to the careful judgment delivered by Swinfen Eady, L.J., in expressing the reasons for the conclusion come to.

It was contended for the appellants that the effect of war is to exclude an alien enemy from any right to interest payable under a contract in respect of money due to him. I do not think it necessary to express an opinion on this question, which is one that will require consideration if it arises. For I am of opinion that it does not arise here. In the absence of a special agreement to the contrary, and there is none such in the contract before us, the rule is that on a dissolution of partnership all the property of the partnership shall be converted into money by a sale, and that the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their shares. If there is a special stipulation giving any partner the right to purchase another partner's share, it must, of course, receive effect. Here there is no such special stipulation, and the general principle primâ facie applies. Why should the fact that one of the partners is an alien enemy exclude its operation? The law of this country does not in general confiscate the property of an enemy. He cannot claim to receive it during war, but his right to his property is not extinguished; it is merely suspended. Now, in winding-up a partnership the procedure belongs to an equitable jurisdiction which, though theoretically concurrent, is practically exclusive. It depends on the principles which courts of equity apply to persons who are in possession of property under circumstances in which they are treated as standing in a fiduciary relationship. It is more than and different from the procedure which applies when the rights of parties arise merely out of the rules of the common law which apply to contracts. Partners cannot sue each other excepting for the balance of the account taken in accordance with the principles which courts of equity apply in working out the results of dissolution. It makes no difference in the present case that the procedure is, and, by reason of the respondents being out of the jurisdiction, must be, no more than declaratory, under the terms of the Legal Proceedings against Enemies Act, 1915 [repealed], for facilitating legal proceedings against enemies. The question is what rights of property accrued on the dissolution on Aug. 4, 1914. There is nothing in s. 42 of the Partnership Act which excludes its application in the case of an enemy. To decide in favour of the appellants in this appeal would be to declare them entitled to confiscate the property of the respondents for their own benefit, and I am of opinion that they have no such right.

LORD DUNEDIN.—I concur. In order to succeed in obtaining the declaration they ask the appellants must make out that the effect of the war was to operate an immediate transfer of the company's business to them, subject only to a payment by them of the respondents' share of the value of the business and goodwill as at

the date of the dissolution of the partnership. I can see no legal ground for such a claim. There is no statute to that effect. The outbreak of war put an end to the partnership. That is admitted on both sides. But the right of the partners was then to have the business realised and the proceeds divided. No doubt realisation may be effected by sale in open market or by sale to one of the partners. But such sales can only be directed in a winding-up, and this process is not a winding-up. The appellants have at their own hand continued the business. The result in law is that they carry on the business as trustees for the partners until the winding-up is effected. No doubt, the enemy partner cannot receive money during the war. But his property as such is not confiscated. Even if it were, it would be confiscated to the King and not to the quondam partner. Nor will he after the war be necessarily entitled to a moiety of the gross profits. He will only get the fruits to which his property is entitled. In other words, the working partner may claim and obtain a large allowance for his work and skill. All that can only be settled in the winding-up. It is for the appellants to bring on the winding-up as soon as may be, and for that purpose they may, if so advised, invoke the aid of the Custodian of Enemy Property; if not, they must wait till the end of the war, or till legislation makes service on an enemy a possibility. The learned judge before whom the case first depended based his view upon the non-applicability of s. 42 of the Partnership Act to the case of an enemy partner. He held that section inapplicable because ss. 37, 39, and 40, which deal with other aspects of dissolution, require the invocation of the court, which invocation the enemy partner, having no right standi in judicio, could not set in motion. In my opinion, s. 42 is not in any way dependent on ss. 37, 39, and 40, and may stand though they fall. But, apart from that, if s. 42 were written out, then all that would happen would be that there was no statutory enactment applicable to the situation, and the result would only be that we should have to invoke the ordinary rules of equity (for the equity courts have practically arrogated to themselves the controlling of partnership rights and duties consequent on dissolution), and these rules would lead us to the same result as is statutorily declared by s. 42. I wish to add that the question raised by the American authorities cited does not seem to me to arise, and I reserve my opinion whether those authorities would or would not be held as in accordance with the law of this country. I agree with the judgment of Swinfen Eady, L.J., and think that the appeal should be dismissed.

LORD ATKINSON.—I concur. The principles contended for in argument in support of this appeal would, in my view, if sound entitle every trustee in this country in whom an income-bearing fund was vested whose cestui que trust happened to be an enemy alien; every agent, having such an alien for his principal, who was in receipt of the produce of that principal's property; every board of directors of a railway, steamship, or commercial company having the alien enemy among its shareholders, to confiscate the income produced by, or the dividend accruing upon, the alien's property or received or receivable during the continuance of the war, on the plea that to hoard or preserve these parts of his property for him till peace was restored would enrich him and by enriching him benefit his country, and necessarily injure this country, his country's enemy. The prerogative of the Crown, it is said, in early days extended to seizing enemy property on land as well as on sea. This has long since fallen into disuse. The principle I have already referred to would revivify it, but transfer it to the King's subjects or to his courts.

The passage cited by Swinfen Eady, L.J., from the judgment of Lord Parker of Waddington in *Daimler Co.* v. *Continental Tyre and Rubber Co. (Gt. Britain), Ltd.* (4) ([1916] 2 A.C. at p. 347) is, in my opinion, directly in point. The appellants' counsel in that case raised the point (ibid. at p. 311) that the respondent company was an alien enemy company, and that it was, therefore, a violation of the prohibition against trading with the enemy to pay to them the sum they sued for; and further that, even if the company had been an English company, it would

still be against this rule to make any payment to it because, all the corporators and directors being alien enemies, any such payment would be a payment for the benefit of alien enemies. It was in reference to this point with others that Lord Parker made the remarks cited. They go to establish that the preservation for the benefit of an alien enemy of the portions of his property situated in this country with the fruits of it until the war ends, for the purpose of their being then restored to him, does not, according to the general law, amount to trading with the enemy, and that the prohibition against doing anything for the benefit of the enemy means the doing of it while he is an enemy, and does not contemplate some possible advantage to him when peace comes. I entirely concur with the judgment delivered by Lord Parker on this point. If this be so, the respondents would be entitled to reap the same benefits from the continued trading of the appellants as those which they would be entitled to reap if this country were at peace with Germany and the partnership had been dissolved for some cause other than war, with this exception, however, that they cannot while the war lasts sue to recover the money that represents those benefits, nor can the appellants legally pay it to them.

I proceed to consider in what relation would the appellants stand to the respondents, apart from statute law, if England and Germany were now at peace, and then to consider how the state of war affects that relation. The relation is a fiduciary relation. If that be so, the authorities show that equity will never permit the person standing in that relation to another to trade with the property of that other for his own gain. He must hold the profits he is making in trust for the owner of the property the use of which produced them. Of course, in estimating the amount of these profits an allowance may well be made for the skill and labour expended by the accounting party in acquiring them. The authorities have gone very far in holding men liable for the profits made by them in trading with the capital of others. When a partnership has been dissolved by death or bankruptcy or otherwise, it has been decided that the relation existing between the surviving partner and his former partner or the representatives of the deceased partner as well as between his surviving partner and the assignees in bankruptcy of the bankrupt partner is a fiduciary relation. In *Knox* v. *Gye* (5) Lord Hatherley, differing from Lord Westbury, delivered a remarkable judgment, insisting, with what appears to me to be convincing reasoning, that such a fiduciary relation did exist. He says (L.R. 5 H.L. at p. 679):

> "It is trite law that a surviving partner cannot make use of the assets of a deceased partner without being accountable for the use he has made of them. The executors of the deceased partner have a right to a sale of every portion of the partnership property, so completely are they held to be in a fiduciary position. . . . Whatever the description of property may be that comes into the hands of the surviving partner by right of his survivorship at law, and which are all vested in that surviving partner by right of his survivorship at law, held to be property in all of which, whether they are chattels of the partnership or estates of the partnership, the executors of a deceased partner have an interest commensurate with the extent of the share of their testator."

In *Cassels* v. *Stewart* (6) Lord Blackburn, after alluding to *Featherstonhaugh* v. *Fenwick* (8) and other cases of that sort, said (6 App. Cas. at p. 79):

> "I do not think that that class of cases has any analogy with the present. Those cases proceed upon the ground that a partner being an agent (for I think it is because he is an agent that the fiduciary character arises), if he, as an agent, makes a profit out of the concerns of his principal and as acting for him he must communicate it to his principal. He cannot make a profit out of his principal's business for himself. As I have said, the partner is an agent, and the principle applying to him is a branch of that general rule which applies to all agents."

In *Vyse* v. *Foster* (8), which was a case where the deceased partner had appointed two of the surviving partners as his executors, LORD CAIRNS said (L.R. 7 H.L. at p. 329): A

> "It is a well-settled rule of the Court of Chancery that a trustee or an executor who uses trust money in trade must account for the profits which he makes by that use of it. . . . With regard to the application of that principle to partnerships I may mention two very familiar examples which really will be found to be cases under which almost if not quite all the authorities cited at your Lordships' Bar may be ranged. If a partner in a trading firm dies, and if he constitutes one or more of his co-partners his executors, and if there is nothing special in the contract of partnership and if the assets of the testator are not withdrawn from the partnership but are left in it, and no liquidation or settlement of accounts come to it, it is a trite and familiar rule in the Court of Chancery to hold that the estate of that testator is to all intents and purposes entitled to the benefit of a share of the profits which are made in the trade after his death." B C

It will be observed that LORD CAIRNS places partners, trustees, and executors on precisely the same footing in respect of their liability to account for the profits realised by employing trust funds or partnership assets in trade. In the present case the articles do not empower the appellants to purchase the share of the defendants at a valuation, nor to take that share for themselves at its value. In the absence of special provisions of that kind no partner can in ordinary times with a view to dissolution, or after dissolution, force another partner against his will to submit to anything of the kind. D

In *Cassels* v. *Stewart* (6) LORD SELBORNE said that he would be sorry to see the day when the principle of such a case as *Featherstonhaugh* v. *Fenwick* (7) could be called in question. That was a case where a partnership for a term certain was continued after the expiration of the term without any new articles having been entered into. It consequently became a partnership at will terminable on reasonable notice being given by any one of the partners. Some differences arose between the partners, and two of them (the defendants) proposed to the then co-partner (Featherstonhaugh) that they should take the partnership property at a valuation, or, if the latter objected, he should take his share off the premises. He refused and the three continued to carry on the partnership business. Featherstonhaugh, having filed a bill, died and the suit was revived by his representative. The defendants insisted that by reason of the offer they had made they (even if the partnership had been dissolved, which it was held to have been) were not accountable for the profits earned since then by means of the partnership property, but only for the value of that property at the date of the dissolution. SIR WILLIAM GRANT, M.R., dealing with this contention, said (17 Ves. at p. 309): E F G

> "The next consideration is whether the terms upon which the dependants proposed to adjust the partnership concern were those to which the plaintiff was bound to accede. The proposition was that a value should be set upon the partnership stock, and that they should take his proportion of it at that valuation, or that he should take away his share of the property from the premises. My opinion is clearly that these are not terms to which he was bound to accede. They had no more right to turn him out than he had to turn them out upon those terms. Their rights were precisely equal to have the whole concern wound-up by a sale and division of the produce. As, therefore, they never proposed to him any terms which he was bound to accept, the consequence is that continuing to trade with his stock and at his risk they come under a liability for whatever profits might be produced by that stock." H I

It appears to me, with all respect to ATKIN, J., that his order offends against the principle thus laid down by SIR WILLIAM GRANT, and treated with so much reverence by LORD SELBORNE, unless the fact that the respondents are alien enemies

deprives them of all the rights they would have had if they were not alien enemies, and justifies the practical confiscation of their property. In my opinion, that fact does not justify anything of the kind. It does during war forbid the transmission to them by a British subject of any sum of money that subject may owe them. It also deprives them during the same period of the right to sue in the King's courts to recover money due to them, but the continuance of this prohibition and this deprivation for all time though they should cease to be alien enemies is a wholly different thing which not even the most rabid patriotism can justify. No justification for it can be found in the Partnership Act, 1890, for though by s. 34 of that statute a partnership is dissolved by the outbreak of war making a partner an alien enemy, s. 42, dealing with the rights of an outgoing partner after dissolution, makes no distinction whatever between dissolutions brought about by the operation of s. 34 and other dissolutions. In each case where a partner by death or "otherwise" (a word wide enough to cover the case of war) ceases to be a partner, he, or in case of death his representative, is entitled in the cases mentioned to a share of the profits made after dissolution at his option, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets. These, if this construction of the statute be its true construction, as I think it is, are the statutory rights of the partner, enemy alien though he be. The statute says nothing as to the remedies available to him to enforce these rights. These may under other provisions of the law be suspended while and as long as he continues to be an alien enemy, but it appears to me that the error underlying the argument presented in support of this appeal, and, indeed, underlying the decision of Atkin, J., also, is this, that the temporary suspension of the remedy is confounded with the permanent loss of the right. The rights belonging to a partner after dissolution were before the passing of this statute very much those it now secures to him. In *Darby* v. *Darby* (9) Kindersley, V.C., states what some of them were in these terms (3 Drew. at p. 503):

> "What is the clear principle of this court as to the law of partnership? It is that on the dissolution of the partnership, all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule; it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie."

The same principle is clearly laid down by Lord Eldon in *Crawshay* v. *Collins* (10), and by Sir William Grant in *Featherstonhaugh* v. *Fenwick* (7).

No authority was cited directly supporting this appeal or laying down the principles contended for in argument. *Syers* v. *Syers* (11) was, however, apparently relied upon as an authority indirectly supporting the decision of Atkin, J. In that case the appellant, who was lessee of the Oxford Music Hall, in June, 1869, being in debt, borrowed from his brother, the respondent, a sum of £250 and at the same time signed a letter which it was decided created a partnership at will between them in one-eighth-share of the profits of the music hall. It was further decided that this partnership was dissolved by a letter written by the appellant in August, 1872, offering to pay this sum of £250 and interest thereon (treating it as a loan) to such an amount as should on a calculation of one-eighth of the profits be found to be due to the respondent. Lord Cairns, exercising the jurisdiction of the court in winding-up the partnership and directing and controlling the realisation of the assets and the ascertainment of the shares of the partners, proposed a particular form of decree which was adopted, prefacing his proposal with the following statement (1 App. Cas. at p. 183):

"It is very true, as was said at the Bar, that on dissolving a partnership of this kind the ordinary course would be for the court to direct a sale of the assets, and if necessary a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the judge in chambers. Those provisions are moulded in every case by the court to meet the circumstances of the particular case, and it appears to me that, looking at the nature of this business and looking at the very small interest which was taken in it by the respondent, it would certainly not be desirable in this case to have a sale or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them. It is a case therefore in which if a decree for a dissolution had been made in the first instance I apprehend that the court would have thought it right to authorise the owner of seven-eighths of the concern to lay proposals for a purchase before a judge in chambers. I am about to submit to your Lordships a provision which will I think in another way arrive in substance at the same end."

The House had already held that a partnership in profits was a partnership in the assets by which the profits are made. The earlier part of the decree declared, as the order of ATKIN, J., in this case purports to declare, the rights of the parties in the partnership assets, the second part of the decree in reference to which the above-cited remarks were made merely directed how the partnership should be wound-up and the assets ascertained and distributed according to the right so declared. The declaration of the rights of the parties is a strictly judicial proceeding to be made according to strict legal principles. The realisation of the assets and their distribution according to the rights so ascertained and declared is a proceeding of an administrative character in which, of two or more modes of procedure all legitimate, that one may be chosen which is best suited to the special circumstances of the case. This case is, in my view, no authority whatever in support of the appeal.

Two American cases and one English (*Du Belloix* v. *Lord Waterpark* (12)) were cited, going to establish that where the relation between the parties is that of debtor and creditor interest does not accrue to an alien enemy while he is an alien enemy. It is not very easy to ascertain what precisely was the principle upon which those decisions were based. As far as one can gather, however, it appears to me to be this: that interest is in the nature of damages payable by the debtor by reason of his withholding his debt, his default in not paying his debt, and since during war he cannot lawfully pay his debt to an alien enemy without committing a crime, he is not in any default in omitting to pay it, and should not therefore be mulcted in damages for not doing what he cannot do lawfully. This doctrine has been extended to a case where the debt was due under a covenant by a mortgagor to pay interest on the mortgage money, presumably on the ground that though the covenant was in form absolute and independent of the payment of the mortgage debt, it was impliedly conditional on default being made in payment of that debt. I do not think these decisions are consistent with the principle of the decision in *Wolff* v. *Oxholm* (3), in which, as I read the report, interest which accrued during the war with Denmark was recovered, and besides I think they have not any application to the present case. This is not a case of mere debtor and creditor. It is a case, to use LORD BLACKBURN'S language, between a principal and an agent who has got possession of his principal's property and traded with it for profit. He is accountable for the profits he has so made, and under the Partnership Act interest on the principal's share of the fund employed in trade is at his option, and only at his option, awarded to him in lieu of his share of those profits. If the principal has a right to the one, he has on his election to take it an equal right to the other. The principle of awarding interest as damages for withholding a debt has not any application to such a state of things. I concur with the Court of Appeal in thinking that the

Trading with the Enemy Act, 1914, proceeds upon the assumption that the property of enemy aliens should not be forfeited, but preserved for them until the end of the war. I also concur with them in thinking that by vesting the interest of the respondents in the partnership and assets in the Custodian under the Trading with the Enemy Amendment Act, 1916 [repealed], the partnership can practically be wound-up. I am clearly of opinion that the decision appealed from was right and should be upheld, and the appeal be dismissed with costs here and below.

LORD PARMOOR.—The question raised in the appeal is as to the respective rights of the English and enemy partner companies, the partnership having been dissolved by the outbreak of war. There is no doubt what the respective rights would have been if the partnership had terminated immediately preceding the outbreak of war. In this event, in the absence of any special agreement in the contract, the property belonging to the partnership would have been sold, and the proceeds of the sale, after discharging debts and liabilities, would have been divided among the partners according to their respective share in the capital. By s. 42 of the Partnership Act, an outgoing partner is entitled to a share of the profits after dissolution, or to interest, where the business of the firm is carried on with its capital or assets, without any final settlement of accounts as between the firm and the outgoing partner. There are special difficulties in procedure incident to the relationship between English and enemy partners on the outbreak of war, but it would be contrary to well-established principle to hold that the existence of these difficulties would justify a declaration giving exceptional rights to the English partner, which in effect would authorise him to confiscate property which is not his, and which he controls in a fiduciary capacity. The right of confiscation of enemy property on land in favour of the Crown has long been disused, and it is a startling proposition that the right, so long disused by the Crown, can be claimed for the benefit of a private individual. This would be the creation of a privilege in favour of partners who, before the outbreak of the war, had been in partnership with enemies or enemy firms. It was argued that under modern conditions of finance some advantage might accrue to the enemy by holding his property in suspension during the continuance of the war, but I concur in the opinion expressed by Lord Parker in *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Gt. Britain), Ltd.* (4) ([1916] 2 A.C. at p. 347), that:

> "Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war."

It will be for the legislature to determine the ultimate destination of the property of the enemy partner, and in the meantime the suspension of his rights is no foundation for the claim of the English partner to have the fiduciary relationship terminated for his sole benefit.

Two Acts of emergency legislation have been passed, based on the principle that enemy property on land is not confiscated, although the right to enjoyment is suspended during the war. The Trading with the Enemy Amendment Act, 1914 [repealed], makes provision not only for preventing payment of money to enemies, but for preserving such money, and certain other property belonging to enemies, so that arrangements may be made at the conclusion of peace. What these arrangements may be, Parliament will determine, but in the meantime no court can decree the confiscation of enemy property in favour of an English partner. The Trading with the Enemy Amendment Act, 1916 [repealed], enables the Board of Trade to vest enemy interests in the partnership and assets in a custodian with full powers of selling, managing, or otherwise dealing with it, thus providing an effectual means to meet the difficulties in procedure which had arisen on the dissolution of a partnership with an enemy partner.

In the course of the argument two American cases were called to the attention of your Lordships—*Hoare* v. *Allen* (1); and *Brown* v. *Hiatts* (2). These cases have not, in my opinion, any direct bearing on this appeal, and I should require further research and investigation before accepting them as an authority that interest is not payable, though there is a stipulation for its payment. In such a case it is difficult to see any difference in principle between the payment of interest and the payment of a capital sum. *Du Belloix* v. *Lord Waterpark* (12) illustrates this point. This was an action on a promissory note which did not contain a stipulation for payment of interest. In the absence of such a stipulation the judge directed the jury that interest was damages for the detention of the debt, and that the question whether it should be allowed was peculiarly for their consideration. The jury found a verdict only for the principal sum named in the note. The court held that the jury had been rightly directed and that the question of interest was entirely for them. In the course of his judgment ABBOTT, C.J., said:

> "But there is another objection to the plaintiff's renewing of interest on the debt, for during the greatest part of the time he was an alien enemy and could not have recovered even the principal in this country."

In my opinion, this dictum would not apply either to a case in which there is a stipulation for interest or where there is a fiduciary relationship between the parties on the dissolution of a partnership. In my opinion, the appeal fails.

Solicitors: *Burn & Berridge*; *Herbert Smith, Goss, King & Gregory.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

BIRMINGHAM CORPORATION *v.* SAMUEL ALLSOPP & SONS, LTD.

[KING'S BENCH DIVISION (Rowlatt and McCardie, JJ.), October 18, 1918]

[Reported 88 L.J.K.B. 549; 119 L.T. 775; 35 T.L.R. 24; 16 L.G.R. 862]

Electricity—Damage to property of undertaking—Recovery of penalty "by way of satisfaction"—Claim in civil action for balance of damage—Competency—Gasworks Clauses Act, 1847 (10 *Vict.*, *c.* 15), *s.* 20.

An electricity undertaking which has recovered a penalty for damage to the property of the undertaking under the Gasworks Clauses Act, 1847, s. 20, is precluded from recovering the balance of the damage in a civil action.

Notes. The Gasworks Clauses Act, 1847, has been repealed by the Gas Act, 1948. Section 20 of the Act of 1847 has been replaced by Sched. III, para. 29 (1) and (2), to the Act of 1948, but that paragraph is in wider terms than the old section and negatives the decision in this case. But the Act of 1847 has been incorporated with the Electricity (Supply) Acts, 1882 to 1936, and the Electricity Act, 1947, and, therefore, the repeal does not affect the Act as incorporated with these subsisting enactments and this case is still law with regard to electricity.

As to the protection of property of an electricity board, see 14 HALSBURY'S LAWS (3rd Edn.) 384 et seq.; and for cases see 20 DIGEST 214.

Cases referred to:

(1) *Crystal Palace Gas Co.* v. *Idris & Co.* (1900), 82 L.T. 200; 64 J.P. 452; 16 T.L.R. 180; 44 Sol. Jo. 229, D.C.; 25 Digest 480, *61.*

(2) *Wright* v. *London General Omnibus Co.* (1877), 2 Q.B.D. 271; 46 L.J.Q.B. 429; 36 L.T. 590; 41 J.P. 486; 25 W.R. 647, 21 Digest 228, *604*.

Appeal from Birmingham County Court.

The plaintiffs sued to recover £24 11s. 1d., the balance of £29 11s. 1d., the amount of damage done to their section box which was attached to an electric standard. On Mar. 5, 1917, a motor lorry driven by a servant of the defendants collided with the section box. On Sept. 5, 1917, the plaintiffs summoned the defendants before a court of summary jurisdiction on a charge of having by their driver "carelessly or accidentally" damaged a pillar, to wit, an electric section box, belonging to the plaintiffs causing damage to the amount of £29 11s. 1d. The summons was issued under s. 20 of the Gasworks Clauses Act, 1847, which provides that:

> "Every person who shall carelessly or accidentally break, throw down, or damage any pipe, pillar, or lamp belonging to the undertakers, or under their control, shall pay such sum of money by way of satisfaction to the undertakers for the damage done, not exceeding £5, as any two justices or the sheriff shall think reasonable."

The justices awarded that the defendants should pay to the plaintiffs £5 damages and 15s. 6d. costs. At the trial of the action in the county court, the defendants submitted that the plaintiffs, having, under s. 20 of the Gasworks Clauses Act, 1847, recovered, "by way of satisfaction," the sum of £5, were estopped from bringing the action on the same facts and the same matters; that the subject of the action was res judicata; and that the plaintiffs, having elected to pursue their remedy before the justices under s. 20 of the Act, were precluded from bringing the action upon the same facts.

The judge found that there had been negligence on the part of the defendants' driver, and held that the defendants' objections failed, and he gave judgment for the plaintiffs for £24 11s. 1d., being the balance of the amount of the damage.

The defendants appealed.

Norman Birkett for the defendants.

T. F. Eales for the plaintiffs.

ROWLATT, J.—In my opinion, this appeal should succeed. It was held in *Crystal Palace Gas Co.* v. *Idris & Co.* (1) that the common law remedy for negligence has not been excluded by s. 20 of the Gasworks Clauses Act, 1847; but that case did not decide that a local authority could first recover a penalty in a summary manner and then sue for the balance of the damage. In the present case, the justices awarded a sum of money by way of satisfaction, and, in my opinion, it was not open to the plaintiffs to take any further proceedings to recover the balance of their damage.

McCARDIE, J.—I am of the same opinion. The plaintiffs had the option to proceed either at common law for negligence, or under s. 20 of the Gasworks Clauses Act, 1847, to recover a sum in compensation up to £5 before the justices without proving negligence. We are bound to give full effect to the words of the section "by way of satisfaction." Their meaning is that the sum of money awarded is to be in full satisfaction. Moreover, it would be highly inconvenient that a second set of costs should be incurred in order that the respondents might, as plaintiffs, recover additional damages in the county court. I think the view we have taken in this case is amply justified by *Wright* v. *London General Omnibus Co.* (2).

Appeal allowed.

Solicitors: *F. C. Minshull*, Birmingham; *Barlow, Barlow & Lyde*, for *James Ore*, Birmingham.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LINDSAY *v.* QUEENS HOTEL CO., LTD.

[KING'S BENCH DIVISION (Bray and Avory, JJ.), November 19, 1918]

[Reported [1919] 1 K.B. 212; 88 L.J.K.B. 535; 120 L.T. 280; 35 T.L.R. 101; 63 Sol. Jo. 136]

Master and Servant—Wrongful dismissal—Dismissal during currency of notice to leave given by servant—Measure of damages.

A domestic servant who had given a month's notice to leave was wrongfully dismissed during the currency of the notice.

Held: the custom that the damages recoverable by a domestic servant for wrongful dismissal was one month's wages did not apply when the dismissal took place during the currency of the servant's notice to leave; the servant was entitled to the actual loss she had sustained which included the value of the board and lodging she would have enjoyed until the expiry of her notice to leave.

Notes. As to summary determination of a contract of service, see 25 HALSBURY'S LAWS (3rd Edn.) 485 et seq.; and for cases see 34 DIGEST 80–82.

Case referred to:

(1) *Gordon* v. *Potter* (1859), 1 F. & F. 644; 34 Digest 80, *584*.

Also referred to in argument:

Re Rubel Bronze and Metal Co. and Vos, [1918] 1 K.B. 315; 87 L.J.K.B. 466; sub nom. *Vos* v. *Rubel Bronze and Metal Co., Ltd.*, 118 L.T. 348; sub nom. *Rubel Bronze and Metal Co.* v. *Vos*, 34 T.L.R. 171; 34 Digest 105, *782*.

Turner v. *Mason* (1845), 14 M. & W. 112; 2 Dow. & L. 898; 14 L.J.Ex. 311; 5 L.T.O.S. 97; 153 E.R. 411; 34 Digest 69, *463*.

Addis v. *Gramophone Co., Ltd.*, [1909] A.C. 488; 78 L.J.K.B. 1122; 101 L.T. 466, H.L.; 34 Digest 106, *790*.

Appeal.

The facts are set out in the judgment of BRAY, J.

R. A. Willes for the appellant.

Dyer for the respondent.

BRAY, J.—This case raises two points which are of general importance. The plaintiff was engaged as a domestic servant on Jan. 21, 1918. On Feb. 4, 1918, she was paid her wages down to Feb. 1, but on Feb. 4 she gave a month's notice to leave. While this notice was running, differences arose between her and her employer, and on Feb. 26 she was summarily dismissed. That was a clear wrongful dismissal. The question arises to what damages she was entitled in those circumstances. It was contended in the court below that the plaintiff was entitled by custom to a month's wages because the only right the master could have was to pay her a month's wages. Although he had that right he does not appear to have availed himself of it. He broke his contract and must pay damages. There appears to me to be no consideration either in law or fact which makes the assessment of damages different in this case to the assessment of damages in an ordinary case of wrongful dismissal. The same principle applies: What was the actual loss sustained? The judge was wrong in law in giving a month's wages, but what should he have done? The plaintiff is clearly entitled to the wages she would have earned for the six days of the unexpired month. But the further question arises whether she is entitled to something in respect of the board and lodging which she would have enjoyed had the service continued. Reliance was placed on *Gordon* v. *Potter* (1), but that merely lays down that, where a month's wages is to be paid in lieu of notice, board and lodging are not included. In that case the master had exercised the right to give a month's notice. It is quite clear

that we must follow the ordinary rules which apply to the assessment of damages. Counsel have left it to us to say how much the board and lodging for the six days was worth. We assess it at 18s., which sum will be added to the judgment for the plaintiff. In the circumstances there will be no costs of this appeal.

AVORY, J.—The question really is, was the county court judge right in saying the damages were liquidated? In my opinion, the general rule as to one month's wages does not apply where the dismissal takes place during the currency of a servant's notice. The appeal will be allowed on the terms stated.

Appeal allowed.

Solicitors: *Iliffe, Henley & Sweet*, for *Haddock*, Cheltenham; *Alfred T. Jones*, Cheltenham.

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law.*]

MILLS *v.* BROOKER

[KING'S BENCH DIVISION (Avory and Lush, JJ.), February 17, 1919]

[Reported [1919] 1 K.B. 555; 88 L.J.K.B. 950; 121 L.T. 254; 35 T.L.R. 261; 63 Sol. Jo. 431; 17 L.G.R. 238]

Conversion—Adjoining owners—Overhanging fruit tree—Nuisance—Abatement—Fruit on overhanging branches picked and sold by adjoining owner.

The plaintiff's apple tree overhung the adjoining land of the defendant, and the defendant picked the apples from the overhanging branches and sold them. In an action by the plaintiff for conversion,

Held: in abating the nuisance the defendant as adjoining owner might lop the overhanging branches, but he had no right to the lopped branches and the apples growing on them, the ownership of which remained in the plaintiff, and in appropriating the apples to his own use the defendant was liable in conversion.

Notes. As to whether trover or detinue lies when fruit has been severed from overhanging trees, see 33 HALSBURY'S LAWS (2nd Edn.) 51, 52; and for cases see 43 DIGEST 468. As to when notice is necessary before abatement of a nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 151; and for cases see 36 DIGEST (Repl.) 305.

Case referred to:

(1) *Lemmon* v. *Webb*, [1895] A.C. 1; 64 L.J.Ch. 205; 71 L.T. 647; 59 J.P. 564; 11 T.L.R. 81; 11 R. 116, H.L.; 36 Digest (Repl.) 305, *519*.

Also referred to in argument:

Mitten v. *Faudrye* (1626), Poph. 161; 79 E.R. 1259; sub nom. *Millen* v. *Fawtrey*, W.Jo. 131; Lat. 119; sub nom. *Millen* v. *Hawery*, Lat. 13; 43 Digest 373, *5*.

Walgrave v. *Ogden* (1591), 1 Leon. 224; 74 E.R. 205; sub nom. *Mulgrave v. Ogden*, Cro. Eliz. 219; sub nom. *Mosgrave* v. *Agden*, Owen, 141; 43 Digest 469, *86*.

Isaack v. *Clark* (1615), 2 Bulst. 306; Moore, K.B. 841; 80 E.R. 1143; sub nom. *Isack* v. *Clarke*, 1 Roll. Rep. 126; 43 Digest 467, *53*.

Appeal from Maidstone County Court.

The plaintiff and the defendant were neighbours. There grew on the plaintiff's land, at a distance of eight feet from his boundary, certain Bramley Seedling apple trees. The branches of these trees projected over the defendant's land. He

plucked and sold ten bushels of apples. In an action for conversion the county court judge gave judgment for the plaintiff for £10, holding that although the defendant was entitled to remove a nuisance he was not at liberty to appropriate that which caused the nuisance to his own use. The defendant appealed.

Maddocks for the defendant.
Fletcher for the respondent.

AVORY, J.—In my judgment, the county court judge was right. The defendant bases his claim to pick the apples on his right to lop overhanging branches. In lopping the overhanging branches he would commit no trespass; nor would he be bound to give notice of his intention to lop to the plaintiff: *Lemmon* v. *Webb* (1), but that right arises because he may abate a nuisance, and it can be exercised for that purpose alone. He has no right to the branches when lopped, nor to the fruit which was growing upon them. The apples when severed did not necessarily cease to savour of the realty. The passage cited from POLLOCK AND WRIGHT ON POSSESSION (8th Edn.), p. 203, does not apply to the subject of conversion. It is true that here the owner never had possession of the apples as chattels, but for the purposes of conversion it is not necessary that there should be taking of the crop of apples as chattels out of the possession of the owner. It is sufficient that he had a right to the apples when they became chattels. This the plaintiff clearly had, for the apples were his property both before and after severance. It is not necessary to decide whether, if the defendant had merely severed the apples, the plaintiff could have enforced his right against him. The defendant not only severed the apples but converted them to his own use, and the proper measure of damages as found by the county court judge was the value of the apples. The appeal must be dismissed.

LUSH, J.—I agree. The plaintiff was the owner of the fruit carried by the overhanging branches while it was still on the tree, and it remains his property whether it is cut down by the hand of man, or is blown off by the wind. In abating a nuisance the adjoining owner may sever the branches and the fruit, but that does not affect the right of ownership. While the owner might not be able to justify an entry on adjoining land for the purpose of recovering fruit, if the adjoining owner carries off the fruit and sells it he is liable in conversion and must pay damages which are measured by the full value.

Appeal dismissed.

Solicitors: *Bracher & Son*, Maidstone; *Paterson, Candler & Sykes*, for *Ellis & Ellis*, Maidstone.

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law.*]

THE PORTO ALEXANDRE

[Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), November 10, 1919]

[Reported [1920] P. 30; 89 L.J.P. 97; 122 L.T. 661; 36 T.L.R. 66; 15 Asp.M.L.C. 1]

Constitutional Law—Foreign sovereign State—Immunity from legal process—Ship owned by foreign State—Destined to public use—Carriage of cargo for private trader.

In 1916, during the European war of 1914–18, a ship, which had formerly been a German vessel, was requisitioned by the Portuguese government and thereafter was the property of that government, or in its possession, employed in the public service of Portugal under the orders of the government of that country as a trading vessel carrying cargo for a private trading company. In 1919 she ran aground at the entrance to the River Mersey, and tugs belonging to the plaintiffs performed salvage services. In a salvage action brought by the plaintiffs against ship and freight,

Held: although the ship was engaged in an ordinary commercial undertaking as an ordinary trading vessel carrying goods for a private trading company, she was the public property of the State of Portugal destined to its public use, and, as such, was entitled to immunity from legal process in English courts, and a motion to set aside the writ in the plaintiffs' action must succeed.

The Parlement Belge (1) (1880), 5 P.D. 197, applied.

Notes. Doubted: *Compañia Naviera Vascongada* v. *Cristina*, *The Cristina*, [1938] 1 All E.R. 719. Referred to: *The Tervaete*, [1922] All E.R.Rep. 387; *Compañia Mercantil Argentina* v. *United States Shipping Board*, [1924] All E.R.Rep. 186; *The Zigurds (No. 1)* (1932), 48 T.L.R. 556; *The Arantzazu Mendi*, [1938] 4 All E.R. 267; *Krajina* v. *Tass Agency*, [1949] 2 All E.R. 274; *Baccus S.R.L.* v. *Servicio Nacional Del Trigo*, [1956] 3 All E.R. 715.

As to the immunity from suit of foreign States, see 7 Halsbury's Laws (3rd Edn.) 265–267; and for cases see 1 Digest 110, 111, and 11 Digest (Repl.) 622 et seq.

Cases referred to:

(1) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, *516*.

(2) *Briggs* v. *Light Boats* (1865), 93 Mass. 157.

(3) *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 10 T.L.R. 115; 9 R. 447, C.A.; 11 Digest (Repl.) 615, *435*.

(4) *Taylor* v. *Best* (1854), 14 C.B. 487; 8 State Tr.N.S. 317; 23 L.J.C.P. 89; 22 L.T.O.S. 287; 18 Jur. 402; 2 W.R. 259; 2 C.L.R. 1717; 139 E.R. 201; 11 Digest (Repl.) 629, *517*.

Motion by the defendants to set aside the writ and all subsequent proceedings in an action of salvage brought against ship and freight, on the ground that the ship and freight were the public national property, and in the possession and public use and service, of the government of an independent sovereign State.

The plaintiffs were the owners, masters, and crews of the steam tugs *Nora*, *Expert*, and *Torfrida*. The defendants were the owners of the Portuguese steamship *Porto Alexandre*, her cargo and freight. While, on Sept. 13, 1919, on a voyage from Lisbon to Liverpool with cargo, the *Porto Alexandre* got into difficulties in the Crosby Channel, River Mersey, and services were rendered to her by the plaintiffs' tugs. On Sept. 16 the plaintiffs issued a writ claiming salvage, and the ship was arrested. An appearance under protest was entered on behalf of the owners of the ship and her freight, but subsequently, on a summons taken out on behalf of the Portuguese government, who were stated to be the owners of the vessel and her freight, the release of the *Porto Alexandre* was ordered by the

Liverpool District Registrar. The salvors thereupon appealed to the Vacation judge, who set aside the order of the district registrar, but without prejudice to the present motion, which was brought on the following grounds:

"(i) That the said steamship and freight were and are the public national property of, and/or requisitioned by, and in the possession and public use and service of the Portuguese government. (ii) That the steamship has been properly and lawfully condemned as prize of war by a decree of a court of competent jurisdiction of the said Portuguese government. (iii) That the court has no jurisdiction to entertain this suit, or, alternatively, that it ought in its discretion to refuse to entertain this suit."

HILL, J., held that the motion succeeded on the ground that it was established that the ship was the property of the Portuguese government, and it followed that, so far as the owners of the ship and freight were concerned, the writ and all subsequent proceedings must be set aside, but the writ and all subsequent proceedings, so far as the cargo was concerned, would remain good. The plaintiffs appealed.

C. R. Dunlop, K.C., and *J. B. Aspinall* for the plaintiffs.

D. Stephens, K.C., and *A. Wallace Grant*, for the defendants, were not called on to argue.

BANKES, L.J.—This is an appeal from the decision of HILL, J., who made an order that the writ and warrant for arrest, and all subsequent proceedings, against the *Porto Alexandre* and freight be set aside, but that the proceedings against the cargo should stand. The learned judge was only concerned with the question of the ship, and so is this appeal.

The vessel was on a voyage from Lisbon to Liverpool, when she ran aground in the Mersey, and three tugs were engaged to get her off. An action was brought, and the ship was arrested in respect of the services rendered by these tugs. The application was founded upon the contention that the ship was the property of a sovereign State, the Republic of Portugal, and that she was thus exempt from arrest. The conclusion of fact at which the learned judge arrived was that it had been established that the ship was the property of the Portuguese government at the time of the arrest and is still their property, and on that ground he made the order. It is now contended that it is not sufficient for a Sovereign or a sovereign State to allege that a vessel is the property of such Sovereign or sovereign State, and that the allegation must go further and say the vessel is employed in the public service or on public service.

The facts with regard to the vessel are as follows. She was formerly a German vessel, and in August, 1916, was requisitioned by the Portuguese government. On Aug. 11, what is called a passport was issued, which authorised the employment of the ship, and bore on it certain notes indicating that during the period that vessel was at the service of the Portuguese government her port of register should be Lisbon. There is also an endorsement on the passport stating that on Jan. 30, 1917, she was adjudged a lawful prize of war. Counsel for the plaintiffs has pointed out that the statement that she was adjudged a lawful prize of war leaves it doubtful whether she has become the actual property of the Portuguese government, or was merely detained pending the conclusion of peace. It would rather appear that the latter is the proper conclusion, because there is an affidavit by the Portuguese Vice-Consul at Liverpool, who says that the vessel is, and has been, requisitioned by the Portuguese government for the service of the State, and is employed under the orders of the government. There is a further statement in writing by the Portuguese Consul at Liverpool, in which he says, in reference to this particular voyage, that the freight on the cargo was paid before shipment and belongs solely and entirely to the Portuguese government. In addition, there is a letter from the Portuguese chargé d'affaires, in which he states definitely that the *Porto Alexandre* is a public service vessel belonging to the Portuguese government.

There is no reason to doubt the accuracy of the statements that have been made on affidavit—that the vessel has been requisitioned under the order of the Portuguese government, and that, on the particular voyage, she was carrying freight for that government. It is, however, contended that that is not sufficient because it is shown that she was engaged in what the counsel for the plaintiffs says was an ordinary commercial undertaking, as an ordinary trading vessel carrying goods for a private individual or company. I gather from the judgment of HILL, J., and from what has been said by counsel, that this question is becoming one of increasing importance. In the days when the early decisions were given, no doubt, what were called government vessels were limited almost entirely to vessels of war. But in modern times, Sovereigns and sovereign States have taken to owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. The fact of itself indicates the growing importance of the particular question, if vessels so employed are to be deemed free from arrest.

The function of this court is to decide whether this particular case is covered by *The Parlement Belge* (1), a decision of this court binding on us. I think that it is, and it is, therefore, not necessary or desirable that the court should enter upon a discussion of the wider question at this stage, or consider the importance of other views that may be taken. There is very little difference between the material facts in *The Parlement Belge* (1) and in the present case, and, in my opinion, *The Parlement Belge* (1) covers this case. It is quite true that in many of the earlier cases the claim put forward, with regard to a particular ship, was that she was on public service and employed in the public service, and no doubt the statement so made was applicable to the particular case and was made because it was applicable to the particular case, and the judgments were delivered in reference to the facts so stated. But in this case the court is bound by *The Parlement Belge* (1), and the appeal must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. I think the case is clearly covered by *The Parlement Belge* (1), and we have, therefore, no alternative but to dismiss the appeal.

The facts proved appear to me to amount to this: First, that the ship in question is a public vessel, the property of the Portuguese government; next, it is proved by the affidavits that she is in the possession of the government for the service of the State; and, thirdly, that she is employed under the orders of the government. I will refer to one passage in the judgment of BRETT, L.J., in *The Parlement Belge* (1) in which he is expressing what he considers to be the result of the judgment in *Briggs* v. *Light Boats* (2), an American case, of which he obviously approves and on which he founds his own conclusion. He says (5 P.D. at p. 213):

> "The ground of that judgment is that the public property of a government in use for public purposes is beyond the jurisdiction of the courts of either its own or any other State, and that the ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property. It puts all the public movable property of a State, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a Sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all courts for the same reason—viz., that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the State."

Again, when he is summing-up the principle which he thinks is to be deduced from all the cases he says (ibid. at p. 217):

> "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any Sovereign or ambassador of any other State, or *over the*

public property of any State which is destined to its public use, or over the property of any ambassador, though such Sovereign, ambassador or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

The words in italics are the material words. Whatever may be the actual use to which the ship is put, I think the evidence is quite sufficient to show that she is the property of the State, and is destined to public use; and, therefore, the case seems to me to come exactly within the principle of the judgment in *The Parlement Belge* (1).

SCRUTTON, L.J.—This and other States proceed in their jurisprudence on the assumption that sovereign States are equal and independent, and that, as a matter of international courtesy, no one sovereign independent State will exercise any jurisprudence over the person of the Sovereign or the property of any other sovereign State; and now that the Sovereigns move about more freely than formerly, and Sovereigns and States do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent States and their Sovereigns. I think it has been well settled, first, as to the Sovereign, that there are no limits to the immunity which he enjoys. His private character is as free as his public character. If he chooses to come into this country under an assumed name and to indulge in privileges not peculiar to Sovereigns, of making promises of marriage and breaking them, the English courts still say, on his appearing in his true character of Sovereign and claiming his immunity, that he is wholly free from the jurisdiction of our courts: *Mighell* v. *Sultan of Johore* (3). It has been held, as counsel admits, in *The Parlement Belge* (1) that trading on the part of a Sovereign does not subject him to any liability to the jurisdiction. His ambassador is in the same position; an ambassador coming here as an ambassador of the Sovereign may engage in private trading, but it has been held that his immunity protects him even from proceedings in respect of his private trading. JERVIS, C.J., in *Taylor* v. *Best* (4), said (14 C.B. at p. 519):

". . . if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne, c. 12, s. 5, in the case of an ambassador's servant. If an ambassador or public Minister, during his residence in this country, violates the character in which he is accredited to our court, by engaging in commercial transactions, that may raise a question between the government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character—the proviso in the statute of Anne limiting the privilege in cases of trading applying only to the servants of the embassy."

There being no limitation in the case of the Sovereign, nor of the ambassador, is there any in the case of the property? Counsel has argued that in the case of property of the State there is a limitation and that, as I understand him, if the property is employed in trading, that cannot be for the public service of the State.

We are concluded in this court by *The Parlement Belge* (1). SIR ROBERT PHILLIMORE took the view that trading with the property of a State might render that property liable to seizure; but the Court of Appeal overruled his views, as I understand them. The principle then laid down has been recited by the other members of the court. BRETT, L.J., said (5 P.D. at p. 217):

"As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over

the person of any Sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use. . . ."

One of the reasons given seems to me conclusive. The moment property is arrested in the Admiralty Court a proceeding is instituted against the person, and he is compelled to appear if he wants to protect his property; and by seizing his property the personal rights of the Sovereign or the personal rights of the State are infringed. The position seems to me to be very accurately stated in HALL'S INTERNATIONAL LAW (7th Edn.) at p. 211, where, after dealing with the warships and public vessels so called, Mr. HALL goes on to deal with other vessels employed in the public service and property possessed by the State within foreign jurisdiction, and says:

"If in a question with respect to property coming before the courts a foreign State shows the property to be its own and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign State."

I quite appreciate the difficulty and doubt which HILL, J., felt because no one can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many States are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult. But while it seems to me that *The Parlement Belge* (1) excludes remedies in these courts, there are practical commercial remedies. If ships of the State find themselves left on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, there may be found a difficulty in finding cargoes for national ships. These are matters to be dealt with by negotiations between governments, and not by governments exercising their power to interfere with the property of other States, contrary to the principles of international courtesy which govern the relations between independent and sovereign States. I think it is clear that we must in this court support the decision of HILL, J., and dismiss the appeal.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.*, for *Hill, Dickinson & Co.*, Liverpool; *Botterell & Roche*, for *Weightman, Pedder & Co.*, Liverpool.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

WELSH *v.* ROE

[KING'S BENCH DIVISION (McCardie, J.), January 14, 15, 17, 1918]

[Reported 87 L.J.K.B. 520; 118 L.T. 529; 34 T.L.R. 187; 62 Sol. Jo. 269]

Solicitor—Authority—Implied authority—Compromise of action—Other side not bound by limitation of authority without notice.

Once an action has been commenced the solicitor retained becomes the general agent of the client and has an implied authority to compromise the action. No limitation of that implied authority can avail the client unless such limitation had been brought to the notice of the other side before the compromise was arrived at.

Notes. Distinguished: *Shepherd* v. *Robinson*, [1919] 1 K.B. 474. Considered: *Conlon* v. *Conlons, Ltd.*, [1952] 2 All E.R. 462.

As to authority of solicitor to compromise action, see 31 HALSBURY'S LAWS (2nd Edn.) 106 et seq.; and for cases see 42 DIGEST 65–68.

Cases referred to:

(1) *Macaulay* v. *Polley*, [1897] 2 Q.B. 122; 66 L.J.Q.B. 665; 76 L.T. 643; 45 W.R. 681, C.A.; 42 Digest 67, *589*.
(2) *Latuch* v. *Pasherante* (1696), 1 Salk. 86; 91 E.R. 81; 42 Digest 68, *599*.
(3) *Smith* v. *Troup* (1849), 7 C.B. 757; 6 Dow. & L. 679; 18 L.J.C.P. 209; 13 L.T.O.S. 73; 137 E.R. 300; 42 Digest 68, *596*.
(4) *Butler* v. *Knight* (1867), L.R. 2 Exch. 109; 36 L.J.Ex. 66; 15 L.T. 621; 15 W.R. 407; 42 Digest 67, *585*.
(5) *Brady* v. *Curran* (1868), 16 W.R. 514; I.R. 2 C.L. 314; 42 Digest 67, *d*.
(6) *Berry* v. *Mullen* (1871), I.R. 5 Eq. 368; 42 Digest 67, *e*.
(7) *Re Newen, Carruthers* v. *Newen*, [1903] 1 Ch. 812; 72 L.J.Ch. 356; 88 L.T. 264; 51 W.R. 297; 19 T.L.R. 247; 47 Sol. Jo. 300; 42 Digest 66, *582*.
(8) *Chown* v. *Parrott* (1863), 14 C.B.N.S. 74; 2 New Rep. 127; 32 L.J.C.P. 197; 9 Jur.N.S. 1290; 11 W.R. 668; 143 E.R. 372; sub nom. *Choun* v. *Parrott*, 8 L.T. 391; 42 Digest 97, *908*.
(9) *Fray* v. *Voules* (1859), 1 E. & E. 839; 28 L.J.Q.B. 232; 33 L.T.O.S. 133; 5 Jur.N.S. 1253; 7 W.R. 446; 120 E.R. 1125; 42 Digest 66, *578*.
(10) *Prestwich* v. *Poley* (1865), 18 C.B.N.S. 806; 6 New Rep. 175; 12 L.T. 390; 144 E.R. 662; sub nom. *Pristwick* v. *Poley*, 34 L.J.C.P. 189; 11 Jur.N.S. 583; 13 W.R. 753; 42 Digest 66, *581*.
(11) *Strauss* v. *Francis* (1866), L.R. 1 Q.B. 379; 35 L.J.Q.B. 133; 14 L.T. 326.
(12) *Neale* v. *Gordon Lennox*, [1902] 1 K.B. 838; 71 L.J.K.B. 536; 86 L.T. 574; 50 W.R. 487; 18 T.L.R. 494, C.A.; reversed, [1902] A.C. 465; 71 L.J.K.B. 939; 87 L.T. 341; 66 J.P. 757; 51 W.R. 140; 18 T.L.R. 791; 46 Sol. Jo. 319, H.L.; 3 Digest (Repl.) 378, *304*.
(13) *Little* v. *Spreadbury*, [1910] 2 K.B. 658; 79 L.J.K.B. 1119; 102 L.T. 829; 26 T.L.R. 552; 54 Sol. Jo. 618, D.C.; 42 Digest 67, *593*.

Action tried by MCCARDIE, J., without a jury.

The plaintiff brought an action against the defendant claiming damages for knowingly and unlawfully inducing a lady to break her contract of marriage with the plaintiff. The statement of claim and afterwards the defence were duly delivered, and the action was duly set down. In March, 1916, the date of hearing was drawing near. Both parties desiring to avoid a public trial their respective solicitors met. The result of the meeting was that the action was settled on the terms of an agreement in writing dated Mar. 24, 1916. That agreement was signed by the plaintiff's solicitor for and on behalf of the plaintiff. Shortly afterwards the plaintiff asserted that the agreement was invalid on the grounds that the compromise was without his consent and contrary to the actual authority of his

solicitor. He then brought this action claiming to have the agreement of compromise declared void.

Plaintiff in person.

Hollis Walker, *K.C.*, and *Dyer* for the defendant.

Cur. adv. vult.

Jan. 17, 1918. **McCARDIE, J.**, read the following judgment.—The facts of this case are unusual. The points of law raised are important to litigants and their advisers. Before 1914 the plaintiff had formed an attachment to a lady. He states that it was the dearest wish of his existence to make her his wife. Apparently his affection was not returned, for in November, 1914, she married another. The present defendant is the husband. Thereupon the plaintiff brought an action against the lady for moneys which he claimed had been paid to her during a period of years. The details are unimportant. He alleged a promise to marry, and asserted that he had paid the moneys in consideration of the marriage promise, and that he was entitled to recover them as special damage on a failure of consideration. On July 2, 1915, the plaintiff obtained a judgment (by consent) against the lady for £1,387. The reasons for her consent may be inferred. The judgment, however, was not satisfied, for the lady had no means. The plaintiff then commenced a further action against the present defendant on July 26, 1915. The ground of claim alleged was that the defendant had knowingly and unlawfully induced the lady to break her contract of marriage with the plaintiff. The special damage alleged was identical with that put forward in the action against the defendant's wife. A defence was duly delivered. It traversed in appropriate language the allegations of the plaintiff and asserted (inter alia) that the defendant and the lady intermarried because the lady preferred the defendant to the plaintiff and because of the affection between the defendant and the lady who is now his wife. It is not necessary to make any comment on either of the two actions so commenced by the plaintiff. The second action was duly set down, and in March, 1916, the day of hearing was rapidly approaching. A public trial might well cause grief and unhappiness to the defendant and his wife. Even the plaintiff himself felt that, if possible, publicity should be avoided. Accordingly the solicitors for the respective parties met. As a result the action was settled on the terms of a written agreement dated Mar. 24, 1916. The agreement was signed by the plaintiff's solicitor (Mr. Davis) for and on behalf of the plaintiff. Shortly after the settlement had been made the plaintiff asserted by letters that the agreement was invalid on the grounds (in substance) that the compromise had been without his consent and contrary to the actual authority of his solicitor. He then commenced the present action against the defendant, by which he asks the court to declare the agreement of compromise void.

I need not now deal with the further circumstances of the case. The facts already stated suffice to raise the important point of law relating to the authority of a solicitor to compromise his client's claim. Argument took place before me on the point. The authorities seemed to be ambiguous and the dicta uncertain. Hence I deem it well to state my view of the law on the point before proceeding to consider the special facts of this case. It is not desirable that the legal position should be in doubt. It is clear that a solicitor cannot compromise a claim before writ issued even though he be retained to bring an action in respect of it—see *Macaulay* v. *Polley* (1) in the Court of Appeal. The party claiming to support the compromise must in such case prove the actual authority of the solicitor. It is a matter of evidence in each case. But when once an action has been commenced the position is wholly different. The solicitor retained thereupon becomes the general agent of the client with respect to such action. To use the words of Chitty, L.J., in *Macaulay's Case* (1) ([1897] 2 Q.B. at p. 123), "his authority thereupon becomes evident." It is important to ascertain the nature of such authority and the limitations which can be placed upon it by the client. In my opinion it is clear that a solicitor has an implied authority to compromise the

action, and that no limitation on such implied authority can avail the client as against the other side unless such limitation had been brought to the notice of the other side before the compromise was arrived at. The question first arose in 1696 in *Latuch* v. *Pasherante* (2), where it was held that a client was bound by his attorney's consent, although it was contrary to the express instructions given by the client. A similar decision was given in 1849 by WILDE, C.J., COLTMAN, CRESSWELL and WILLIAMS, JJ., in *Smith* v. *Troup* (3), and was followed in 1867 by *Butler* v. *Knight* (4), where it was held that a client was bound by a compromise which had been brought about by his solicitor against his (the client's) express instructions. The power of the solicitor to settle was fully recognised by KELLY, C.B., and CHANNELL and PIGOTT, BB. As it was put by PIGOTT, B.: "He binds her by the exercise of this power, but violates his duty in so doing." In 1868 MONAGHAN, C.J., and O'HAGAN and MORRIS, JJ., arrived at a similar conclusion in Ireland in *Brady* v. *Curran* (5). They adopted and applied the English decisions, and pointed out that the authority of a general agent in matters within scope of his employment could not be limited by secret instructions. It is also worthy of note that they indicated that the recovery of damages by a client against his solicitor for compromising against instructions was grounded on the basis that the client was bound by the compromise. As MONOGHAN, C.J., said: "If it were otherwise, no injury would arise to the plaintiff, as his right of action would not be affected by the compromise." *Brady* v. *Curran* (5) was followed and applied by WARREN, J., in 1871 in *Berry* v. *Mullen* (6), where the English decisions were also considered and dealt with. The rule as I have stated it is clearly, and in my opinion correctly, stated in CORDERY ON SOLICITORS (3rd Edn.), p. 90, and in POLEY ON SOLICITORS, at p. 160, and is not questioned by the decision of FARWELL, J., in *Re Newen* (7).

It is now desirable to consider the decisions which have led, in my opinion, to confusion. Those decisions cannot, I think, be correctly appreciated unless a clear distinction is drawn between the power of a solicitor to compromise and his liability to the client if such compromise is effected either negligently or in violation of instructions. If this distinction is borne in mind, then the decisions referred to present no difficulty. In *Chown* v. *Parrott* (8) the action was brought by the client against the solicitor to recover damages for breach of duty in compromising without instructions. It is clear from that decision that if the solicitor acts without or contrary to instructions he will be responsible to the client in damages. But that case throws no doubt on the rule that the client is bound by the apparent authority of his solicitor. As ERLE, L.J., says (14 C.B.N.S. at p. 83): "The attorney is his general agent for that purpose"—that is, for the purpose of compromise. In *Fray* v. *Voules* (9) (1 E. & E. at p. 847) LORD CAMPBELL, C.J., adopted the same view with regard to the responsibility of a solicitor for breach of duty. But he seemed to think—and, in my opinion, rightly—that the client was bound even though the compromise was against his express instructions. In *Prestwich* v. *Poley* (10) the court decided nothing contrary to the rule as I have stated it. That case raised a question with regard to the validity of a compromise. The compromise was allowed to stand. BYLES, J., pointed out (18 C.B.N.S. at p. 809) that the question as between attorney and client differed from the question as between party and party. The true view of the case was stated by BLACKBURN, J., in *Strauss* v. *Francis* (11) (L.R. 1 Q.B. at p. 382), where he is reported as saying:

> "In *Prestwich* v. *Poley* (10) the question was as to the authority of an attorney to settle an action, and the compromise was held binding, there being no express prohibition communicated to the other side."

Such, I think, is the correct effect of *Prestwich* v. *Poley* (10). The view which I have stated with regard to the authority of a solicitor is supported by the decision in the case which deals with the authority of counsel. The two are analagous. In *Strauss* v. *Francis* (11) it was held that a client was bound by the act of his counsel even though against the client's express wish, inasmuch as the limitations

of the counsel's authority had not been brought to the knowledge of the other side. There the question of principle was definitely raised and authoritatively dealt with. In *Neale* v. *Gordon Lennox* (12) a question again arose with regard to the authority of counsel to bind his client. The rule laid down in *Strauss* v. *Francis* (11) was accepted and applied by Lord Alverstone, C.J., and also by the Court of Appeal. In my view such rule is not only convenient in practice, but is also consonant with sound legal principle. If the rule did not exist much confusion might result. No litigant could rest securely upon an interlocutory arrangement or compromise. The principle is one of high practical utility.

But I must refer to two decisions which call for consideration. The first is the decision of the House of Lords in the above-named case of *Neale* v. *Gordon Lennox* (12). By that decision the House of Lords reversed the conclusion arrived at by the Court of Appeal. If that decision destroyed or impaired the old authorities, numerous and weighty as they are, I should be bound to follow the guidance of the highest tribunal. But I cannot accept such a view of the decision. The older authorities were before the House. They were fully discussed. Did the House overule them? The answer, I think, is clearly no, for Lord Halsbury says ([1902] A.C. at p. 470): "I can well adopt, and feel that I could safely affirm, every one of the decisions referred to." I see nothing in the other opinions of the House which indicate any dissent from the view as expressed by Lord Halsbury. However, I think the decision of the House of Lords turned upon a particular point, namely, whether the courts were imperatively bound, when applied to for their assistance, to enforce a particular arrangement made between counsel for the respective parties, although such arrangement was contrary to the express instructions of one of the clients, and contrary also to the view which the courts took of the supreme requirements of justice. The House of Lords held that the courts were not so bound. The case turned, in the final tribunal, upon a particular and peculiar point. It is not a precedent of general application. I agree with the opinion expressed by Bray, J., as to the effect of the House of Lords' decision in *Neale* v. *Gordon Lennox* (12) in his judgment in the case to which I shall next refer. That case requires careful examination. It is the decision of the Divisional Court in *Little* v. *Spreadbury* (13). Upon considering the judgment of Bray, J., it will be observed that he expressly leaves open the question whether a limitation of the solicitor's authority, unknown to the other side, can be asserted by the client in order to set aside a compromise. But the judgment of Lord Coleridge undoubtedly indicates a view that the solicitor cannot effect a compromise which will bind his client, if he acts in defiance or disregard of his client's instructions. I feel compelled to say that I cannot accept the view of Lord Coleridge. In my opinion it is contrary to the weight of long-standing authority; I am unable to follow it. I need not refer to other and less important decisions which may touch directly or indirectly upon the point now at issue. In my opinion the rule is as I have stated it in this judgment. The application of the rule is safeguarded in various ways. A compromise which is collusive will be void. A compromise which is made negligently may form the subject of an action by the client for breach of duty. The high responsibility of solicitors is guarded by the disciplinary powers of the court. The court, moreover, may, if justice imperatively so requires, refuse, in a special case, to assist actively in the enforcement of a compromise which, as in the *Neale* v. *Gordon Lennox* (12) litigation, ought not to be sanctioned.

The view which I have expressed with regard to the law disposes in substance of the case. For even if there had been a limitation by the plaintiff of his solicitor's authority, I am satisfied that no such limitation was ever brought to the attention of the defendant or his adviser. The evidence is, to my mind, conclusive upon that point. I accept without hesitation the testimony given by the defendant and his solicitor (Mr. Brooks). If I had adopted the view of the law taken by Lord Coleridge in *Little* v. *Spreadbury* (13) I should still have come to the conclusion that the plaintiff must fail in the present action. For he has failed to satisfy me that there was any prohibition (either express or implied) by him to his solicitor

(Mr. Davis) which could cut down the implied authority of Mr. Davis to compromise the action. The plaintiff alone gave evidence. Mr. Davis was not called. No satisfactory explanation of his absence was given. I am wholly unable to think that he would have effected the compromise if he had known or believed that he had no authority so to do. Indeed, in the course of his reply the plaintiff said that he thought that the solicitor acted in ignorance rather than in defiance of his instructions. I am equally unable to think that Mr. Davis did not understand the nature or the terms of the compromise. He was an experienced solicitor. In my opinion Mr. Davis made the best compromise possible. The statement of claim is well and clearly drawn, yet it contains no allegation that Mr. Davis acted in defiance of any prohibition. I have read the correspondence; it is equally devoid of any such allegation. The plaintiff asserts that he intended to compromise the action on terms only which would include a settlement by the defendant upon his wife providing for an immediate income at the rate of £150 per annum. Yet the plaintiff knew quite well that the defendant had no available means which would enable him to make such a settlement. The defendant had, however, a valuable reversionary interest, and I am satisfied that his solicitor would negotiate upon the basis of such a settlement on the wife as would give her £150 a year when the reversion fell into possession. The defendant loyally carried out the terms of settlement and effected, with the aid of a well-known Chancery counsel, an appropriate settlement in pursuance thereof.

It follows that the action fails. I regret it has been brought. The plaintiff admitted in cross-examination that he had become satisfied that the defendant had done all he could, and that the best settlement had been made in the circumstances to protect the future of the lady. Yet he persisted in these proceedings although nothing was to be gained save the unhappy publicity of the trial. I dismiss the action, with costs, and upon the counterclaim I make the order as asked, with costs. I need only add that I trust this prolonged and distressing litigation will now cease. The plaintiff should remember that it is the first duty of a man to save a woman whom he has once loved from the pangs of avoidable grief and the acuteness of unceasing pain.

Judgment for defendant.

Solicitor: *Richard Brooks.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

BRADLEY AND OTHERS v. NEWSUM, SONS & CO., LTD.

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Sumner, Lord Parmoor and Lord Wrenbury), June 27, 28, July 2, 4, 29, 1918]

[Reported [1919] A.C. 16; 88 L.J.K.B. 35; 119 L.T. 239; 34 T.L.R. 613; 14 Asp.M.L.C. 340; 24 Com. Cas. 1]

Shipping—Freight—Abandonment of ship—Right of cargo-owner to treat contract of affreightment as at an end—Ship in hands of salvors—Right of cargo-owner to delivery of goods without payment of freight—"Abandonment"—Master and crew forcibly removed from ship by enemy during war.

If a ship be abandoned by her master and crew without any intention on their part to re-take possession of her—they having no spes recuperandi or animus revertendi—the cargo-owner may elect to treat the contract of affreightment as at an end, and, while the ship is in the hands of salvors and before her owner has resumed possession of her, he may claim delivery of his goods without payment of freight. If this state of mind by the master and crew be once ascertained, a subsequent change of intention on their part and efforts to save the ship are immaterial. But the term "abandonment" in this connection denotes the exercise of some discretion or volition by the master, and is not applicable to a case where he and the crew are forcibly removed from the vessel, e.g., under threats from an enemy ship during the time of war. In such a case there is no abandonment within the above rule, and the cargo-owner has no right to take possession of the cargo without paying freight.

So **held** by Lord Finlay, L.C., Viscount Haldane, Lord Parmoor and Lord Wrenbury; Lord Sumner dissenting.

Notes. Applied: *Court Line, Ltd.* v. *R.*, [1945] 2 All E.R. 357. Referred to: *Speltabile Consorzio Veneziano di Armamento e Navigazione* v. *Northumberland Shipbuilding Co.*, post, p. 963; *The Albionic*, [1942] P. 81.

As to freight, see 30 Halsbury's Laws (2nd Edn.) 564–592; and for cases see 41 Digest 620 et seq.

Cases referred to:

(1) *The Cito* (1881), 7 P.D. 5; 51 L.J.P. 1; 45 L.T. 663; 30 W.R. 836; 4 Asp.M.L.C. 468, C.A.; 41 Digest 648, *4805.*

(2) *The Arno* (1895), 72 L.T. 621; 11 T.L.R. 453; 8 Asp.M.L.C. 5, C.A.; 41 Digest 649, *4807.*

(3) *The Kathleen* (1874), L.R. 4 A. & E. 269; 43 L.J.Adm. 39; 31 L.T. 204; 23 W.R. 350; 2 Asp.M.L.C. 367; 41 Digest 648, *4804.*

(4) *The Aquila* (1798) 1 Ch. Rob. 37; 165 E.R. 87; 41 Digest 851, *7151.*

(5) *The Zeta* (1875), L.R. 4 A. & E. 460; 44 L.J.Adm. 22; 33 L.T. 477; 24 W.R. 180; 3 Asp.M.L.C. 73; 41 Digest 877, *7549.*

(6) *The Sarah Bell* (1845), 4 Notes of Cases, 144; 6 L.T. 371; 41 Digest 851, *7155.*

(7) *The John and Jane* (1802), 4 Ch. Rob. 216; 165 E.R. 590; 41 Digest 851, *7152.*

(8) *Cossmann* v. *West*, *Cossmann* v. *British America Assurance Co.* (1887), 13 App. Cas. 160; 57 L.J.P.C. 17; 58 L.T. 122; 4 T.L.R. 65; 6 Asp.M.L.C. 233, P.C.; 41 Digest 892, *7813.*

(9) *The Fenix* (1855), Sw. 13; 166 E.R. 992; 41 Digest 852, *7165.*

(10) *The Cosmopolitan* (1848), 6 Notes of Cases, Supp. XVII; 41 Digest 852, *7164.*

(11) *The Florence* (1852), 19 L.T.O.S. 304; 16 Jur. 572; 41 Digest 846, *7091.*

(12) *The Dantzic Packet* (1837), 3 Hag. Adm. 383; 8 L.T. 582; 166 E.R. 447; 41 Digest 893, *7849.*

(13) *R.* v. *Property Derelict* (1825), 1 Hag. Adm. 383; 166 E.R. 136; 41 Digest 851, *7148.*

(14) *Hochster* v. *De La Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, *2960.*

(15) *The Eliza Lines* (1905), 199 U.S. 119.

(16) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, *2966.*

(17) *Hunter* v. *Prinsep* (1808), 10 East, 378; 103 E.R. 818; 41 Digest 514, *3441.*

(18) *Shipton* v. *Thornton* (1838), 9 Ad. & El. 314; 1 Per. & Dav. 216; 1 Will, Woll. & H. 710; 8 L.J.Q.B. 73; 112 E.R. 1231; 41 Digest 480, *3131.*

(19) *Vlierboom* v. *Chapman* (1844), 13 M. & W. 230; 13 L.J.Ex. 384; 8 Jur. 811; 153 E.R. 96; 41 Digest 646, *4777.*

(20) *Scott* v. *Shepherd* (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, *100.*

(21) *The Janet Court*, [1897] P. 59; 66 L.J.P. 34; 76 L.T. 172; 8 Asp.M.L.C. 223; 41 Digest 869, *7416.*

(22) *The Leptir* (1885), 52 L.T. 768; 5 Asp.M.L.C. 411; 41 Digest 649, *4808.*

(23) *The Clarisse* (1856), Sw. 129; 166 E.R. 1056; 41 Digest 892, *7824.*

(24) *The Coromandel* (1857), Sw. 205; 6 L.T. 371; 8 L.T. 441; 166 E.R. 1097; 41 Digest 854, *7196.*

(25) *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460; 55 L.J.Q.B. 162; 54 L.T. 629; 50 J.P. 694; 34 W.R. 238; 2 T.L.R. 249, C.A.; 12 Digest (Repl.) 377, *2961.*

Also referred to in argument:

Freeth v. *Burr* (1874), L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 22 W.R. 370; 12 Digest (Repl.) 378, *2970.*

General Billposting Co., Ltd. v. *Atkinson*, [1909] A.C. 118; 78 L.J.Ch. 77; 99 L.T. 943; 25 T.L.R. 178, H.L.; 43 Digest 50, *511.*

Appeal by shipowners from an order of the majority of the Court of Appeal (Pickford and Bankes, L.JJ., Sargant, J., dissenting) which affirmed a judgment of Sankey, J.

The facts sufficiently appear from the opinion of the learned Lord Chancellor.

MacKinnon, K.C., and *Lewis Noad* for the appellants.

Leck, K.C., *R. A. Wright, K.C.*, and *Le Quesne* for the respondents.

LORD FINLAY, L.C.—This case relates to a contract for the carriage of a cargo of timber from Archangel to Hull in the steamship *Jupiter*, and the question is whether the cargo-owners, the plaintiffs of the action and now respondents, were entitled without payment of freight to demand delivery of the timber at Leith, to which place the vessel had been brought by salvors. The claim rested on the contention that the vessel was "derelict" when she was picked up by salvors, and that this amounted to an abandonment by the shipowners of the contract of carriage which entitled the cargo-owner to take possession of the goods at Leith. The cargo-owners brought the action by writ dated Oct. 25, 1916, claiming a declaration that they were entitled to such delivery. The points of claim alleged that the *Jupiter*, while proceeding on the voyage, was attacked on Oct. 7 by enemy submarines and that the master and crew abandoned the vessel which was picked up by vessels of H.M. Patrol Flotilla and brought into Leith, where she was beached and placed in the hands of the Receiver of Wreck. In the points of defence the shipowners denied the abandonment and pleaded that the crew was compelled to leave the vessel by an enemy submarine, and they counterclaimed for the freight.

The respondents had chartered the *Jupiter*, which belongs to the appellant, by a charterparty of July 18, 1916, for the carriage from Archangel to Hull of a cargo of deal battens and other timber at agreed rates. By cl. 7 acts of God, the King's enemies, restraints of princes and rulers, and the perils of the seas were excepted. Bills of lading were given, and these are held by the respondents. What happened

is best stated in the words of the protest by the master of the *Jupiter* and others, dated Oct. 11, 1916:

"After discharging the pilot and tug the vessel proceeded without the occurrence of anything worthy of note until 3.40 p.m. on Oct. 7 instant, when the vessel was crossing the Firth of Forth, with the Longstone Lighthouse bearing S. by W. about forty miles distant. While following the route laid down by the Admiralty, the master suddenly saw a submarine rise out of the water on his vessel's starboard side, and about a quarter of a mile distant. The submarine at once fired a blank shot over the vessel, followed immediately afterwards by two more live shots forward and aft of the vessel. The submarine then signalled to the master and crew to abandon their ship. Seeing no possible chance of escape, the master at once ordered the crew to take to the boats, and the submarine signalled for these to go on her. On getting near, the commander of the submarine asked the master for the ship's papers, but was told they were still on board the vessel. The commander also demanded from the master the name of the vessel, where she belonged, her registered tonnage, and what their position then was—which information was given by the master. The ship's second boat, which contained the mate and second engineer, was then ordered alongside the submarine and the engineer was taken on board. Four of the Germans then proceeded to the vessel in the mate's boat, taking the mate with them, and remained aboard about ten minutes, where they took possession of the ship's papers, forcing the mate to show them these with threats of loaded revolvers, and they then returned to the submarine. Shortly afterwards the master heard an explosion aboard his vessel, which had previously had a strong list to port, and which, after the explosion, took a strong list to starboard. The submarine subsequently took the two boats to tow, and towed them in a westerly direction for about five miles, when they were cast adrift, and during the towage the master and crew heard further explosions aboard their vessel, of which they lost sight in the gathering darkness. At 7.30 p.m. the master and crew were picked up by the trawler *Ayacanora*, of North Shields (No. 72), which vessel took them to Aberdeen, where they arrived at 10.30 a.m. on Sunday morning Oct. 8, and where the master at once reported the matter to the naval authorities. The master says that as soon as he sighted the submarine he destroyed his secret instructions by tearing them up and throwing the pieces overboard. The master lastly says that he has subsequently heard that the vessel, floating on her cargo, has been picked up, and beached near Newhaven."

The master was under the impression that the steamship had sunk, and on his arrival at Aberdeen, on the morning of Oct. 8, telegraphed to Mr. Bradley: "Ship sunk yesterday submarine," and repeated this in his letter of that day to Mr. Bradley. By Mr. Bradley's instructions his agents, Messrs. Bordewich, sent on Oct. 9 the following letter:

"Messrs. N. Newsum, Sons & Co., Ltd., Hull.—Dear Sirs,—S.S. *Jupiter*.—We have the following letter from owner of this steamer to-day, which kindly note:—'It is with very great regret I advise you of the loss of my ss. *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew are all landed safely. Will you kindly advise charterers and oblige.'—Yours faithfully, (Signed) P. R. Bordewich & Co."

At 2 a.m. on Wednesday, Oct. 11, the *Jupiter*, which had been picked up by a government patrol boat, was beached at Newhaven, a village within the limits of the port of Leith. The appellants were informed of this by a telephonic message from their agents at Leith, Messrs. Furness, Withy & Co., which they received at 10.35 a.m. on the morning of the same day (Oct. 11). Mr. Bradley requested Messrs. Furness to protect his interests at Leith, and informed them that he would arrive that night. He left Hull by train at 5.5 p.m., and arrived at Leith after

11 p.m. Before he left Hull he had received from the respondents' solicitors the following telegram, dated Oct. 11, 1916: A

"*Jupiter* We represent owners cargo of this steamer recently brought into Leith derelict our clients elect take possession their property where now lying please note."

The respondents' solicitors, on the same day, also sent to the Receiver of Wreck at Leith the following telegram: B

"Steamer *Jupiter* We represent cargo understand she is now lying at Newhaven please note our clients claim elect take possession their property where steamer now is please do not allow cargo to be dealt with except with our sanction please do anything necessary protect property for our clients."

The shipowners asserted that they were entitled to take the cargo on to Hull, thus earning their freight, which would amount to more than £14,000, while the cargo-owners insisted on their right to take possession at Leith without payment of any freight as the voyage had not been completed. On Oct. 26, the day after the writ in the action was issued, an agreement was entered into by a memorandum of that date arranging for the carriage to Hull of the cargo, reserving the question of liability for payment of freight to be decided in the action. The cargo was, accordingly, carried to Hull and delivered there. C D

The question now is whether freight was payable. SANKEY, J., held that the case came within the authority of *The Cito* (1) and *The Arno* (2). He said that the abandonment of a vessel by its crew during a voyage without any intention to re-take possession gives the owner of the cargo the right to treat the contract of affreightment as at an end, and that the cargo-owners had exercised this right before the shipowner resumed possession. He summed up his view of the case thus: E

"In my view there was in fact an abandonment of the vessel, and there was on the part of the servants of the owners an act done clearly indicating their intention not to carry out the contract—in other words, there was the predicament mentioned by A. L. SMITH, L.J., in *The Arno* (2) of a ship left derelict in mid-ocean and abandoned by its master and crew." F

His Lordship, therefore, gave judgment for the plaintiffs for the relief claimed. In view of a possible appeal, he found that the amount of freight, if payable, would be £14,050 2s. 9d. The shipowners appealed. The Court of Appeal were divided in opinion. The majority, PICKFORD, L.J., and BANKES, L.J., affirmed the judgment of SANKEY, J., but on a different ground. They held that the letter of Oct. 9, 1916, from the shipowners' agent to the cargo-owners, advising them of the loss of the steamship *Jupiter* amounted to an intimation that the shipowners were not in a position to carry out the contract, and justified the cargo-owners in treating the contract of affreightment as at an end and in claiming the delivery of the cargo at Leith without payment of any freight. SARGANT, J., differed. He held that the crew did not "abandon" the ship by quitting it under the compulsion of the enemy submarine, and that the communication of the supposed fact of the loss of the vessel did not amount to an intimation of the shipowners' intention not to carry out the contract. In accordance with the opinion of the majority, the appeal was dismissed with costs. It is from this decision that the present appeal has been brought to your Lordships' House by the shipowners. G H I

The effect of the decisions by SIR ROBERT PHILLIMORE in *The Kathleen* (3) and of the Court of Appeal in *The Cito* (1) and *The Arno* (2) is that if a ship be abandoned by her master and crew during a voyage, the cargo-owner may elect to treat the contract of affreightment as at an end, and claim delivery of his goods without payment of any freight. I agree with the principle of law laid down in these cases. This principle would apply to the present case if quitting the vessel under the circumstances amounted to an abandonment within the meaning of the rule as laid down in these cases. For this purpose there must be an abandonment

without any intention to re-take possession, and it must be the act of the master and crew. The test is sometimes said to be whether the vessel has become a derelict. This is merely another way of stating the same question. The word "derelict" is sometimes loosely used as denoting a vessel drifting about at sea without any crew on board, but the legal sense of the term is that this state of things must have been brought about by the abandonment of the vessel by the master and crew. A vessel would not be a derelict if the master and all the crew had been swept off the deck by a heavy sea and drowned, or if all on board were dead of the plague. Sir W. Scott laid it down in *The Aquila* (4) that it is sufficient to constitute a derelict if there has been abandonment at sea by the master and crew without hope of recovery. There must be no spes recuperandi and no animus revertendi: see *The Zeta* (5) (L.R. 4 A. & E. at p. 462), and this, as was said by Dr. Lushington in *The Sarah Bell* (6) (4 Notes of Cases at p. 146) depends on the state of mind of the master and crew at the time when they quitted the vessel. If this be once ascertained, a subsequent change of intention on their part and effort to save the vessel are immaterial. The animus derelinquendi is essential to constitute a derelict: *The John and Jane* (7). As was said by Sir Barnes Peacock in delivering the judgment of the Judicial Committee in *Cossmann* v. *West* (8) (13 App. Cas. at p. 180) the term "derelict" is legally applicable to a ship which is abandoned and deserted at sea by the master and crew without any intention of returning to her.

In *The Fenix* (9) the crew of one of two vessels in collision jumped on to the other, and Dr. Lushington pointed out (Sw. at p. 15) that the salvors were not entitled to such a proportion as is usually given in cases of derelicts

> "because the vessel was not abandoned in consequence of being utterly incapable of being navigated, or because she was not seaworthy. It was merely from a sense of imminent danger, not knowing what the consequence of the collision might be. It was an abandonment for the security of the person, accompanied with an intention of returning provided that life should no longer be in danger. I cannot, therefore [he said], consider this case to be placed in the degree of ordinary cases of derelict."

The whole of this subject was considered in the High Court of Admiralty in Ireland, in *The Cosmopolitan* (10). The circumstances of that case were similar to those of *The Fenix* (9) and the learned judge—Dr. Stock—made an elaborate review of the authorities, and said, "The issue is quo animo, the act of quitting was done." On the question of derelict or not derelict, everything depends on the state of mind of the master and crew when they quit the vessel, and their state of mind may, of course, be inferred from the surrounding circumstances. Dr. Lushington remarked in *The Florence* (11) that the abandonment for the purpose of constituting a case of derelict must be by order of the master in consequence of danger by reason of damage to the ship and the state of the elements, and went on to say (19 L.T.O.S. at p. 304):

> "The master is, as I conceive, the proper person to form a judgment whether abandonment is absolutely necessary or not. He is the person whom the owners have voluntarily intrusted with the command of their vessel and the crew and the property embarked in it. They must be taken to have deemed him competent for the discharge of the duties committed to him, and especially that he would not without adequate cause leave to destruction their property."

The question is not of the intention of the owner personally. In the immense majority of cases he does not and cannot know anything of the abandonment until after it has been effected, but he acts in this matter through the master as his agent. The effect upon the contract of affreightment of the final abandonment of a vessel at sea is only an example of the general law of contract by which, if one contracting party puts it out of his power to carry out the contract, the other may treat the contract as at an end. The question what constitutes a derelict has very commonly arisen when the scale of salvage was under consideration, as more

liberal remuneration was usually given if the vessel was a derelict, but it has also arisen when the point was whether the crew of the vessel were entitled to salvage remuneration in afterwards saving her, on the ground that their contract of service was brought to an end when the vessel became derelict: see *The Florence* (11). A

The fact that the vessel is a derelict does not involve necessarily the loss of the owner's property in it, but any salvors by whom such a vessel is picked up have the right to possession and control. In *The Dantzic Packet* (12) SIR JOHN NICHOLL, in dealing with the misconduct of salvors, who had attempted to exclude other salvors, said (3 Hag. Adm. at p. 385): B

> "It is different in the case of a derelict. There the first occupant has a vested interest and a right to exclude possession if alone he can save the property. He takes possession indeed for the benefit of the Crown in the first instance, but subject to a liberal remuneration." C

In the marginal note to this passage there are inserted after the words "of the Crown," the words "or owners." The question of property in a derelict was discussed in *The Cito* (1), and BRETT, L.J., said that he was not prepared to accept the proposition that abandonment constituting a derelict, together with a subsequent seizure by anyone who found it, would make the ship a droit of Admiralty, and alter the property. It was stated by the King's Advocate in *R.* v. *Property Derelict* (13) (1 Hag. Adm. at p. 384) that the owner would be entitled if he came in in time, otherwise the Crown, but this topic is, of course, quite immaterial for the purposes of the present case. D

The crucial question is this. Was this vessel when she was picked up by salvors a derelict in the legal sense of the term, or in other words, had the master and crew *abandoned* her without any intention of returning to her, and without hope of recovery? It appears to me to be quite impossible to answer this question in the affirmative. In quitting the vessel the master and crew simply yielded to force. There was no voluntary act on their part, and the case stands exactly as it would have done if they had been carried off the vessel by physical violence on the part of the crew of the German submarine. It would be extravagant to impute to them the intention of leaving the ship finally and for good. They simply bowed to the pressure of irresistible physical force. If a British destroyer had appeared on the scene and had driven off or sunk the submarine, they would gladly have returned to their vessel. All they intended was to save their lives by obeying the orders of the German captain. I entirely agree with SARGANT, J.'s observations on this part of the case. The physical act of leaving the vessel is only one feature in such a case; another and essential feature in order to make it a case of derelict is the state of mind of the captain and crew when they left. The question quo animo is decisive, and the facts seem to me to show clearly that the quitting of the ship was not under such circumstances as to make it a case of derelict. *The Kathleen* (3), *The Cito* (1), and *The Arno* (2) appear to me to have no application. The case is merely one of temporary interruption of the voyage by the action of an enemy submarine, and this afforded no ground for the claim of the cargo-owners to resume possession of the goods at Leith when the greater part of the voyage had been completed. The shipowners were ready and willing to carry the goods on to Hull and were entitled to do so. The contention that the communication to the cargo-owners of the erroneous information that the loss of the ship amounted to abandonment of the contract of carriage is not sustainable. It was a very proper thing to convey this information to the cargo-owners in order that they might take any action which the fact, if it really had occurred, would render expedient in their interests. I cannot see how it can possibly be considered as an intimation that the shipowners abandoned the contract of carriage whether the information was true or not. For these reasons I think that the appeal should be allowed, and judgment entered for the appellants with costs here and below. E F G H I

VISCOUNT HALDANE.—This is an appeal from a judgment of the Court of Appeal (PICKFORD and BANKES, L.JJ., SARGANT, J., dissenting) which affirmed a judgment of SANKEY, J. The question raised was whether the respondents, the charterers of the steamship *Jupiter*, were entitled to claim delivery of the cargo (which consisted of timber) at Leith, not being the port of destination, free of freight. The voyage contracted for with the appellants, the owners of the steamer, was to be from Archangel to Hull, where the cargo should have been delivered, and the matter of dispute was whether the appellants through their master had abandoned possession in the open sea of the steamer and cargo, in such a way that the respondents were entitled to resume possession of their cargo at Leith where they found it, free of the freight, which would have amounted to £14,050 2s.

[HIS LORDSHIP stated the facts and continued:] What we have to consider is whether the steamer was really abandoned so as to become derelict and no longer possessed or owned by the appellants. If this was so the contract was abandoned with the vessel, and the cargo-owners were entitled to take possession of the cargo if they could, and free of freight. If the steamer had sunk and the cargo had somehow floated independently of her the result would have been the same. The physical fact of the actual loss of the steamer which was to have made the voyage would have imported the loss of all title to claim on the footing that the contract had been carried out. But the steamer was in fact not lost, and the question, therefore, is whether she was abandoned so that the same result followed from her having ceased to be in point of law any longer the possession or the property of the appellants.

It will be convenient to consider this question in the first place as one of principle, before referring to authorities. I think that the letter of Oct. 9, 1916, sent by the appellants' brokers to the respondents, did not convey any intimation of intention on the part of the appellants to abandon their steamer if it had not been sunk. The intimation was merely one of their belief that she was sunk, and this belief was founded on what proved in the result to have been a mistake of fact. There was nothing in the letter which warranted the statement made by the respondents through their solicitors in their telegram of the 11th when they had ascertained the truth, that, the steamer not having been sunk, but having been brought into Leith, the owners had abandoned her. If this be so, it follows that the foundation of the reasoning of SANKEY, J., in his judgment is unsound. He held that there was an abandonment and that there was, therefore, a repudiation of the contract. But I am unable to find in the circumstances any evidence disclosing the element of intention which is essential to the application of the doctrine of abandonment in cases where there has been no actual loss. The master and crew left the steamer, not of their own volition but under duress, being forced to do so. As the result they cannot be taken to have chosen to repudiate their obligation to carry any more than they can be taken to have chosen to abandon the vessel. The fact of having been forced away from her is one thing. An intention to leave her derelict is quite a different thing. They did not leave the vessel. It was really taken from them. I think there is a confusion in the judgment of the courts below, between a being parted from the vessel by force of arms, and a quitting of it as an act of free will. No doubt, if they had quitted it because they desired to make sure of saving themselves from being drowned if she went down, that would have been an act to the performance of which they would have been moved by a motive none the less that it was one of the most potent. It would have been an act of volition, just as, on the other hand, it is plainly an act of volition when men elect to perish with a war vessel instead of being taken prisoners and saved. But in this case I am of opinion that there was no act on the part of the master and crew which the law can treat as one of free choice. They were not bound to choose to resist in vain, and they did not do so. Once reached this conclusion appears to me to be fatal to the similar reasoning which prevailed with the majority in the Court of Appeal. I agree with SARGANT, J., in thinking that the vessel was neither lost in fact nor was the subject of any

intention indicated to abandon her if she should not prove to be lost. There was no such intention indicated either by the owners or by the master and crew. All of them were for a time under the mistaken belief of facts that the vessel had been lost, but there was no more than this belief with the bare implications dependent on it.

Apart from the possible result of authority I should have thought that these considerations were fatal to the conclusions reached by PICKFORD and BANKES, L.JJ. But those learned judges were of opinion that they were bound to hold as they did because of the decided cases, and particularly by the decisions in *The Cito* (1) and *The Arno* (2). When I look at these cases I find in them mere exemplifications of a wider principle which seems to me not to apply here—the general principle laid down by LORD CAMPBELL, C.J., in *Hochster* v. *De La Tour* (14). There the defendant had bound himself to employ the plaintiff as courier from a date subsequent to that of the writ. The breach alleged was that, before the day for the commencement of the employment, the defendant had intimated a refusal to carry out the agreement. The jury found for the plaintiff, and there was a motion in arrest of judgment or for a non-suit. The defendant contended that there could be no breach until the day for performance, which had not arrived when the action was commenced, and that both parties remained bound. But the Court of Queen's Bench held that, both on principle and on authority, the parties were from the time of making the agreement engaged each with the other, and that it was a breach of an implied contract if either of them renounced the engagement. Otherwise, if the plaintiff had no remedy unless he continued to treat this contract as a force he could not enter into any other employment which would prevent him from being bound to performance when the due date should arrive, and this would merely tend to increase the damages. He ought, therefore, to be held as at liberty to rely on the defendant's assertion of intention to treat their obligation as altogether at an end, and the defendant should not be permitted to take this assertion back. The repudiation in advance, therefore, entitled the plaintiff to say that there had been a breach of contract. The principle laid down in this judgment has often been followed, and is undoubtedly right. I think it explains and is the foundation of the decisions on abandonment of contracts to carry at sea when there has been no actual loss of the vessel.

In *The Kathleen* (3) a barque laden with cargo shipped in America for Bremen as the port of destination was run into in the Channel, and in consequence abandoned. It was held that the abandonment put an end to the contract to pay freight, notwithstanding that the barque and cargo were ultimately salved and properly sold by order of the court, reserving question of freight. SIR ROBERT PHILLIMORE in giving judgment said that, even if a new implied contract in the course of the salvage operations might have given the shipowner a title to pro rata freight, no such claim could be established in the face of what had happened. By abandoning, the ship was rendered derelict and put into the possession of the salvors, and it was clear that the original contract no longer subsisted and that the title to the possession of the cargo became as from the time of the abandonment one in the cargo-owners, so far as they could assert it, only through the salvors and the salvage court, and not through the shipowners. In *The Cito* (1) the Court of Appeal gave a similar decision. BRETT, L.J., explained the law as being that (7 P.D. at p. 8)

> "by an abandonment of a ship without any intention to re-take possession of it the shipowner has, so far as he can, abandoned the contract so as to allow the other party to it, the cargo-owner, to treat it as abandoned."

COTTON, L.J., added that it was true (ibid. at p. 9)

> "that the shipowners could not by their own act put an end to the contract of affreightment, but by their abandonment they gave a right to the cargo-owners to elect to treat the contract as at an end, and the shipowners could not . . .

after their abandonment have objected if the cargo-owners had found another vessel and taken the cargo on in it to the port of destination."

LINDLEY, L.J., concurred. *The Arno* (2) was also a decision of the Court of Appeal. The vessel had been justifiably abandoned, owing to perils of the sea, on Mar. 31, 1895. She drifted with her cargo until April 3, when salvors found her, and brought both ship and cargo to Liverpool, the port of destination and discharge, where they arrived on April 25. On April 11 the owner, having heard of the towage of the ship by salvors, but not knowing to what port in England they might bring her, got the salvors to agree on that date to hold for him, subject to their claim for salvage. On April 18 the cargo-owners claimed to be entitled to the possession of their cargo free of freight. It was held that the salvors were not the agents of the shipowner so as to make their possession of the cargo his. He did not get possession of it until arrival at Liverpool, and then, before he could claim, had to pay salvage on the cargo. Thus a new burden had been put on the cargo-owner inconsistent with the original contract of affreightment, and he was entitled to elect, as he had done while this state of things existed, to treat the contract as repudiated. The judgments, in my opinion, merely exemplify the principle of *Hochster* v. *De La Tour* (14).

In the case before us, if the vessel had been in point of fact lost, that would have put an end to the very basis of the contract of carriage, and not the less if, the ship having been lost, the cargo had floated and the cargo-owner had rescued it. But that did not happen here. Nor did the owners, through the master and crew or otherwise, express or imply an intention to abandon. All that really happened was that, in the erroneous belief that the former alternative, an actual loss of the *Jupiter*, had taken place, the owners of the steamer informed the cargo-owners of what they believed to have happened. They were wrong in this, but their mistaken statement of the facts disclosed no intention that I can discover to repudiate if the facts were otherwise and the vessel was actually still in existence. I agree with the view of SARGANT, J., who dissented from the majority in the Court of Appeal, and I think that we ought to reverse the judgment.

LORD SUMNER.—Two questions have been raised in this case—the first, as to the effect of the communications between the parties on shore; the second, as to the nature and effect of the events which took place at sea. I think that the shipowners' letter, passed on to the cargo-owners at Hull, did not intimate an intention no longer to be bound by the contract of carriage. It stated a fact, and it stated it wrong. The cargo-owners could not have taken it as a statement of such an intention, for they must have seen that, if the shipowners had known as much as they knew, their intention would have been the very opposite. The episode seems to me irrelevant. There is nothing on the record to show that the solicitors, who first put forward the cargo-owners' claim to take the cargo at Leith, knew anything about this letter when they did so. Their clients may have been underwriters; they may have acted on news of the ship not obtained from the cargo-owners at all. They have never laid stress on this letter as the foundation of substantive rights, and the prominence given to it in the Court of Appeal was excessive.

The real point of the case is the fact that the *Jupiter* was left for good at sea to fare as she might, and that the master and crew came ashore. The word "abandonment," though unavoidable, is apt to be ambiguous. It introduces special considerations of marine insurance law not now in question. As little is it a question of abandoning a contract. The effect upon the contract is a conclusion of law. The fact was that all the shipowners' servants abandoned ship and cargo on the high seas, to sink or swim, and believed she had sunk, although the ship just floated on her cargo till she was salved next day. It is common enough for a laden ship to be left derelict at sea, and many decisions have settled the legal consequence. Several sets of rights are affected. A salvor's possessory right is different where the ship is derelict and where it is not. The crew of a derelict

may claim that their contract of employment has terminated, and may be awarded remuneration as salvors for services rendered. The rights of assured and underwriters may be in question, or, as here, the right of a cargo-owner to claim that the performance of the contract of carriage has come to an end and cannot be renewed. It is highly desirable, since so many interests may be affected by it, that existing views about what makes a derelict should not be unsettled, and that the test of a ship's being derelict should be such as can be readily applied, and will not be dependent on inquiry into the state of mind of men who, unfortunately, may not have survived the marine disaster. As to the rights of the cargo-owner, the authorities, extending over about forty years, are all one way. *The Kathleen* (3), *The Cito* (1), and *The Arno* (2) are all decisions on motions in salvage actions for delivery of cargo to the cargo-owners freight free. They have often been applied in cases not formally reported, and have been followed in the Supreme Court of the United States: *The Eliza Lines* (15).

The proposition there laid down was that by the general principle of contract an open cessation of performance with the intent to do no more, even if justified, excuses the other party from future performance on his side. No contrary decision has been found. JUDGE CARVER states their effect thus (CARVER'S CARRIAGE BY SEA (6th Edn.), at p. 716, para. 555):

> "Where a ship has been definitely abandoned at sea by the master and crew without any intention of coming back to her, the freighter is entitled to treat the contract of carriage as abandoned; so that, if the ship or cargo be afterwards brought into port by salvors, the cargo-owners may claim to have their goods without paying any freight, even though the shipowner is ready and demands to be allowed to take them on to their destination."

The learned authors of SCRUTTON ON CHARTER PARTIES (I quote from the edition of 1914, at p. 318) say:

> "Where the shipowner has no longer a right to carry on, or where he abandons the ship and cargo, or where he delays repair or transhipment beyond a reasonable time, the goods owner, who receives the goods, will not thereby give the shipowner any claim for freight pro rata."

Obviously, it is a fortiori to say that there will be no claim for ordinary bill of lading freight. The work of KENNEDY, L.J., on THE LAW OF CIVIL SALVAGE (2nd Edn.) 1907, at p. 218, is to the like effect. I think that the argument disclosed a misapprehension of the principle on which these decisions rest, for the suggestion was that, except that it is done by an agent, a master's act in leaving ship and cargo derelict at sea is identical in principle with an intimation by one of the parties to an executory contract made to the other that he does not intend to perform his part of the contract or to be bound by his obligations under it when the time for performance or observance may arrive. Hence it was argued that in such a case (i) the actual intention of the captain as a mental state is crucial, (ii) that the actual intention of the shipowner is also material, since his mind is deemed to have gone to the making of the contract, and must, therefore, play its part in the unmaking of it, and that any breach by leaving the ship derelict cannot be final so long as it is possible that he may repair the consequences of the master's conduct, and (iii) that the act of quitting the ship cannot have effect on the rights of the contracting party until it has been intimated to him by the shipowner or on his behalf. I think this argument was fallacious.

As the judgments in *The Cito* (1) and *The Arno* (2) show, there is an analogy between those cases and *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (16), but the distinctions between them must be kept in mind. The master is the shipowner's agent to perform the voyage and to take such decisions and do such acts in the course of it as must be taken then and there by the person in command, but his employment does not of itself ordinarily authorise him to vary a contract made by his employer. His actions may have far-reaching consequences, but he is not authorised to form or express his employer's intentions, as such, in a matter of his

employer's contract. If the shipowner, by his authorised agent, has definitely ended the performance of the voyage in medio, and quitted possession of the cargo, which is the effect of leaving the derelict, the cargo-owner is free to do what he will with his own. Thus only the result is the same, and not the question, as in the *Mersey Steel Co.'s Case* (16) which turns not on the significance of an act, but on the intimation of an intention, not on performance entirely brought to a premature end, but on anticipatory refusal to perform at all. If this is right, the master's frame of mind is not the question; his acts are. If the master and crew perished, the result would be the same. Whether he was moved to quit the vessel by one kind of peril or another cannot matter when he does quit it, provided he does so for good and not for the purpose of procuring the means of prosecuting the voyage in the course of a temporary absence. In some ways, indeed, the matter is most conclusive when least is known of the captain's actual mental processes. The shipowner's intention is not material, nor is even his knowledge, for if the voyage is at an end and the cargo-owner has availed himself of his liberty, the shipowner cannot revive it by acquiring knowledge and thereupon forming an intention. Equally little can intimation to the cargo-owner matter, for if the master's action has in truth put an end to the voyage and the cargo-owner knows it, he is free to avail himself of his legal rights without more.

The effect on the contract of carriage of maritime disaster occurring in the course of a voyage was originally always discussed in connection with claims for freight pro rata itineris peracti. It was not until the middle of the last century that the shipowner's right to tranship at a port of refuge and earn original bill of lading freight by carrying on in another bottom was fully recognised in this country, and it has never been formally decided that he has the same right when the ship is abandoned at sea and possession of the cargo has been abandoned with it instead of being retained at the port of refuge as in earlier cases. Yet the language used in the earlier cases is significant, though the circumstances of the two types of cases differ so widely. In *Hunter* v. *Prinsep* (17), where the cargo had been sold at the master's instance by order of a court in a port of distress, LORD ELLENBOROUGH says (10 East. at p. 394):

> "If no freight be earned and he declines proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order for selling the goods and selling them accordingly, which was unnecessary and which disabled him from forwarding the goods, was in effect declining to proceed to earn freight."

I ask myself why the captain's conduct in leaving the goods to their fate at sea is not also in effect a "declining to proceed to earn freight," which gives the freighter a similar right to possession. If stress be laid on the words "which was unnecessary," I recall the salvors were held to have got possession in *Cossmann* v. *West* (8), though the abandonment was only necessary because the captain had first scuttled the ship. Again, in *Shipton* v. *Thornton* (18), which established the right to tranship in order to complete the earning of the bill of lading freight, LORD DENMAN says (9 Ad. & El. at p. 335):

> "In the case supposed [the case of a ship disabled in a port of refuge without fault of the master] let the owner of the goods arrive and insist, as he undoubtedly may, that the goods shall not proceed but be delivered to him at the intermediate port, there is then no question that the whole freight at the original rate must be paid, and that because the freighter prevents the master, who was able and willing and has the right to insist on it, from fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract."

Whatever other criticisms may arise on this language, I think it is clear that this passage, which states the principles on which the right to tranship or carry on was upheld, rests on the proposition that the master is able and willing to fulfil the

contract, which, though a contract for carriage in a named ship, is deemed to be validly performable in another, where carriage in the original ship to the destination is both impossible and excusable. This prevents it from being a mere claim to take the benefit of a contract arising out of a breach of the contract: it becomes the next best performance that maritime perils allow. If, however, the captain is neither able nor willing to complete the voyage, but by every act open to a seaman has thrown it up for good, what is there to prevent the owner of the goods from insisting that he may take possession of his own goods, possession of which the master has abandoned? I think it ought to be remembered that these cases lie, logically as well as historically, behind *The Cito* (1) and *The Arno* (2), and that the current of authority ought to be surveyed as a whole.

The matter may be tested in two other ways. The shipowner has a possessory lien on goods shipped on board his vessel to secure the earning and payment of his freight. If he loses possession, what term in the bill of lading contract prevents the cargo-owner from taking possession of his own property, or constrains him to ship it over again or to re-deliver it to the shipowner for his benefit? No term in fact assuredly, and no authority whatever is forthcoming to support the implication of such a term in law. Now, it is clear that, if a ship and cargo are left derelict at sea, the shipowner loses possession and with it his lien: the ship and cargo are at large to be taken into the possession of the first salvor.

> "In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession or control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but, in the ordinary case of disaster, when the master remains in command he retains the possession of the ship. . . . Unless a vessel is derelict, the salvors have not the right, as against the master, to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning and claiming charge of the vessel to give it up to him":

see *Cossmann* v. *West* (8), 13 App. Cas. at p. 181. Again, when a ship is in distress, under certain circumstances the master, though in general only the servant of the shipowner, becomes agent of necessity for the cargo-owner to dispose of his cargo, independently of the ship, the voyage, and the bill of lading contract. When does this happen? Parke, B., in *Vlierboom* v. *Chapman* (19) says (13 M. & W. at p. 239):

> "The agency of the master from necessity arises from his total inability to carry the goods to the place of destination."

How are these authorities to be reconciled with the view that although the master is so little able to prosecute the voyage or to carry the goods in any way to their destination that he leaves them and the ship out at sea for good, still the cargo-owner cannot act as his own agent of necessity and cannot do what the first salvor can do, namely, take and keep possession of his own goods, but if he meddles at all, becomes an agent of necessity for the shipowner and must assist him to earn a freight which he cannot earn for himself?

Cases of derelicts are common enough, but no single decision was produced in which, under circumstances similar to these, a ship has not been treated as derelict with all the consequences that follow thereupon. Sankey, J. found that the ship and cargo were left derelict. I think he was right. Pickford, L.J., agreed with him. Bankes, L.J., expressed no opinion on the point. Evans, P., so found in the salvage action. The judgment of Sargant, J., alone holds that the ship was not abandoned, because the master and crew acted involuntarily, and that the facts show no intention on their part to abandon the contract of affreightment on behalf of the shipowners. Even he does not see any ground for supposing that there was any intention of returning to the *Jupiter* or hope of recovering her. Before your Lordships it has also been argued that the ship was not left derelict, because it

A has not been shown that the master had not some hope or intention of returning to the ship, if the enemy left him the chance of doing so. Now as BRETT, L.J., says in *The Cito* (1), the abandonment of the ship does not put an end to the contract. It is certainly kept alive for the purpose of enforcing causes of action already accrued upon it; possibly it is kept alive for the purpose of enabling the shipowner to carry on the goods and earn the bill of lading freight, if he can B recover possession before the cargo-owner has done so, or has intimated his election to take his cargo where it lies, and not at the port of delivery. This point, expressly reserved in *The Cito* (1) and *The Arno* (2), need not be decided now. I have endeavoured to show that the supposed intention of the master to abandon his owner's contract for him is not material, and it is clear that the cargo-owners elected to take their goods at Leith, subject only to the salvor's claim, at a time C when the shipowner had taken no steps to prosecute the voyage, or even ascertain that it was possible to do so. What he did was far less than was done by the shipowners in *The Arno* (2) and yet was held by the Court of Appeal to be ineffectual to prevent the cargo-owner from claiming his cargo freight free.

After all, what is the evidence about the abandonment of the vessel? It is all contained in the protest—and it is the master's own tale, in his own words, not D cross-examined to, and not contradicted. The pleadings and judgment in the salvage action add some significant details as to the ship's state next day, but none as to her condition on Oct. 7. The story cannot now be carried by inference or by speculation beyond where it was left by the master. The ship was fired on by an enemy submarine, but was not hit. Signals were made to the captain to abandon ship. He deciphered the signals; he presumably considered the matter, though E probably very rapidly. He saw no possible chance of escape. He decided to obey and at once gave orders to take to the boats. In all this I assume that he displayed neither lack of courage nor lack of wisdom. He did not try to run; perhaps he did not think of it. He did not try to fight; probably the attempt would have been foolhardy. He decided to do what he thought was the only thing to be done, and I take it that he was right. Still he decided. He decided under duress, but F pressure, which would have released him from a contract thereby induced or have negatived any consensus ad idem, is very different from that mechanical action which is illustrated by *Scott* v. *Shepherd* (20), or *The Cosmopolitan* (10), or *The Fenix* (9). His act was neither unintentional nor involuntary. At this time it was not dark, but before the submarine cast off the boats it had become dark enough for the vessel to be lost sight of. After the boats were left free by the G enemy—which was before 7.30 p.m.—the master might have put back to look for the vessel; after he was picked up by the *Ayacanora* he might have prevailed on her commander to go back. He believed she had sunk, and did neither; but the fact that he wrongly thought she had foundered does not prevent his action from being voluntarily, deliberate, and unconstrained. Whether there was a mistake or not on the part of the master, says DR. LUSHINGTON in *The Sarah Bell* (6), is not H of the slightest importance, for, assuming it to have been a mistake, his mind was actuated thereby, and the spes recuperandi must be governed by the feelings of the individual's own mind at the time. So in *The Janet Court* (21), JEUNE, P., took it as obvious that, if a master believed his ship had been sunk after he quitted her, he could have had no intention of returning, although he was in fact wrong, as in that respect the captain always is in salvage cases where the ship is saved. What I is clear about the whole story is that, in fact, he then had neither animus nor spes revertendi, and, if he left the ship to her fate for good and all, he did so all the more decidedly because he did actually think that she was no longer on the surface but was at the bottom. If a master and crew quit ship and cargo at sea they commit a very grave dereliction of duty unless the grave peril in which they find themselves justifies their action. Ships are sometimes left without justification, but I feel sure not often, and, in my opinion, the inference from such an abandonment de facto is that the voyage cannot be further prosecuted. If this is to be rebutted it must be by positive evidence. There is no such evidence here. If all

that is proved is that there was an abandonment de facto, the presumption is that the master intended to do what he did in fact. He acted as if he had no hope of return, and unless it is proved that he had such a hope it must be taken that he had none. It is not as though salvors were standing by and the captain had remained with them: *The Leptir* (22), or as if the ship was aground or near the shore and the crew had gone ashore for their personal safety, but took steps to recover the vessel: *The Clarisse* (23). Even when a ship is left at sea there is often so far a hope of return that the captain says to himself: "If I do fall in with possible salvors, I will send them back," but, as DR. LUSHINGTON says in *The Coromandel* (24) (Sw. at p. 208):

> "It may be that they intended, if possible, to employ steamers to go and rescue the vessel, but is not that the case every day?"

This does not prevent the ship from being a derelict, when no salvors are sent back. Surely the rights of first salvors to possession and control, the right of the crew to salvage remuneration for salvage services, the right of cargo-owners to take charge of their own goods cannot be left in dubio till the interior of the captain's mind is explored, if death has not for ever closed that inquiry. Would the ship have been no derelict, if all the crew had been drowned, and evidence was, therefore, unprocurable about their hope or despair of return? Whatever objections there are to the argumentum ab inconvenienti, at least it should dissuade us from applying novel tests to familiar incidents and disturbing the ordinary legal conclusions drawn from well-known nautical conduct. The casualty may take place in one hemisphere and within reach of the shipper; must he stay his hand till the fate of the crew is known and the master's liberty of judgment can be investigated, or till the shipowner, perhaps a foreigner resident in the other hemisphere, hears of the accident and has a chance to intimate one intention or another? A shipowner's first step in such a case is nearly always to abandon his ship to underwriters and thereby to abandon to them such right as he may have to carry on and earn freight; if so, in ninety-nine cases out of a hundred his election will thus virtually be not to abandon further performance of the contract, and the ship underwriter's position will be permanently superior to that of the cargo underwriter. Cargo underwriters insure against loss of cargo by marine perils, but not against liability to pay freight. In such a predicament the cargo-owner will naturally leave the derelict alone. Again, when a ship has proceeded but a short distance on her voyage and is abandoned, the shipowner has the minimum of interest in recovering the cargo, while the shipper may still be near at hand. Towards the end of the voyage the shipowner may be able to earn a great reward by recovering and delivering at its destination a cargo, so damaged as to be valueless, though being still in specie, it may be good enough to earn freight. If so, the cargo-owner's interest probably is to rescue the cargo from further transit, while there is still time to arrest the damage and pluck something from the disaster. I think it would be lamentable if in these cases the cargo-owner were compelled to stay his hand and do nothing to save the cargo, lest having done so he should only saddle himself with a liability for freight which the shipowner himself might never have earned, instead of letting well alone and claiming a total loss on his insurance policy. It is to the advantage of all parties, and of the public too, that when a ship is known to have been left to her fate at sea, no uncertainty about the rights should stand in the way of an energetic attempt to save the cargo.

It is said that every case of marine disaster is legally a question of fact. Be it so. Let it be too that the captain and crew had to go. No one blames them, but is the prosecution of the voyage terminated or only suspended according as the captain's motive or his judgment is good or bad? A ship may be a derelict with all the consequences that follow in law, though she was corruptly abandoned and equally a derelict, though the captain did it for the best. The owner may be liable in damages to the cargo-owner according as he has or has not exceptions of barratry or negligence of the captain in the bill of lading to protect him, but if the mere

de facto termination of the voyage produces legal results, they follow equally, no matter what the captain's motives may have been. Though the question is one of fact, it is one which in typical states of fact can only be answered one way. Negligence in a running-down case is a question of fact for a jury, but there is an abundance of ordinary conjunctures connected with such accidents in which a jury's verdict must recognise the ordinary views taken of such facts, or it will be set aside. The fact that the captain and crew had little choice here and virtually had to leave their ship to save their lives is an ordinary incident of derelicts, and whether this is caused by fire or by the King's enemies or perils of the sea cannot distinguish the cases from one another. They have to leave the ship and they go and the ship is left derelict, and the clearer the compulsion the clearer is the termination of the voyage, unless special circumstances show a spes (not a speculation) revertendi, a plan, not a bare possibility of leaving the ship the better to procure help and to continue the voyage. For myself, I do not see how the judgment of the majority in the Court of Appeal can be reversed without disregarding *The Cito* (1) and *The Arno* (2), and without taking a view of maritime disaster which will introduce new considerations into all these cases, and I should dismiss the appeal.

LORD PARMOOR.—The main argument put forward on behalf of the respondents in their points of claim in the action was that the *Jupiter* was abandoned by the master and crew during the voyage to which the contract of affreightment attached, and that such abandonment without any intention to re-take possession gave the cargo-owner the right to treat the contract of affreightment as at an end, and that he so treated it. In support of this contention counsel for the respondents relied on *The Cito* (1), *The Arno* (2), and *The Kathleen* (3). I think that the term "abandonment" of a vessel in the ordinary sense denotes some discretion or volition on behalf of the master, and that it is not applicable to a capture followed by the forcible removal of the master and crew under enemy threats. The vessel was abandoned, not by the master and crew, but by the captors, who intended to sink her, but in fact left her a derelict. If this is the right view of the incidents which took place on Oct. 7, it cannot be said that there was in any sense an act done on the part of the shipowners or their representatives indicating an intention to repudiate the contract of affreightment such as would entitle the freighters to infer that the shipowners did not intend to carry out the contract and give them a right to treat it as at an end. I agree with SARGANT, J., that the conditions of this case are toto cælo different from the case of abandonment of *The Cito* (1) or *The Arno* (2), where the master and crew exercised a discretion to abandon the vessel under stress of the violence of the weather.

In the second place, counsel for the respondents relied on the fact that the vessel was left as a derelict, and the consequent inability of the appellants to carry on without interruption the contract of affreightment put an end to that contract. I think that it is impossible to maintain this proposition in general terms. The circumstances of the present case are an apt illustration to the contrary. Assuming for this purpose that no subsequent communications had passed between the shipowner and the cargo-owner, but that the vessel, in spite of being for a time without a crew, did successfully perform the voyage to Hull for delivery of the cargo to that port, I see no ground on which the cargo-owners could have disputed their liability to pay freight under the terms of the contract. The same argument would apply to carriers by land as to carriers by sea. If carriers who have done no act evincing an intention to abandon the contract of affreightment in fact deliver goods entrusted to them in accordance with the terms of a contract of carriage, freight is not the less payable under the contract if, during the conveyance, the carriers have for a time lost control of the vehicle in which the goods were packed. Counsel, however, used the additional argument that it was not only a case of temporary inability to perform the contract, but that there was evidence of an intention on the part of the shipowners not to return to the vessel, or take any steps to perform

their obligations under the contract. I find no evidence of any such intention. The subsequent action of the appellants appears to have been based not on any intention to abandon a floating vessel, but on the mistaken view that the captors had succeeded in sinking the ship after taking off the master and crew, and that the vessel had gone to the bottom of the sea.

A further point made on behalf of the respondents was that if a carrier or his representatives had been removed from the vehicle of carriage, whether ship or cart or train, and the freighter finds his goods on such ship or other vehicle, the freighter is then entitled to take possession of his goods and to deal with them in such way as he may think fit, not being under any liability to pay freight to the carrier, since the contract of affreightment had not at such time been completed. I think that before a freighter is entitled to take possession of goods which he has entrusted to a carrier for carriage under a contract of affreightment he must show either that he is exercising a right which the contract has given him or that the contract itself has in some way been terminated. For reasons already stated I think that the contract of affreightment had not terminated either through repudiation by the shipowners accepted by the freighters or by the fact that the vessel in which the goods were being carried was for a time without a crew, and in the terms of the contract the freighters were certainly not entitled to take delivery on the open sea or at any other port than the port of delivery. No doubt, if the shipowners had abandoned the ship and cargo so as to put an end to the contract of affreightment they could not, by gaining possession of their ship from salvors, revive the contract or establish a right to freight, but these conditions do not apply to the capture of the *Jupiter* and the forcible removal of the master and crew.

The last point raised on behalf of the respondents depends on the messages and correspondence which passed subsequently to the capture of the vessel. The majority of the Court of Appeal held that these messages and correspondence amount to a statement by the shipowners that they are not in a position to carry out the contract of affreightment, and that, as the freighters acted on this communication, the shipowners, who made it, are bound to observe it. A letter was sent by the shipowners to be communicated to the charterers in the following terms:

> "It is with very great regret I advise you of the loss of my steamship *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely. Will you kindly advise charterers and oblige."

At the time when the shipowners made this communication they were under the mistaken impression that the *Jupiter* had been sunk. I cannot find anything more in the letter than a communication from the shipowners giving the information which they had received as to the conditions of the vessel and crew. I am unable to construe this communication as an intimation of the intention of the shipowners not to carry out the obligation of their contract, or that it was written in such form as to prevent the shipowners stating later that it was sent under a mistake of fact. On Oct. 11 the following telegram was sent on behalf of the respondents:

> "*Jupiter* We represent owners cargo of this steamer recently brought into Leith derelict our clients elect take possession their property where now lying please take note."

This telegram shows that the respondents or their representatives very early ascertained that the shipowner had made a mistake in stating that the vessel had been sunk. On the same day a further telegram was sent to Leith:

> "Steamer *Jupiter* We represent owners cargo understand she is now lying at Newhaven please note our clients claim elect take possession their property where steamer now is please do not allow cargo to be dealt with except with our sanction please do anything necessary protect property for our clients."

The advisers to the respondents were properly astute to protect the interests of their client, but on the assumption that, apart from these communications, the

A contract for affreightment was still in force, I cannot draw the inference that the message sent by the shipowners under a mistake of fact, read in connection with the subsequent telegrams, is sufficient evidence of an act done by the shipowners indicating their intention to repudiate the contract of affreightment such as would entitle the freighters to put an end to the contract and to place them in a position to take possession of their goods without payment of freight. In my opinion, the B appeal should be allowed with costs.

LORD WRENBURY.—The decision is in this case, in my judgment, to be reached by the application to the facts of certain principles of the law of contract. The application of the principles may not be easy, but the principles themselves are not difficult of statement, and, but for the arguments which we have heard, C are not, I should have thought, capable of serious dispute.

A contract between two persons results from the consensus of the two minds agreeing animo contrahendi to terms which each accepts and which create obligations between them. The contract having been entered into may be determined in any one of three ways. First—consensus created the contract and consensus may determine it. If the two parties agree to determine the contract it is deter- D mined. Secondly—some contracts, though expressed in absolute terms, are by the nature of the matter so obviously dependent upon the possibility of performing the promise that a term is implied excepting the events which render performance according to the promise impossible. In the case of such events happening the contract ceases to be operative. Thus in a contract for personal service for a term of years will be implied a condition that the party shall so long live. Thirdly E —if the one party to the contract by words or by conduct expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say: "I take you at your word; I accept your repudiation of your promise and will sue you for breach." This is really no addition to, but a particular application of, the principle first above stated. The first party has, in fact, made an offer. This offer is: "I am not F going to perform the contract. I offer to end it here and now, and to accept the consequences of ending it, those consequences, as I know, being that you can sue me for damages for my refusal." The other may accept or may decline that offer. If he accepts them by consensus the contract is determined, but with a right to damages against the party who has refused to perform. In each of these cases it is the consensus of the parties which brings the contract to an end. In the first G and third cases it is consensus dehors the contract. In the second it is the consensus to the implied term contained in the contract.

But it is said in argument there is a fourth way in which a contract of affreightment may be determined, and in this case consensus is not necessary. I hope I state the contention accurately when I say it is this. If the performance of the contract of carriage has ceased by the shipowner abandoning his ship, whether H sine animo revertendi or sine spe revertendi, the cargo-owner may, if he can while the ship is derelict or in the hands of salvors, re-take possession of his cargo. If he can be first in the field and forestall the shipowner in resuming possession, he may take his cargo and refuse to allow the shipowner to resume the voyage and may escape payment of any freight even if the goods in fact reach the contractual port of discharge. Let me assume, in the first place, that the shipowner has I abandoned his ship sine animo revertendi, that his intention in that respect has by words or by conduct been communicated to the cargo-owner, and that before any change of intention has been communicated the cargo-owner has acted upon the expressed intention and accepted it. In that state of facts it seems to me that upon the principles already stated there is a consensus which terminates the contract. But the contention is carried much beyond that. The contention is rested not upon any animus—not upon any intention—but upon a certain fact. In summarising his argument, learned counsel for the respondents said: "My case is abandonment in fact and possession claimed by the cargo-owner before possession

is taken by the shipowner." The contention is that if the shipowner's possession has ceased—if the ship is out of the owner's possession—is afloat, but not in the possession of her owner, then, whether the owner's possession has been determined by violence or has been abandoned voluntarily—whether with or without sufficient cause—the cargo-owner may take possession if he can, and if he does so will not be liable for freight. The ground upon which the contention is rested is that there has occurred a complete interruption of the contract of carriage, and that, therefore, it results, not that the contract is at an end, but that at the option of the cargo-owner it can be brought to an end. I cannot accept that proposition.

In order to make clear what my view is of the law applicable to such a case, I must say something of what is commonly called "anticipatory breach" of contract. The expression is, I think, unfortunate. In *Hochster* v. *De La Tour* (14), the leading case upon this subject, LORD CAMPBELL made no use of the expression in his judgments. It is used several times by LORD ESHER in *Johnstone* v. *Milling* (25), but not by either of his colleagues. The words used are, of course, immaterial unless they lead in course of time to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor before that time arrives says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take BOWEN, L.J.'s words in *Johnstone* v. *Milling* (25) (16 Q.B.D. at p. 473), it is "a wrongful renunciation of the contractual relation into which he has entered." It is the third case which I put above. The result is that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does the latter, it is still by consensus of the parties and not by some superior force that the contract is determined. I cannot see that the doctrine of what is generally called "anticipatory breach" lends any support to the contention of the respondents in this case. It is no authority for the proposition that anything other than the intention of the contracting parties can either tie or untie the bonds of a contract.

I ask myself this question. What consequence results from the following facts without more: (i) The ship has been abandoned at sea; (ii) neither shipowner nor cargo-owner is in possession; the ship has no one on board; (iii) the shipowner and cargo-owner arrive together at the place where, in fact, the ship is found to be. Which of the two has prior right to take possession? The answer, to my mind, is that contractually the shipowner is entitled as against the cargo-owner to take possession of the ship and complete the voyage. It is a wrongful act on the part of the cargo-owner to prevent his doing so, unless the contract has been determined. He cannot say: "I will take possession of my cargo" so as to determine it. He can only say: "I will take possession of my cargo because the contract has been determined." But the very question is whether it has been determined or not. Further, upon authority, what is the result of abandonment at sea in itself and without more? Does it put an end to the contract of affreightment? BRETT, L.J., in *The Cito* (1) says it does not. He says (7 P.D. at p. 8):

> "Suppose a wrongful abandonment without its being occasioned by the perils of the sea, it is clear that in that case the owner of the cargo might sue the shipowner for his breach of contract, so it cannot be said that it puts an end to the contract of affreightment."

The ground of the decision in *The Cito* (1) seems to me to be clear from BRETT, L.J.'s next words:

> "It is sufficient, I think, for the determination of the present case to say that by an abandonment of a ship without any intention to re-take possession

A of it the shipowner has so far as he can abandoned the contract so as to allow the other party to it, the cargo-owner, to treat it as abandoned."

If the ship is abandoned sine animo revertendi and the cargo-owner has accepted that intention, I feel no difficulty in arriving at the conclusion at which the Court of Appeal arrived in *The Cito* (1). In *The Arno* (2) both GAINSFORD BRUCE, J., and LORD ESHER rest the case upon the intention of the shipowner.

B If I am right in these views there is no fourth way in which a contract of affreightment as distinguished from all other contracts is capable of being determined. If it were alleged and shown that every contract of affreightment contains an implied term that the contract of carriage shall be performed continuously and without any interruption of the shipowner's possession, then I could understand that the respondents might succeed—that would be the second case above stated—

C but that is not alleged or shown. The respondents did not agree on that point. If they had done so, I cannot tell whether the appellants might not successfully have contended the contrary. Under these circumstances I cannot but preserve my opinion upon the question. I cannot resolve it in favour of the respondents, who did not raise it and give his opponents an opportunity of answering it. It is

D under these circumstances that I have to apply to the facts of this case the principles applicable to all contracts with which I started. [HIS LORDSHIP stated the facts and continued:] Unless the case turns, not upon intention, but on the fact that the owners were out of possession, it seems to me that the respondents cannot succeed.

There is another ground upon which the contention was sought to be rested, and

E that was inability to perform. Intention not to perform or inability to perform raises, it is said, the right of the cargo-owner to treat the contract as at an end. If there was inability to perform, if the contractual act had become impossible, then upon the second ground above stated the contract would, no doubt, determine by the operation of the implied term that if the act proved to be impossible the contracting parties were not bound. But the point is not open upon the facts of

F the present case. The contractual act had not become impossible and the cargo-owner when he acted knew that it had not become impossible. The shipowner's letter of Oct. 8 was not, I think, an expression of intention at all, but assuming that it was, it results only in this. The shipowner I will assume says: "My contract has become impossible; I am not going to perform it." The cargo-owner replies: "Your expression of intention not to perform is made in ignorance of the

G real facts; the contract has not become impossible, but I will accept your expression of intention and will elect to determine the contract." To say that that is a consensus to determine the contract seems to me impossible. In my view, abandonment at sea is not an operative cause but only evidence, although it may, no doubt, be strong evidence of intention. If the owner voluntarily abandons at sea it may well be that the onus is on him to show the animus revertendi. If he

H abandons only in the sense that he is compulsorily dispossessed by violence, the abandonment, or as I prefer to call it, the dispossession, does not in itself effect anything in affecting the contract. If the owner having been dispossessed by violence does by words or by conduct express an intention not to seek to regain possession, no doubt the option arises in the cargo-owner to treat the contract at an end. Nothing of that kind arose here. The owner did not abandon in any

I way as an act of volition: having been dispossessed by violence he did no act to express an intention not to seek to regain possession. He did in fact seek to regain possession and subject to the prior rights of the salvors I think he was entitled to take it. For these reasons I think that the appeal must be allowed and judgment entered for the appellants upon the claim for £14,050 2s. 9d. and upon the counter-claim, with costs of both claim and counter-claim.

Appeal allowed.

Solicitors: *Downing, Handcock, Middleton & Lewis*; *William A. Crump & Son.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

Re ROGERSTONE BRICK AND STONE CO., LTD. SOUTHALL *v.* WESCOMB AND ANOTHER

[COURT OF APPEAL (Swinfen Eady, M.R., Duke, L.J., and Eve, J.), October 22, 23, 1918]

[Reported [1919] 1 Ch. 110; 88 L.J.Ch. 49; 120 L.T. 33]

Mortgage—Sale—Fixtures—Mortgage of interest under lease and fixtures on demised land—Severance of fixtures for sale—Right of mortgagor to proceeds.

By a lease dated Nov. 8, 1904, a company took a lease of land with liberty to get clay, brick earth, etc., and make bricks, tiles and other articles, and to erect engines, machinery, kilns, and other buildings. The company issued debentures charged on all the property of the company by the conditions of which the charge was expressed to be a floating security, the company was not to create any mortgage or charge prior to or pari passu with the debentures, and any debenture-holder had power to appoint a receiver with authority to take possession of the property charged, carry on the business, and sell or concur in selling any of the property charged. The company requiring further capital, the debenture-holders signed a memorandum consenting to the company creating a mortgage prior to the debentures, by which mortgage there were assigned to the mortgagee the unexpired term in the premises demised by the lease with all buildings and erections and all plant and machinery then or thereafter to be erected or placed on the premises, so far as the latter could be legally assigned without registration under the Bills of Sales Acts. In 1913 the debenture-holders appointed a receiver and manager of the company, and he closed the works in 1915. In 1917, the lease being unsaleable, it was agreed between the mortgagee and the receiver and manager that the fixed plant should be sold, and that was done. In an action by a debenture-holder in which he claimed that the debenture-holders were entitled to the proceeds of the sale of the plant in priority to the mortgagee,

Held: (i) the mortgage deed did not confer any separate right to the fixtures or constitute a separate assignment of the fixtures; it conferred no right to sever and sell them separately from the leasehold property; and the provisions of the Bills of Sale Acts did not apply to it; (ii) all the interest which the company had in the leasehold premises and the fixtures attached thereto was assigned to the mortgagee by the mortgage deed, and when the fixtures were severed with a view to their sale they did not immediately re-vest in the company, and when they were sold the company was not entitled to any part of the proceeds of sale; and, therefore, the action failed.

Notes. As to what is a bill of sale and the statutory requirements of a valid bill, see 3 HALSBURY'S LAWS (3rd Edn.), Parts 2 and 5; and as to the sale of fixtures by a mortgagee, see ibid., vol. 27, p. 305. For cases see 7 DIGEST 5 et seq., 39 et seq., and 35 DIGEST 505.

Cases referred to:

(1) *Re Yates, Batcheldor* v. *Yates* (1888), 38 Ch.D. 112; 57 L.J.Ch. 697; 59 L.T. 47; 36 W.R. 563; 4 T.L.R. 388, C.A.; 7 Digest 38, *200*.

(2) *Meux* v. *Jacobs* (1875), L.R. 7 H.L. 481; 44 L.J.Ch. 481; 32 L.T. 171; 39 J.P. 324; 23 W.R. 526, H.L.; 7 Digest 34, *177*.

Also referred to in argument:

Sanders v. *Davies* (1885), 15 Q.B.D. 218; 54 L.J.Q.B. 576; 33 W.R. 655; sub nom. *Saunders* v. *Davis*, 1 T.L.R. 499; 35 Digest 310, *569*.

Cumberland Union Banking Co. v. *Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 92; 61 L.J.Ch. 335; 66 L.T. 103; 36 Sol. Jo. 78; 35 Digest 545, *2737*.

Gough v. *Wood & Co.*, [1894] 1 Q.B. 713; 63 L.J.Q.B. 564; 70 L.T. 297; 42 W.R. 469; 10 T.L.R. 318; 9 R. 509, C.A.; 35 Digest 309, *562*.

Southport and West Lancashire Banking Co. v. *Thompson* (1887), 37 Ch.D. 64; 57 L.J.Ch. 114; 58 L.T. 143; 36 W.R. 113, C.A.; 35 Digest 505, *2367*.

Re Joyce, Ex parte Barclay (1874), 9 Ch. App. 576; 43 L.J.Bcy. 137; 30 L.T. 479; 38 J.P. 708; 22 W.R. 608, L.JJ.; 7 Digest 36, *189*.

Reynolds v. *Ashby & Son*, [1904] A.C. 466; 73 L.J.K.B. 946; 91 L.T. 607; 53 W.R. 129; 20 T.L.R. 766, H.L.; 35 Digest 309, *565*.

Ellis v. *Glover and Hobson, Ltd.*, [1908] 1 K.B. 388; 77 L.J.K.B. 251; 98 L.T. 110, C.A.; 35 Digest 320, *644*.

Deyes v. *Wood*, [1911] 1 K.B. 806; 80 L.J.K.B. 553; 104 L.T. 404; 18 Mans. 229, C.A.; 10 Digest (Repl.) 822, *5370*.

Re Wilde, Ex parte Daglish (1873), 8 Ch. App. 1072; 42 L.J.Bcy. 102; 29 L.T. 168; 21 W.R. 893, L.JJ.; 7 Digest 35, *185*.

Ex parte Quincy (1750), 1 Atk. 477; 26 E.R. 304, L.C.; 35 Digest 304, *533*.

Gibson v. *Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 43 Digest 779, *2201*.

Appeal by the plaintiff from an order made by YOUNGER, J., in a debenture-holders' action.

By an indenture of lease dated Nov. 8, 1904, and made between Francis Mesmer Capron, of the first part, Willie Ponsford, of the second part, and the Rogerstone Brick and Stone Co., Ltd., of the third part, certain land at Welsh Oak, near Newport, Monmouthshire, was demised to the company for twenty-one years from Sept. 7, 1904, with liberty to dig for and get clay, brick earth, loam, and sand and to make and manufacture the same into bricks, tiles, and other articles, and to sell and dispose of the same, and to win and get stone, gravel, and other like substances upon or under the said land, and to erect and maintain all such engines, machinery, houses, kilns, sheds, huts, and other erections on the said land as might be necessary for carrying on the aforesaid works, with a reservation to the lessor of all coal, mines and minerals, yielding and paying a royalty of 1s. for every 1,000 bricks made on the premises, and a rent, including such royalties, of £40 for the first year and £80 for subsequent years, with the option for the lessees to renew the lease for a further term of twenty-one years on the expiration of the first-mentioned term. The lease contained a covenant by the lessees to carry on the manufacture of bricks, tiles, &c., so long as there was clay available and suitable for such manufacture, and so long as the said manufacture could be made remunerative, and to render proper accounts to the lessor, with a power of re-entry by the lessor for the breach of any covenant by the lessees, and, if the lessees should fail to manufacture bricks to the number of 1,600,000 in every year of the term, unless prevented by unavoidable accident or other circumstances over which the lessees had no control. On Nov. 11, 1904, the company issued a series of eight debentures of £100 each, bearing interest at £4 10s. per cent. per annum, charged upon all the property of the company whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. Conditions were endorsed on each of such debentures, by the first of which the charge was to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge on any of its property and assets pari passu with or in priority to the debenture, but the debenture was not to include any book debts owing to the company in its trade or business. By the twelfth condition the registered holder of a debenture might, with the consent of the registered holder of at least one other debenture, while any principal or interest remained owing on the debenture, appoint by writing any person or persons to be receiver or receivers of the property thereby charged, and any such receiver was to have power (a) to take possession of the property charged; (b) to carry on or concur in carrying on the business of the company; (c) to sell or concur in selling any of the property charged by the debentures; (d) to make any arrangement or compromise which he or they should think expedient in the interests of the debenture-holders. One of these

debentures was issued to John Edward Southall, two were issued to, or were afterwards acquired by, John William Botsford, and three were issued to, or were afterwards acquired by, Mrs. F. A. Lonnon. The debentures were issued for the purpose of raising money to enable the company to erect the necessary plant and machinery, but the money so raised was not sufficient for the purpose. On Feb. 25, 1905, the holders of seven out of the eight debentures, including J. E. Southall, signed a memorandum whereby they consented, if and so far as their consent was necessary, to the company creating a mortgage or charge upon the lease, and declared that all moneys then or thereafter owing upon any such mortgage or charge should have a priority over the debentures of the signing parties. The holder of the other debenture signed a conditional memorandum in a different form. On the same day an indenture of mortgage was executed between the company, of the one part, and Robert Herbert Boyd Parnall, of the other part, whereby, in consideration of £500 then advanced to the company and of two other sums of £250 and £250 to be thereafter advanced, the company assigned to Parnall all the hereditaments and premises demised by the lease, together with all brick kilns, brickmaking shops, sheds, offices and buildings, and all other erections then or thereafter to be erected upon the premises, and all plant and machinery then or thereafter to be brought upon the premises (so far as the same could be legally assigned without registration under the Bills of Sale Acts) to hold unto the mortgagee for all the residue then unexpired of the term granted by the lease and for any further or extended term which might be granted under the provisions in the lease subject to the proviso for redemption therein contained. By three further indentures of mortgage, dated respectively April 7, 1905, June 24, 1905, and July 27, 1905, three further sums of £500, £100, and £300 were charged upon the premises in favour of R. H. B. Parnall. On Oct. 9, 1912, the indenture of mortgage and the three indentures of further charge were transferred to John William Botsford. The memorandum had been held by Parnall and was handed over to Botsford. In June, 1913, an execution was threatened against the company on an unsatisfied judgment, and on June 27, 1913, J. W. Botsford, as the holder of two debentures, with the consent of Mrs. F. A. Lonnon, the holder of three debentures, appointed William John Wescomb, the manager of the company, receiver under the powers given by the debentures, and he entered into possession, and, under the powers authorised by the debentures, carried on the business of the company. In February, 1915, the receiver found that it was impossible to carry on the business of the company except at serious loss, and he, accordingly, closed down the works and by realising the stock of bricks was able to continue the payment of rent and other outgoings. The lessor did not re-enter upon the demised premises. J. W. Botsford, as mortgagee, never entered into possession of the mortgaged premises. In the autumn of 1917 the funds in the hands of the receiver were exhausted, and he consulted with J. W. Botsford as to the best course to be pursued, the lease being unsaleable. They agreed that it would be to the interest of both the mortgagee and the debenture-holders that the loose plant, over which the debenture-holders alone had charge, and the fixed plant and machinery, which were considered to be comprised in the mortgage, should be sold together. J. W. Botsford agreed to the receiver putting them up for sale together upon the terms that the expenses of the sale should be apportioned between the fixed and loose plant, and that the net proceeds of sale of the fixed plant should be paid to him, and the proceeds of sale of the loose plant paid to the debenture-holders. Accordingly, tenders were invited for the fixed and loose plant together, and they were so sold. John Edward Southall, as a debenture-holder, objected to this, claiming that the memorandum signed by the debenture-holders did not authorise a mortgage of the fixed plant; that the debenture-holders had not abandoned their prior charge over the fixed plant; and that, in any event, the mortgagee was not entitled to sell the fixed plant apart from the lease. The mortgage had not been registered as a bill of sale or under the Companies (Consolidation) Act, 1908. On Dec. 19, 1917, J. E. Southall issued a writ against Wescomb and Botsford and the company, on behalf of

himself and all other the debenture-holders, claiming a declaration that the debenture-holders were entitled to have the proceeds of sale of all the plant and machinery formerly upon the demised premises and sold applied in payment of the amount due on the debentures in priority to any claim of Botsford as mortgagee, or, in the alternative, that the priorities as between the debentures and the mortgage in respect of the proceeds of sale might be determined. It did not appear that any other debenture-holder supported Southall's claim. No oral evidence was given at the trial, and the material facts were admitted, among them that a better price was probably obtained for the loose plant sold in connection with the fixed plant than would have been obtained had it been sold separately, and that the lease was onerous and unsaleable. The proceeds of sale of the loose plant were not sufficient to satisfy the amount due to the debenture-holders, nor were the proceeds of sale of the fixed plant sufficient to satisfy the amount due under the mortgage. It was admitted that the debenture-holder who did not sign the memorandum had priority over the mortgagee. YOUNGER, J., gave judgment for the defendants, and the plaintiff appealed.

Terrell, K.C., and *Topham* for the plaintiff.
Mathew, K.C., and *Owen Thompson* for the defendants.

SWINFEN EADY, M.R.—This is an appeal from the judgment of YOUNGER, J., and it raises a short question—whether the debenture-holders of the Rogerstone Brick and Stone Co., Ltd., are entitled in priority to the defendant Botsford to the proceeds of sale of certain fixtures. The learned judge dismissed the action brought to assert that claim, and the plaintiff appeals.

It is, to my mind, clear that the Bills of Sale Act has no reference to the point in dispute. Having regard to the language of the mortgage, it is not suggested that the deed required registration as a bill of sale. Manifestly it did not. According to its tenour, it does not confer any separate right to the fixtures. It does not constitute a separate assignment of the fixtures, and it confers no right to sever and sell them separately from the leasehold property. But the plaintiff puts his case in this way. The fixtures belonged to the company equally with the lease. The fixtures were attached to the property, and his case is that all the company parted with was the interest in the premises and the fixtures for the residue of the term, and no more, and that when the term came to an end all the fixtures would belong to the company as mortgagor. He contended that the mortgagee could claim nothing but the use of the fixtures, and that on the fixtures being severed during the term they reverted to the mortgagor.

No authority was cited in support of that proposition other than *Re Yates, Batcheldor* v. *Yates* (1). In that case the point for decision was whether a particular instrument required to be registered as a bill of sale. In the court below it was contended that the instrument was void both as to the freehold and the fixtures. On appeal this contention was abandoned so far as regarded the freehold, and the court held that the instrument was not a deed requiring to be registered as a bill of sale; that as the trade machinery only passed by virtue of being affixed to the freehold, the mortgagee could only take possession of the machinery by taking possession of the freehold; and that the power of sale did not authorise the mortgagee to sever the fixtures and sell them apart from the freehold. That was the decision, but reliance is placed on some words at the end of the judgment of LINDLEY, J. (38 Ch.D. at p. 126):

> "That shows pretty well what the understanding of conveyancers is, and it appears to me that a mortgagee of land in this form has the trade fixtures as part of his security, and under a power of sale in this form can sell the land wholly or in part, but cannot sever the fixtures and sell them separately. I am of opinion that if the mortgagee of a mill wants to have the power of selling the trade machinery apart from the mortgaged property he must have a bill of sale."

On that passage the plaintiff has founded an argument that, if the mortgagee severs the fixtures with a view to sale, they immediately re-vest in the mortgagor. In my opinion, this argument is not well founded. True it is that during the term the mortgagor on redeeming might have the right to remove the fixtures. But the right had to be exercised during the term, and it is clear law that during the term the mortgagor could not enter and remove the fixtures while the mortgage continued. Apart from redemption, the mortgagor on assignment had parted with all his interest in the premises, including the fixtures, and the mortgagee would have a power of sale, and, if he sold, he would sell the lease with all the rights attached thereto. It may be that, if the mortgagee improperly severed the fixtures to the damage of the mortgagor, the mortgagor could recover damages, but that is all. There is no ground for saying that on severance from any cause the fixtures would immediately re-vest in the mortgagor. If that were so, see what a curious result would ensue. If the company did not carry on the works and so occasioned a forfeiture, it would obviously be to the interest of the mortgagee to sever before the landlord entered, and, if the effect of this was to cause the fixtures to re-vest in the company, the position would be that the company as mortgagee could, by its own default, occasion a forfeiture of the security belonging to the mortgagee and regain possession of the fixtures. In my opinion, all the interest that the company had in the leasehold premises and the fixtures attached thereto was assigned to the mortgagee, and, on the security being realised by severance and sale of the fixtures, no part of the proceeds of sale belonged to the mortgagor. He had the right to redeem, but he could not claim part of the proceeds of sale. It may well be that the mortgagee could not remove the fixtures without the consent of the mortgagor, but here the debenture-holders by the receiver consented to the severance, and, although counsel for the mortgagee said he did not rely on this as bettering his title, still it would be difficult for the debenture-holders to say it was improper when their receiver consented to it and when it would obviously be for the benefit of all parties that the fixtures should be severed. For these reasons I am of opinion that the learned judge was right in saying that the plaintiff had not established a case against the defendants, and the appeal therefore fails.

DUKE, L.J.—In the form in which the action was brought and on the grounds on which it was conducted below it is clear to demonstration that judgment was rightly entered for the defendants, and counsel for the plaintiffs has conceded that the utmost relief for which he could ask was an aliquot part of the proceeds of sale bearing the same proportion to the amount of those proceeds as the interest of the mortgagor bore to the interest of the mortgagee. The real question contested here, therefore, is whether there was some unascertained part of the proceeds of sale which ought in equity to be paid to the debenture-holders. Counsel for the plaintiff founded his claim on the proposition that that which passed to the mortgagee was not the interest that the lessee of the premises had in the fixtures, but something less than that. It was described as a right of user of the fixtures during the term. What the position would be when the mortgage was effected by way of sub-demise is not material here, but it is pretty clear that then the position might be different. Here the mortgage was by assignment of the term, including the fixtures. Lord Hatherley in *Meux* v. *Jacobs* (2), without saying anything about an underlease, says (L.R. 7 H.L. at p. 491) that

> "a mortgage or assignment, out and out, of all a leaseholder's interest in the property itself, as distinguished from the fixtures, carries with it also the interest in the fixtures attached to the property."

He goes on to say that it would extend to fixtures subsequently attached to the premises. He says:

> "The mortgage would attach to them, and the mortgagee would at any time during the lease have the benefit which his mortgagor had of removing those chattels that had been attached to the premises anterior to his mortgage, and also those that were subsequently attached thereto posterior to his mortgage."

What is said is that as between the two mortgagees the equitable interest of the common mortgagor entitles the second mortgagee to defeat the grant of the chattels to the first mortgagee. No authority has been cited for that proposition, which is a sufficiently startling one. I have always understood that equity was tender of rights in equity, but that the second mortgagee could oust the first mortgagee from part of the property comprised in his security, is not a tenable proposition. It is founded on cases containing statements of what assignments of chattels and fixtures require registration as bills of sale, and these cases are irrelevant for the present purpose. I desire to express my concurrence with the Master of the Rolls in thinking that they have no bearing on the present question. When you find that such has been effected by the mortgagor in possession with the concurrence of the mortgagee out of possession, and that the mortgagee out of possession cannot, therefore, dispute the validity of the sale, the only question that remains is whether the person by whom the sale was made has obtained the right to a share of the proceeds of sale. The proposition that the debenture-holders have a right to a share of the proceeds of sale is founded, first, on cases under the Bills of Sale Act and then on the circumstances of the sale. It happened that the mortgagee was as solicitor instrumental in obtaining the appointment of the receiver for the debenture-holders, and, therefore, it is said that the mortgagee must be taken to have forfeited any right dependent on the consent of the receiver. I was struck for some time with the proposition that if there could be no sale of the fixtures, apart from the leasehold premises, without the debenture-holders' consent, the right to some benefit could be founded on the need for that consent. But I am satisfied that this was not a consent for which any consideration ought to have been exacted. To my mind, there was a moral duty on the person who might have obstructed the process of securing satisfaction of the mortgagee's debt not to do so. I concur with the Master of the Rolls, and I have only added these observations because of the extreme claim that has been made by the debenture-holders as second mortgagees.

EVE, J.—The discussion has extended over a wide area, but the only material point of time is a date immediately antecedent to the removal of the fixtures. At that moment of time the only right of the mortgagor was to redeem and receive back the leasehold property and fixtures. Subject to that right, both the leasehold premises and the fixtures were vested in the mortgagee, but he was precluded from severing the fixtures and selling them separately. The argument on behalf of the plaintiff is that on the mortgagee severing the fixtures the property in the fixtures re-vested in the mortgagor company or those claiming under it. No authority for such a proposition has been produced, and, in my opinion, the proposition is quite unusual. It may be that the mortgagor company could have recovered in respect of any damage caused by the severance, but between that remedy and the rights which the plaintiff contends enured to the mortgagor there is a very obvious and material difference. The unsoundness of the plaintiff's argument is demonstrated when it is pressed to its logical conclusion, for counsel for the plaintiff was bound to contend that, if there had been a sale of the leasehold property and the fixtures to a purchaser in exercise of the mortgagee's power of sale, and the purchaser had severed the fixtures, the plaintiff would have been entitled to recover them. Such a contention is obviously absurd. I am of opinion, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Theodore Roberts*; *Bell, Brodrick & Gray*, for *Cousins & Botsford*, Cardiff.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

HARRIS *v.* LUCAS

[KING'S BENCH DIVISION (Darling, Avory and Salter, JJ.), May 12, 1919]

[Reported [1919] 2 K.B. 291; 88 L.J.K.B. 1082; 121 L.T. 317; 83 J.P. 208; 35 T.L.R. 486; 17 L.G.R. 421; 26 Cox, C.C. 468]

Animals—Wild birds—"Recently killed or taken"—Birds taken lawfully in another country—Prohibition of possession in London—Wild Birds Protection Act, 1880 (43 & 44 *Vict.*, *c.* 35), *ss.* 3, 8—*Wild Birds Protection Act*, 1881 (44 & 45 *Vict.*, *c.* 51), *s.* 1—*Wild Birds Protection (Administrative County of London) Order*, 1909, *arts.* 2, 4.

By s. 3 of the Wild Birds Protection Act, 1880, it was provided that "any person who . . . shall have in his control or possession . . . any wild bird recently killed or taken . . ." shall be liable to a penalty. By s. 8 of that Act: "One of Her Majesty's Principal Secretaries of State as to Great Britain . . . may . . . by order, extend or vary the time during which the killing or taking of wild birds . . . is prohibited. . . ." By the Wild Birds Protection (Administrative County of London) Order, 1909, the killing or taking of certain wild birds, including goldfinches, was prohibited throughout the whole of the year in the county of London.

The appellant was a bird dealer carrying on business in London. On Jan. 15, 1919, he had twenty-one goldfinches in his possession. The birds had arrived that day in a box or cage from Tipperary, Ireland, and were sent later on in the day by the appellant to the Army and Navy Stores for exhibition and sale, where they presented a wild and terrified appearance. It was admitted that the birds had been taken on or about Dec. 3, 1918, when it was lawful to take goldfinches in Ireland, and that, had they been sent to London immediately, they would not have arrived in good condition for exhibition and would have run the risk of dying or injuring themselves on the journey, which occupied a week. It was further admitted that it was an offence to have wild birds in possession in London, if they had been recently taken, even though they had been taken in a place where it was perfectly lawful to capture them. On an information being laid against the appellant under the above Act and Order, the magistrate before whom the summons was heard was of opinion that it was a question of fact whether the birds were "recently taken," and that, taking into consideration all the facts of the case, he came to the conclusion that the charge was proved. On appeal,

Held: the magistrate was right in considering all the circumstances of the case, and on the facts there was ample ground for his determination that the offence had been committed.

Notes. The Wild Birds Protection Act, 1880, and the Wild Birds Protection Act, 1881, were repealed by the Protection of Birds Act, 1954, s. 1 of which corresponds to s. 3 of the 1880 Act. The Protection of Birds Act, 1954, gives, with scheduled exceptions, comprehensive protection to all wild birds throughout the country during the whole of the year.

As to the protection of wild birds, see 1 HALSBURY'S LAWS (3rd Edn.) 701 et seq.; and for cases see 2 DIGEST (Repl.) 390, 391. For the Protection of Birds Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 23.

Case referred to:

(1) *Flower* v. *Watts*, [1910] 2 K.B. 327; 79 L.J.K.B. 751; 103 L.T. 39; 74 J.P. 302; 26 T.L.R. 495; 8 L.G.R. 809; 2 Digest (Repl.) 391, *626*.

Also referred to in argument:

Green v. *Carstang* (1901), 85 L.T. 615; 66 J.P. 102; 20 Cox, C.C. 92; 2 Digest (Repl.) 390, *619*.

Hollis v. *Young*, [1909] 1 K.B. 629; 78 L.J.K.B. 340; 98 L.T. 751; 72 J.P. 199; 24 T.L.R. 500; 21 Cox, C.C. 582; 2 Digest (Repl.) 390, *623*.

R. v. *Hopkins, Ex parte Lovejoy* (1911), 104 L.T. 917; 75 J.P. 340; 22 Cox, C.C. 465; 2 Digest (Repl.) 390, *624*.

Case Stated by a metropolitan magistrate.

An information was preferred by the respondent against the appellant for that he, the appellant, on Jan. 15, 1919, did knowingly and wilfully have in his possession certain wild birds, to wit, twenty-one goldfinches, recently taken, contrary to the provisions of the Wild Birds Protection Acts, 1880 to 1908, and the Wild Birds (Administrative County of London) Order, 1909.

On the hearing of the information it was proved or admitted that the appellant was a bird dealer, carrying on business at Nos. 112 and 114, Bethnal Green Road, in the County of London. On Jan. 15, 1919, he had twenty-one goldfinches in his possession, and the said wild birds were sent later in the day to the Army and Navy Stores for exhibition and sale. The birds had arrived on that day in a box or cage from Fethard, county Tipperary, Ireland, where they had been taken on or about Dec. 3, 1918. The respondent saw the birds on Jan. 15, 1919, when they had a wild and terrified appearance. If the birds had been sent to London immediately after they had been taken they would not have arrived in as good a condition for exhibition and sale, and, owing to their wild condition, they would have run the risk of dying or injuring themselves on the journey, which occupied a week. The appellant was in the habit of receiving similar consignments from Ireland at regular intervals.

On behalf of the appellant it was contended that since the birds had been taken at least six weeks before Jan. 15, 1919, they could not be held to be "wild birds recently taken" within the meaning of the Acts. On behalf of the respondent it was contended that in judging whether the birds had or had not been recently taken the whole of the circumstances ought to be taken into consideration, and that on the facts disclosed it was quite possible for the magistrate to find that in spite of the lapse of six weeks the birds were nevertheless recently taken. The magistrate was of opinion that upon a consideration of the facts that the goldfinches were wild when caught and placed in a cage, that there was a journey of a week in carrying the birds from Tipperary to London, and that it was necessary to wait some time before sending them, so as to have them alive and in a fair condition when they arrived in London, the birds had been recently taken, and the appellant was guilty of the offence with which he was charged. As the magistrate was of opinion that the appellant believed that he was acting lawfully, he was discharged under the Protection of Offenders Act, 1907 (now the Criminal Justice Act, 1948), and was ordered to pay costs.

Lewis Thomas, *K.C.*, and *Blanco White* for the appellant.

Stuart Bevan, *K.C.*, and *Buchanan* for the respondent.

DARLING, J.—The appellant, who is a bird dealer in London, had in his possession on Jan. 15 of the present year a number of goldfinches, and it appears that these birds arrived on that day in London in a cage from Tipperary, where they had been captured on or about Dec. 3 of last year. Proceedings were taken against him under s. 3 of the Wild Birds Protection Act, 1880, which makes it an offence for any person to have in his control or possession after Mar. 15 any wild bird recently killed or taken. Under s. 8 of the same Act the Secretary of State has power to extend the time prescribed by the Act, and by an Order the Home Secretary has extended the time in London to all the year round. The whole question which we are called upon to decide is whether the birds were recently taken. They were not killed but were alive on the date in question, namely, Jan. 15, 1919, and so the sole point in the case is, as I have said, whether they were recently taken. For a long time I was inclined to think that they were not recently taken, and I still think, using the English language in its ordinary sense, that such is the fact. In my opinion, the word "recently" means "within a short

time." It is not possible to get behind it and say that it means within a week before or within a month before. Whether what happens is recent or not depends upon what you are talking about. If you are speaking of an act which is repeated at intervals, it must depend entirely upon what is the nature of the act whether it was recent or not. It seems to me, therefore, that it is quite impossible to construe the statute according to the ordinary use of the English language.

Fortunately for us, however, the court has, when differently constituted, construed this statute, and the decision in *Flower* v. *Watts* (1) makes it possible for us to support the conclusion at which the learned magistrate arrived. Now, what is the result of the decision in *Flower* v. *Watts* (1)? It is an authoritative pronouncement that the Act, coupled with the Order of the Secretary of State, was one which was meant to apply to Ireland. It was intended to protect the goldfinches in Ireland as well as the goldfinches in England, and it seems to me that what it was aiming at was to make the offence dependent upon whether the person was exposing for sale a wild bird or a tame bird, and so the words "recently taken" are used. Naturally the meaning would be "recently captured," and all that had to be done was to discover how long the bird had been taken. If it was taken a year ago it has become tame, and it cannot be said to have been recently taken. If it was taken the day before yesterday, of course it was recently taken. The statute does not mention how many days or how many months must elapse before it can be said that a bird was not recently taken, nor does it tell us when a bird is to be considered a wild bird and when it becomes a tame bird. But still it meant to punish people for exposing for sale birds which are not tame, and therefore it is necessary to look not only at the time when the bird was captured, but also at its condition when exposed for sale, whether it has ceased to be a wild bird or not. For this reason I think that the learned magistrate was entitled to consider, when arriving at his decision, what was the character of these birds, that is, whether they were tame or not. He said in effect: "Well, I find that these birds were not tame birds; they were kept in Ireland some time after they were caught, because if they had been sent away at once they would have beaten themselves to pieces on their journey to England; they could not have been brought over alive if they had been sent off at once. They were therefore kept in Ireland until they were, not tame birds, but until they were just so far removed from the condition of absolute natural birds as to bear the journey without being depreciated." It is for this reason that I am of opinion that the learned magistrate was justified in arriving at his decision that these birds were recently taken within the meaning of the Act, although these words "recently taken" are there used in a sense in which nobody would ever think of applying them anywhere else. For this reason the present appeal must be dismissed.

AVORY, J.—I am of the same opinion. The Act of 1880 had for its main purpose the prevention of the destruction of wild birds during the close season, and in order to carry out that purpose, instead of prohibiting the killing or shooting of these birds, it prohibited any person having in his possession after Mar. 15 any wild birds recently taken. The statute provided a defence for any person if he could satisfy the court that he had bought or received the birds from any person residing outside the United Kingdom. I think that meant if he bought the birds from some person who had them in some place outside the United Kingdom, contemplating therefore birds being brought from abroad, that is, a foreign country. But the proviso of the Act of 1880 is absolutely repealed by the Act of 1881, and that defence is now taken away from the person who is charged with having wild birds in his possession, and it has provided a different defence for persons who are in possession of birds recently killed, whilst there is no particular defence provided for persons who have in their possession birds which have been recently taken.

As the statute contemplates and the present case establishes that these birds were captured in Ireland and sent to London, where they were received by the appellant, it seems to be perfectly clear that the time which was occupied in the

journey to London may be taken into consideration, and that the birds may still well be described as having been recently taken, although time has been occupied on their journey. If this were not so, an absurd result would follow, because no birds which were taken in Ireland could ever be the subject-matter of a prosecution when a person is alleged to have them in his possession in London. For some time I was puzzled by the suggestion that the birds had been kept in Ireland a sufficient length of time to reduce them from their wild condition to a tame condition, and, if that had appeared, I should have been of opinion that another answer to this case might have been put forward, namely, that the birds were not wild birds in the possession of the appellant. Upon a closer examination of the case, however, I think that that is a wrong inference to draw from the finding of the learned magistrate. What he really finds is this, that if the birds had been sent to London immediately after they had been captured they would, owing to their wild state, have run the risk of killing themselves or seriously injuring themselves upon the journey, and he expressly stated that he was of opinion that he could properly take this matter into consideration. In my opinion the learned magistrate was quite right in doing so. If it is to be an offence for a person to receive or to be in possession of wild birds in London when the birds have been taken in Ireland, then it seems to me that the time that is necessarily occupied in the journey, and that is necessarily occupied in waiting so as to ensure the safe arrival of the birds in London, can reasonably be taken into account in deciding whether these birds have or have not been recently taken within the meaning of the statute. For these reasons I think that the learned magistrate was right in considering all these matters, and that it was quite competent for him upon the facts before him to arrive at his decision. It is no part of our duty to say whether we should or should not have come to the same conclusion that he did. There was evidence upon which he could act, and upon which he did act, and as he came to the conclusion after a consideration of all the facts that these birds had been recently taken, we cannot interfere with his finding, and therefore the present appeal must be dismissed.

SALTER, J.—I am also of the same opinion. I think that there was evidence upon which the learned magistrate could find that these goldfinches came within the words "any wild bird recently taken," and that he did not misapprehend the meaning of the words. The Acts have for their object the protection of wild birds, and they make it an offence to kill them, either at any time or at certain periods. But it is not an offence to have one or more of these protected species in a cage provided that they are no longer wild birds and have become accustomed to captivity. Speaking entirely for myself, I am inclined to think that the expression "any wild bird recently taken" means any bird of the particular class protected which has been recently captured and is still wild and unaccustomed to captivity.

Appeal dismissed.

Solicitors: *Harry F. Strouts*; *S. G. Polhill.*

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

SLATER & CO. *v* HOYLE AND SMITH, LTD.

[COURT OF APPEAL (Bankes, Warrington and Scrutton, L.JJ.), November 11, 12, December 5, 1919]

[Reported [1920] 2 K.B. 11; 89 L.J.K.B. 401; 122 L.T. 611; 36 T.L.R. 132; 25 Com. Cas. 140]

Sale of Goods—Contract—Breach—Measure of damages—Claim for breach of warranty of quality of goods—Sub-contract under which some goods sold by buyer—No notice to seller of sub-contract.

By s. 53 (3) of the Sale of Goods Act, 1893: "In the case of breach of warranty of quality such loss is primâ facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Sellers agreed to sell to buyers 3,000 pieces of unbleached cotton cloth of a certain quality. They delivered 1,625 pieces of inferior quality which the buyers accepted and paid for, but they refused to accept any further deliveries. The sellers sued the buyers for non-acceptance of the balance of the 3,000 pieces, and the buyers counterclaimed for damages for breach of warranty of quality in respect of the 1,625 pieces delivered. The buyers had contracted to sell certain pieces of cloth to third persons and in fact used 691 of the 1,625 pieces received from the plaintffs for the purpose of this sub-contract, receiving as payment from the third persons the full contract price. The plaintiffs had no knowledge of the existence of this sub-contract.

Held: in assessing damages on the buyers' counterclaim the fact that they had sold some of the goods delivered to them by the sellers and had been paid therefor was not to be taken into consideration.

Rodocanachi v. *Milburn* (1) (1886), 18 Q.B.D. 67, and *Williams Bros.* v. *Ed. T. Agius, Ltd.* (2), [1914] A.C. 510, followed and applied.

Wertheim v. *Chicoutimi Pulp Co.* (3), [1911] A.C. 301, commented on and distinguished.

Notes. Applied: *James Finlay & Co., Ltd.* v. *N.V. Kwik Hoo Tong Handel Maatschappij*, [1928] All E.R.Rep. 110. Referred to: *Lebeaupin* v. *Richard Crispin & Co.*, [1920] All E.R.Rep. 353; *Taylor* v. *Bank of Athens*, *Pinnock* v. *Same* (1922), 91 L.J.K.B. 776; *Foscolo Mango & Co.* v. *Stag Line, Ltd.*, [1931] 2 K.B. 48; *The Arpad*, [1934] All E.R.Rep. 326; *Strand Electric and Engineering Co.* v. *Brisford Entertainments, Ltd.*, [1952] 1 All E.R. 796.

As to the buyer's remedies on breach of warranty by the seller, see 34 HALSBURY'S LAWS (3rd Edn.) 156–162; and for cases see 39 DIGEST 476 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

(1) *Rodocanachi* v. *Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp.M.L.C. 100, C.A.; 39 Digest 669, *2570*.

(2) *Williams Bros.* v. *Ed. T. Agius, Ltd.*, [1914] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 30 T.L.R. 351; 58 Sol. Jo. 377; 19 Com. Cas. 200, H.L.; 39 Digest 670, *2571*.

(3) *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301; 80 L.J.P.C. 91; 104 L.T. 226; 16 Com. Cas. 297, P.C.; 39 Digest 672, *2588*.

(4) *Great Western Rail. Co.* v. *Redmayne* (1866), L.R. 1 C.P. 329; 12 Jur.N.S. 692; 8 Digest Repl.) 152, *958*.

(5) *Horne* v. *Midland Rail. Co.* (1873), L.R. 8 C.P. 131; 42 L.J.C.P. 59; 28 L.T. 312; 21 W.R. 481, Ex. Ch.; 8 Digest (Repl.) 153, *964*.

(6) *Williams* v. *Reynolds* (1865), 6 B. & S. 495; 6 New Rep. 293; 34 L.J.Q.B. 221; 12 L.T. 729; 11 Jur.N.S. 973; 13 W.R. 940; 122 E.R. 1278; 39 Digest 675, *2608*.

(7) *British Columbia, etc., Saw Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 16 W.R. 1046; 8 Digest (Repl.) 150, *951*.
(8) *Salford Corpn.* v. *Lever*, [1891] 1 Q.B. 168; 60 L.J.Q.B. 39; 63 L.T. 658; 55 J.P. 244; 39 W.R. 85; 7 T.L.R. 18, C.A.; 42 Digest 978, *88*.

Appeal by the plaintiffs from an order of GREER, J., in an action tried by him at Manchester Assizes without a jury.

The facts appeared in the headnote and the judgments.

Cyril Atkinson, K.C., and *T. B. Leigh* for the plaintiffs.
Sylvain Mayer, K.C., and *Eastham* for the defendants.

Cur. adv. vult.

Dec. 5, 1919. The following judgments were read.

BANKES, L.J.—This is the plaintiffs' appeal from a judgment of GREER, J. The plaintiffs are manufacturers of cotton cloths. The action was brought by them to recover damages for a refusal to accept 1,375 pieces of cotton cloth, the balance of a quantity of 3,000 pieces, which the defendants had agreed to purchase from the plaintiffs. The defendants justified the refusal upon the ground that the goods which the plaintiffs had delivered under the contract were unmerchantable, and they counterclaimed for damages in respect of the goods which had been delivered. The learned judge held that the defendants were in the right in refusing to accept any more goods under the contract, and he awarded them a considerable sum as damages in respect of the goods which had been delivered. From this decision the plaintiffs appeal, and ask that judgment shall be entered in their favour or that a new trial shall be ordered upon the ground that the learned judge put a wrong construction upon the contract and applied a wrong test in considering whether the goods supplied by the plaintiffs under the contract were in accordance with the contract or not, and, further, that the damages awarded by the learned judge were excessive. The last point that was taken was the only one which appeared to present any difficulty.

The contract between the parties is dated June 20, 1918, and was for 3,000 pieces, delivery to commence in two months, and to be completed in December or earlier. The cotton was to be unbleached. The defendants had entered into two contracts with the West Somerset and Devon Manufacturing Co. for bleached cloth, one dated Dec. 14, 1917, for 2,000 pieces at 8½d. per yard, and the other dated June 26, 1918, for 3,000 pieces at 1s. 3d. per yard. The defendants completed the deliveries under the earlier of the two contracts by the end of January, 1919. They in fact used 691 pieces of the plaintiffs' cloth in fulfilment of that contract and were paid the full contract price for it. Under these circumstances, it was contended for the plaintiffs that the defendants had suffered no loss, and that they ought not to be awarded any damages in respect of these 691 pieces. It is not suggested that the plaintiffs had any knowledge of the defendants' contract with the West Somerset and Devon Company. We reserved judgment in order that we might consider *Rodocanachi* v. *Milburn* (1), *Wertheim* v. *Chicoutimi Pulp Co.* (3), and *Williams Bros.* v. *Ed. T. Agius, Ltd.* (2), to which attention was called by a member of the court.

Rodocanachi v. *Milburn* (1) has been expressly approved by the House of Lords in *Williams Bros.* v. *Ed. T. Agius, Ltd.* (2). LORD ESHER, M.R., in *Rodocanachi's Case* (1) laid down the law as follows (18 Q.B.D. at p. 77):

> "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is incidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods."

The claim in *Wertheim* v. *Chicoutimi Pulp Co.* (3) was for delay in delivering goods. LORD DUNEDIN, in *Williams Bros.* v. *Ed. T. Agius, Ltd.* (2) ([1914] A.C. at p. 522), approved the decision in *Wertheim's Case* (3), and distinguished it from

Rodocanachi's Case (1) upon the ground that in the one case the buyer got the goods and was only claiming damages for the delay in delivering them, whereas in the other case the buyer never got any goods at all. LORD ATKINSON, in *Williams Bros.* v. *Ed. T. Agius, Ltd.* (2) ([1914] A.C. at p. 529), expressly says that *Rodocanachi's Case* (1) has, "of course, no reference whatever to cases of the late delivery of goods as distinguished from their non-delivery." Having regard to what appears to me to be the well-established rule as to damages as laid down in *Great Western Rail. Co.* v. *Redmayne* (4), and in *Rodocanachi's Case* (1), I do not think that the decision in *Wertheim's Case* (3) can be extended to apply to a case where damages are claimed for a breach of warranty of quality. It is not, however, necessary to decide that point, as in the present case what the defendants were buying from the plaintiffs were unbleached goods, whereas what they were selling to the West Somerset and Devon Manufacturing Co. were bleached goods. If the rule laid down in *Wertheim's Case* (3) is ever to be applied in a case like the present, it can only be so applied where the sub-sale relied on in mitigation of damages is a sale of the identical article which was the subject of what LORD DUNEDIN speaks of in *Williams Bros.* v. *Ed. T. Agius, Ltd.* (2) as the principal sale. This is made clear by a passage in LORD DUNEDIN'S speech in that case ([1914] A.C. at p. 523). For the above reasons I think that the appeal fails on all points, and must be dismissed with costs.

WARRINGTON, L.J.—The plaintiffs are the sellers, and the defendants are the buyers, under a contract dated June 20, 1918, for the sale and purchase of certain goods—to wit, 3,000 pieces of cotton cloth of a description mentioned in the contract. After 1,625 pieces had been delivered the defendants refused to accept the remaining 1,375, alleging that the cloth already delivered had been persistently of a quality not in accordance with the contract, and that they were entitled to assume that future deliveries would be as bad, and to treat the plaintiffs as repudiating the contract. The plaintiffs sued the defendants for non-acceptance of the undelivered goods, and the defendants counterclaimed for damages, first, for the non-delivery of the undelivered goods; and, secondly, for breach of warranty of quality in respect of the goods delivered. The learned judge decided the main issue in the defendants' favour, and on the counterclaim he awarded no damages for non-delivery, on the ground that the market price at the date of the breach was below the contract price; but as damages for breach of warranty he awarded the difference between the value at the date of delivery of the goods actually delivered and the value they would have had if they had answered to the warranty, eliminating from consideration certain sub-contracts made by the defendants, which I will refer to more particularly in a moment, in partial fulfilment of which 691 pieces of the cloth delivered by the plaintiffs had been employed.

On the main question I agree with the judgment of GREER, J., and BANKES, L.J., and have nothing to add. I also agree that, taking, as he did, 4½d. a yard as the difference in the two values, the judge was doing the best he could on the materials before him, and we ought not to interfere. But the plaintiffs say that, as to the 691 pieces delivered under the sub-contracts, the learned judge ought to have taken into account the prices realised by the defendants under the sub-contracts, and that, as those prices were equal to or exceeded the contract price, the defendants in fact suffered no damage, and ought to have had none awarded to them. There were two sub-contracts, both with the West Somerset and Devon Manufacturing Co., one dated Dec. 14, 1917, before the date of the contract in question, and the other dated June 26, 1918. The price under the first was 8½d. a yard, and under the second 1s. 3d. The cloth to be delivered under the head contract was unbleached or "grey" cloth; that under the sub-contracts was, as I understand, to be bleached. The plaintiffs knew nothing of these contracts, and the defendants were under no obligation to their purchasers to deliver the plaintiffs' goods. In these circumstances the question is: Was the learned judge right in the course he took? The general principle on which he acted is that laid down by s. 53 (3) of the Sale of

Goods Act, 1893, and this appears to be clearly the right principle where goods are delivered not of the right quality, and the buyer elects, not to reject them, but to claim damages. Into the calculation for the purpose of applying this principle the contract price, as such, does not enter at all, though I suppose it may be an element in assessing the value. The defendants rely on the rule laid down by LORD ESHER, M.R., in *Rodocanachi* v. *Milburn* (1). He said (18 Q.B.D. at p. 77):

> "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is incidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods."

In those cases the elements for comparison are, in general, the contract price and the market price at the date when the goods should have been delivered or accepted, as the case may be; and if in such cases sub-contracts are not to be taken into account, I do not see why they should be in such a case as the present. Indeed, on the facts of the case, there are special reasons against doing so. The sub-contracts were not for the identical goods, being for bleached instead of grey cloth, and they might, or might not, be performed by delivering the goods the subject of the head contract. The decision in *Rodocanachi* v. *Milburn* (1) was followed in the House of Lords in *Williams Bros.* v. *Ed. T. Agius, Ltd.* (2). But it is said that the present case is governed by *Wertheim* v. *Chicoutimi Pulp Co.* (3). That was an action for delayed delivery of goods. The purchaser had sold the goods, the subject of the head contract, at a price exceeding that prevailing at the date of delivery, and it was held that the higher price so obtained must be substituted for the lower one as one of the elements of comparison. I do not think the present case is governed by *Wertheim's Case* (3). The purchaser here has received inferior goods of smaller value than those he ought to have received. He has lost the difference in the two values, and it seems to me immaterial that by some good fortune, with which the plaintiffs have nothing to do, he has been able to recoup himself what he paid for the goods. If the goods had been of the quality contracted for he might have sold them at a higher price, and made a profit. In truth, as I have already pointed out, in the class of case we are dealing with, the contract price does not directly enter into the calculation at all. On the whole I agree that the appeal fails.

SCRUTTON, L.J.—In this case I personally desired to reserve judgment, because of a question of the measure of damages of some general importance. Slater & Co., whom I call "the sellers," sold to Hoyle and Smith, whom I call "the buyers," certain cotton goods, 3,000 pieces, to a given specification. After the buyers had received part of them, 1,625 pieces, they refused to take any more—namely, 1,375 pieces—on the ground that the goods were so consistently and seriously below contract quality that there was no reason to believe that goods would be delivered in accordance with the contract. The sellers thereupon brought an action against the buyers for damages for refusing to accept 1,375 pieces. The buyers counter-claimed for failure to deliver 1,375 pieces according to contract, and for delivering 1,625 pieces of inferior quality.

As is usual, experts for both parties made an examination of what was treated as a sample of the goods actually delivered—in this case twenty pieces, about 2,600 yards—and gave contradictory evidence as to their condition and their compliance with the specification. The judge saw the witnesses and the goods, and heard their explanations of the defects in the goods produced; and he has found that the goods were not merchantable under the contract description. The sellers have not satisfied me that he was wrong in this. Some of the goods delivered, about 690 pieces, were delivered to a sub-buyer from the buyers. The sub-buyer made oral complaints, but did not reject the goods, and though at the time of the trial he was claiming on the buyers, he had not taken any actual legal proceedings. As he was using the goods for the manufacture of shirts, probably the measure of damages

and test of merchantable character were entirely different from those in the principal contract. There was less evidence about these goods than about the twenty pieces which both sides treated as a sample of the delivery; but in view of the way in which the case was fought on the sample bales, the judge below did not make any distinction between the goods delivered to the sub-purchaser and the rest of the bales, and I do not see my way to differ from him. Taking this view, the judge below gave judgment for the defendants. He, however, gave them only nominal damages for the 1,375 pieces not delivered, as the market price had fallen below the contract price; so there was no loss. The buyers had claimed loss of profit under a contract, or a price higher than the market price. This the judge refused them, as the parties had not contracted with reference to the sub-contract. As to the 1,625 pieces delivered the judge gave them the difference between the market price of sound goods and the market price of the goods as delivered. These market prices he took on a general average, though scientifically the measure should have been taken at the date of each delivery, an almost impossible task. His assessment was objected to by the sellers, and was no doubt somewhat rough and conjectural, but I see no reason to interfere with it if the principle is the principle to be applied.

A point, however, was raised that, as the sub-buyer of the 691 pieces delivered under the sub-contract had made no claim on the buyers, the buyers should not recover anything for the inferiority in the goods they rejected, for, as the sub-buyer had paid the buyers their full contract price, to allow them to recover, in addition, something for the inferiority would be to give them more if the goods were inferior than they would have got if they were sound and were to be delivered. It is to be observed that the buyers had two contracts with the sub-buyer—the first below the market price, the second above it. Neither sub-contract formed the basis of the original contract. The buyers were under no obligation to deliver the goods of the original contract to the sub-buyer, and in fact they delivered under the first sub-contract a large quantity of goods not obtained from the sellers. Further, the judge has refused to make the sellers pay the profits which the buyers might have made by supplying sound goods from this contract under their second sub-contract; but the sellers, though freed from liability for the higher price of the second sub-contract, desire to take advantage of the lower price of the first sub-contract.

Can they do so? It is well settled that damages for non-delivery or delay in delivery of goods, where there is a market price, do not include damages for the loss of any particular contract, unless that contract has been in contemplation of the parties to the original contract: *Horne* v. *Midland Rail. Co.* (5). The value of the goods in the market, independently of any circumstances peculiar to the plaintiff, is to be taken: *Great Western Rail. Co.* v. *Redmayne* (4); and *Williams* v. *Reynolds* (6), per BLACKBURN, J., 6 B. & S. at p. 505. If the plaintiff has a profitable contract to sell goods, and there is a market, he can supply himself with the goods by purchasing in the market; and he is then left without the goods he should have received under the original contract, and has lost their market value. But suppose his sub-contract is at a price below instead of above the market price, so that, if he delivers goods under the sub-contract, he loses. Can his damages be limited by the amount he would have received on the sub-contract? On the above reasoning it would seem not. He could supply the sub-contract by buying in the market, and then should have goods delivered to him of a certain market value, which he has lost because they were not delivered. This has been decided in the case of non-delivery of goods by the Court of Appeal in *Rodocanachi* v. *Milburn* (1), and by the House of Lords in *Williams Bros.* v. *Ed. T. Agius, Ltd.* (2), where *Rodocanachi* v. *Milburn* (1) was approved.

In *Rodocanachi* v. *Milburn* (1) goods should have arrived by a certain ship at a date when a certain market price prevailed. The owner had made a sub-contract to deliver similar goods at a price below the market price. It was argued that, if the goods had arrived, the owner would only have received a price less than the market price, and that he ought not to get more by their non-arrival than by their

arrival. The Court of Appeal rejected this argument, holding that the value of the goods must be assessed independently of any circumstance peculiar to the plaintiff, "and so independently of any contract made by him for sale of the goods": per LORD ESHER, M.R., 18 Q.B.D. at p. 77. In *Williams Bros.* v. *Ed. T. Agius, Ltd.* (2) the House of Lords approved this. In that case A. had not delivered coals which he had sold at 16s. 3d. a ton to W. At the time when they should have been delivered the market price was 23s. 6d., but W. had sold a similar quantity and description of coals at 19s. The question was whether A. ought to pay 7s. 3d. a ton damages, or only 2s. 9d. a ton, being the amount W. would have received if he had fulfilled his sub-contract. The House of Lords held the damages were 7s. 3d. a ton, approving *Rodocanachi* v. *Milburn* (1); and LORD DUNEDIN held that the defaulting seller is neither mulcted in damages for the extra profit the buyer would have got owing to a forward sale at over the market price, nor can he take benefit of the fact that the buyer has made a forward sale at under the market price. He put the case as a dilemma ([1914] A.C. at p. 523):

> "The truth is that the respondents' argument leaves them in a dilemma. Either the sub-sale was of the identical article which was the subject of the principal sale or it was not. If it was not, it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract. If, on the other hand, the sub-sale is of the selfsame thing or things as is or are the subject of the principal sale, then ex hypothesi the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller. And how can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract? All that will depend upon what the sub-buyer will be able to make out. The only safe plan is, therefore, in the original contract, to take the difference of market price as the measure of damages and to leave the sub-contract and the breach thereof to be worked out by those whom it directly concerns."

Apply these principles to the delivery of goods, not sound, but damaged. The only difference appears to be that, in the case of non-delivery, the buyer has not got the goods, and has not paid their contract price. What he has lost is the difference between the market price of the goods and the contract price he would have to pay to get them. If the goods are delivered damaged, he has got goods, and has paid the contract price; what he has not got is sound goods, and his loss is therefore the difference between the market value of sound goods and the market value of damaged goods. Again, sub-contracts do not come into account, for the buyer is under no obligation to use these goods for his sub-contract. He may buy in the market, and he will then be left with goods damaged to a certain extent at the then market price of such goods, instead of sound goods at the then market price of sound goods. The difference between the two market prices should be the measure of damages. If the buyer delivers under the sub-contract the damaged goods, and has to pay damages, these damages will not be the measure of damages. As LORD DUNEDIN says ([1914] A.C. at p. 523):

> "How can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract?"

If these damages are greater than the difference in market price of sound and damaged goods, they will clearly not be recoverable. The result seems the same if they are less; it is res inter alios acta: circumstances peculiar to the plaintiff, which cannot affect his claim one way or the other. If the buyer is lucky enough, for reasons with which the seller has nothing to do, to get his goods through on the sub-contract without a claim against him, this on principle cannot affect his claim against the seller any more than the fact that he had to pay very large damages on his sub-contract would affect his original seller.

In support, however, of the proposition that the sellers would be relieved by what took place under the sub-contract, *Wertheim* v. *Chicoutimi Pulp Co.* (3) was relied on. This is a decision of the Privy Council, and, though not technically binding on us, is, of course, entitled to the greatest respect. It was a claim for delay in delivery. The contract was to deliver wood pulp in November, 1900, when the market price was 70s. a ton. The pulp was delivered in July, 1901, when the market price was 42s. 6d. a ton; but the buyer had made a sub-contract for sale at 65s. a ton. The Privy Council only gave the buyer 5s. a ton damages. It is difficult to see how this fits in with the principles above stated. If the buyer had made a sub-contract at 35s. a ton and only received that sum, it seems clear that the Privy Council would not have given him 35s. but only 27s. 6d. a ton, for they would have said the seller had nothing to do with the sub-contract. If the buyer had made a forward contract at 80s., and lost it, the Privy Council would not have given him 37s. 6d., but only 27s. 6d.: *Horne* v. *Midland Rail. Co.* (5); again for the reason that the seller had no concern with matters peculiar to the buyer. The buyer was under no obligation to deliver the contract goods on the sub-contract. If he had bought other goods and used them for the sub-contract, he would have been left with goods delivered at a time when the market price was 42s. 6d., instead of when it was 70s., and would have recovered 27s. 6d. Lord Atkinson says that in the case of non-delivery the price at which the purchaser might in anticipation of delivery have re-sold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter. It is always so treated, as I understand the law, unless the buyer can affect the seller with such notice of the sub-contract as makes him liable for loss by its non-fulfilment. But he goes on to say that the existence of a sub-contract shows that the real value of the goods is more than the market value and the loss he sustains must be measured by that price. I respectfully think that all the English decisions show that a plaintiff cannot measure the real value of what he has lost by reference to a contract peculiar to himself, for which the defendant is not responsible, and that his loss, therefore, is not measured by that price.

Wertheim v. *Chicoutimi Pulp Co.* (3) was a case of delay in delivery and not, as the present, a case of delivery of inferior goods. I should myself have thought the principles applying to these two cases were the same as those applying to non-delivery, and that the Privy Council judgment was erroneous as departing from those principles. But at any rate it does not decide the case of delivery of inferior goods instead of sound goods, which appears to me the same as the case of non-delivery of any goods at all. It is true that on these principles the plaintiff may recover more than an indemnity. English law frequently gives him less than his real loss. The plaintiff in *Horne* v. *Midland Rail. Co.* (5), a case of delay, certainly sustained a real loss greater than the amount he recovered. The plaintiff in *British Columbia, etc., Saw Mill Co.* v. *Nettleship* (7), a case of non-delivery, certainly recovered much less than his real loss. He sometimes recovers more than his real loss. The plaintiffs in *Salford Corpn.* v. *Lever* (8) recovered their real damage twice. The rules of English law do not always give exact indemnity, and in this case I think they do not. For these reasons I think that Greer, J., was right in disregarding the fact that the buyers, for reasons we do not know, were able to deliver inferior goods under their sub-contract without having to pay damages, just as he would have been right in disregarding the fact if they had had to pay larger damages than the difference in market value. In my view, the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Barlow, Barlow & Lyde*, for *James Chapman & Co.*, Manchester; *Haslam & Saunders*, for *Denham & Jackson*, Manchester.

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN COMPTOIR COMMERCIAL ANVERSOIS AND POWER, SON & CO.

[Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), November 5, 11, 20, 1919]

[Reported [1920] 1 K.B. 868; 89 L.J.K.B. 849; 122 L.T. 567; 36 T.L.R. 101]

Sale of Goods—Contract—Frustration—Implication of term—Question for court—Necessity of term—Ability of sellers to sell foreign exchange.

The questions whether the doctrine of frustration is to be applied to a case, whether, and, if so, what, term is to be implied in a contract, or whether a term in a contract is a condition precedent so that its untruth invalidates the contract or is only a promise breach of which gives rise to a claim for damages, are questions of construction and law for the court, but the circumstances in which a contract was made, which the court is entitled to know in construing the contract, are facts to be found by the jury.

By contracts of June and July, 1914, sellers in New York sold to buyers in Antwerp wheat to be shipped during August and up to the middle of September, 1914, from an Atlantic and/or Canadian port at sellers' option, to Rotterdam and Antwerp, at a price free on board, including freight and insurance, to be paid net cash on presentation of bills of lading and/or delivery order. The contracts provided that the sellers were to furnish marine policies of insurance for 2 per cent. over invoice amount, and they contained the following clauses: "In the event of war, should sellers not have received from buyers approved English and/or American policies . . . for approximate invoice amount covering war risk three days prior to shipment, sellers shall have the right, if they think fit, and are able, to cover war risk for account and risk of buyers." "In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end." On Aug. 5 the sellers cabled to the buyers that they could not effect insurance against war risks and were, therefore, unable to sell in America the exchange on Rotterdam or Antwerp, and they asked the buyers to arrange for payment in New York. The buyers having refused, the sellers on Aug. 6 cancelled the contracts. The buyers claimed damages for breach of contract, and the dispute was referred to arbitration in London, when the arbitrators found that the business of exporting grain from America to Europe was based upon the sale of exchange in America, that it had long been well-recognised usage or custom for shippers of grain from America to sell or negotiate the exchange to or with an exchange buyer in America, and that the sale of wheat could not be carried out unless such exchange were possible. They further found that it was an implied term and/or condition of the contracts that the seller should at all material times be able to sell or negotiate the exchange; that the buyers were aware of this usage or custom when the contracts were made; that from Aug. 1 to 6 inclusive, when the sellers claimed to cancel the contracts, they were unable to sell exchange on Antwerp or Rotterdam, and this inability continued throughout the whole period for shipment provided by the contracts; that from Aug. 1 to 6 inclusive no war insurance could have been effected by the sellers on the shipments; that the commercial purpose of the adventure so far as the sellers were concerned became frustrated by the impossibility in the circumstances prevailing of their being able to sell or negotiate exchange in America; that this impossibility and the circumstances prevailing were caused by hostilities; and that shipment was prevented by hostilities within the meaning of the prohibition clause in the contracts. Accordingly, they made an award in favour of the sellers.

Held: (i) that the word "preventing" in the contracts meant a physical or legal prevention; inability to sell exchange was neither a physical nor a legal matter; and, therefore, the shipment of the goods had not been "prevented" by hostilities; (ii) on the question of frustration, for the court to imply a term in a contract it was not sufficient that it thought it a reasonable term to have been included if the parties had thought about the matter, but the term must be such a necessary term that both parties must have intended that it should be a term of the contract; on the facts of the present case it could not be said that the parties to the contracts must both necessarily have intended that the ability of the sellers to sell exchange in New York was a condition precedent to the continuance of the contract; and, therefore, the buyers were entitled to succeed.

Shipping—"Shipment"—Meaning.

Per **Curiam** (approving a dictum of BAILHACHE, J.): The widest meaning of which the word "shipment" is capable is the bringing of goods to the shipping port and then loading them on board a ship prepared to carry them to their contractual destination.

Notes. Considered: *Court Line, Ltd.* v. *Dant and Russell Inc.*, [1939] 3 All E.R. 314. Followed: *Tsakiroglou & Co., Ltd.* v. *Noblee Thorl G.m.b.H.*, [1959] 1 All E.R. 45. Referred to: *Larrinaga* v. *Soc. Franco-Americaine des Phosphates de Medulla* (1922), 38 T.L.R. 739; *Livock* v. *Pearson* (1928), 33 Com. Cas. 188; *Hall* v. *Brooklands Auto-Racing Club*, [1932] All E.R.Rep. 208; *Kulukundis* v. *Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 242; *Broome* v. *Pardess Co-operative Society of Orange Growers (Established 1900), Ltd.*, [1939] 3 All E.R. 978; *Imperial Smelting Corpn., Ltd.* v. *Joseph Constantine Steamship Line, Ltd.*, [1940] 2 All E.R. 46; *London Cemetery Co.* v. *Cundey*, [1953] 2 All E.R. 257.

As to frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 185–194; and as to shipment under a contract for the sale of goods, see ibid., vol. 34, p. 167, 168. For cases see 12 DIGEST (Repl.) 436 et seq., and 39 DIGEST 460–462.

Cases referred to:

(1) *Turner* v. *Goldsmith*, [1891] 1 Q.B. 544; 60 L.J.Q.B. 247; 64 L.T. 301; 39 W.R. 547; 7 T.L.R. 233, C.A.; 12 Digest (Repl.) 431, *3312*.

(2) *Bank Line, Ltd.* v. *Capel & Co.*, ante, p. 504; [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 35 T.L.R. 150; 63 Sol. Jo. 177; 14 Asp.M.L.C. 370, H.L.; 12 Digest (Repl.) 443, *3365*.

(3) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242*.

(4) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266*.

(5) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp.M.L.C. 392, H.L.; 41 Digest 517, *3471*.

(6) *Jackson* v. *Union Marine Insurance Co., Ltd.* (1873), L.R. 8 C.P. 572; 42 L.J.C.P. 284; 22 W.R. 79; affirmed (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 12 Digest (Repl.) 438, *3339*.

(7) *Horlock* v. *Beal*, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp.M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, *3322*.

(8) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, *5274*.

(9) *Guaranty Trust Co. of New York* v. *Hannay & Co.*, ante p. 151; [1918] 2 K.B. 623; 87 L.J.K.B. 1223; 119 L.T. 321; 34 T.L.R. 427, C.A.; 6 Digest 161, *1037*.

(10) *Bassano, Zuccotti & Co.* v. *Carruthers & Co.* (November 25, 1918), unreported.

(11) *Behn* v. *Burness* (1863), 3 B. & S. 751; 2 New Rep. 184; 32 L.J.Q.B. 204; 8 L.T. 207; 9 Jur.N.S. 620; 11 W.R. 496; 1 Mar.L.C. 329; 122 E.R. 281, Ex. Ch.; 12 Digest (Repl.) 470, *3508*.

(12) *Oppenheim* v. *Fraser* (1876), 34 L.T. 524; 3 Asp.M.L.C. 146; 39 Digest 414, *482*.

(13) *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 32 T.L.R. 677; 21 Com. Cas. 299; 115 L.T. 315; 13 Asp.M.L.C. 467, H.L.; 12 Digest (Repl.) 442, *3361*.

(14) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1917] 2 K.B. 1; 86 L.J.K.B. 675; 116 L.T. 201; 33 T.L.R. 242; affirmed, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102, H.L.; 12 Digest (Repl.) 456, *3410*.

Also referred to in argument:

Scottish Navigation Co., Ltd. v. *W. A. Souter & Co., Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.*, [1917] 1 K.B. 222; 86 L.J.K.B. 336; 115 L.T. 812; 33 T.L.R. 70; 61 Sol. Jo. 85; 13 Asp.M.L.C. 539; 22 Com. Cas. 154, C.A.; 12 Digest (Repl.) 437, *3335*.

Blackburn Bobbin Co. v. *Allen & Sons*, [1918] 2 K.B. 467; 87 L.J.K.B. 1085; 119 L.T. 215; 34 T.L.R. 508, C.A.; 12 Digest (Repl.) 452, *3400*.

Tennants (Lancashire), Ltd. v. *Wilson & Co., Ltd.*, [1917] A.C. 495; 86 L.J.K.B. 1191; 116 L.T. 780; 33 T.L.R. 454; 61 Sol. Jo. 575; 23 Com. Cas. 41, H.L.; 12 Digest (Repl.) 449, *3387*.

Ashmore & Son v. *Cox & Co.*, [1899] 1 Q.B. 436; 68 L.J.Q.B. 72; 15 T.L.R. 55; 4 Com. Cas. 48; 12 Digest (Repl.) 432, *3318*.

Appeal by the sellers from the judgment of BAILHACHE, J., on an award in the form of a Special Case.

The Comptoir Commercial Anversois Société Anonyme of Antwerp (hereinafter called the buyers) carried on business at Antwerp, and Power, Son & Co. (hereinafter called the sellers) carried on business in New York. By eight contracts of June and July, 1914, the sellers sold to the buyers 18,500 quarters of wheat, shipments to be made during August, up to Sept. 14, from an Atlantic and/or Canadian port or ports at sellers' option, at a certain price free on board, including freight and insurance, the first contract providing for shipment to Rotterdam and the others to Antwerp. The contracts were all in the same form, and contained the following clauses:

"Reimbursement net cash on presentation of bill or bills of lading and/or delivery order.

"Marine Insurance: Sellers to furnish policies and/or certificates of insurance (free of war risk) for 2 per cent. over invoice amount (any surplus over this to be for sellers' account in case of total loss only) effected with approved underwriters and/or companies, but for whose solvency sellers are not responsible.

"In the event of war, should sellers not have received from buyers approved English and/or American policies (if American, losses shall be payable in England) for approximate invoice amount covering war risk three days prior to shipment, sellers shall have the right, if they think fit, and are able, to cover war risk for account and risk of buyers.

"In case of prohibition of export, force majeure, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof shall be at an end."

The contract further provided that any dispute arising, including any question of law, should be settled by arbitration in London under the Arbitration Rules of the London Corn Trade Association in force at the date of the contract. The European war of 1914–1918 broke out on Aug. 4, 1914; the sellers claimed to cancel the

contracts; and the buyers claimed damages for breach of the contracts. The disputes thus arising were referred to arbitration under the contract, and the arbitrators awarded that the buyers had no claim against the sellers in respect of the non-shipment of the wheat under the contracts. The buyers appealed to the appeal committee of the London Corn Trade Association in accordance with the rules of the association, and the committee stated their award in the form of a Special Case.

In the Special Case it was stated that the sellers had in fact shipped the wheat which they had tendered, but claimed that they were absolved from any further performance of the contracts as they were prevented by force majeure or hostilities from making shipments to Rotterdam and Antwerp as contemplated by the contracts in that they were unable to sell in New York exchange on Rotterdam or Antwerp. It was proved by the sellers that in no circumstances would the banks in New York buy exchange on Rotterdam or Antwerp unless the goods shipped were insured against war risks, and they also produced evidence that war risk insurance on merchandise destined to Antwerp or neighbouring continental ports was not procurable between Aug. 4 and 11 at practicable rates. The buyers contended that it was no concern of theirs whether the sellers could sell their exchange or effect war insurance, and that they were not bound to pay in New York, . . . and they produced a certificate from the port of Antwerp as to vessels which had entered that port between Aug. 6 and Oct. 7, 1914, . . . and a list of steamers which arrived at Antwerp between Aug. 4 and Sept. 15, 1914, certified by the Administration of the Belgian Marine.

It was contended on behalf of the sellers: (i) That is was not the custom of American shippers of grain to finance their own shipments to Europe, but that the course of business customary in the trade, and which was well known both to buyers and sellers at all material times, was for a seller who has sold goods on the terms contained in the said contracts to sell or negotiate the exchange to or with an exchange buyer in America, and that owing to the position which had arisen upon and continued after the outbreak of war it was impossible at all material times for sellers to sell or negotiate the said exchange to or with any exchange buyer or bank in America, as no one would buy or negotiate such exchange, and as all business with regard to the sale or negotiation of bills drawn on Antwerp or Rotterdam was closed. (ii) That it was an implied term and/or condition of each of the said contracts that the sellers should at all material times be able to sell or negotiate the exchange. (iii) That the whole commercial purpose of the venture, so far as the sellers were concerned, became frustrated by the impossibility of selling the exchange in America owing to the conditions prevailing. (iv) That the impossibility of selling or negotiating the said exchange, the closing of the business referred to in (i) above and the frustration referred to in (iii) above were in each case caused by hostilities. (v) That the shipment under each of the contracts was prevented by hostilities within the meaning of the prohibition clause in the contracts. It was contended on behalf of the buyers (i) That the buyers committed no breach, and intimated no intention to commit a breach of their contract, and that the sellers did not contend to the contrary. (ii) That the sellers refused to ship under the contracts on the ground that the buyers refused to pay cash in New York. (iii) That there was no condition either express or implied in the contracts that the sellers should be able to sell exchange in America. (iv) That there was no evidence or no sufficient evidence before the appeal tribunal of the custom or course of business alleged by the sellers; there was no evidence that such custom or course of business was known to the buyers. (v) That the said alleged custom or course of business is inconsistent with the contract. (vi) That the said alleged custom or course of business was unreasonable. . . . (ix) That there was no frustration of the commercial purposes of the contracts.

The appeal committee found (i) The business of exporting grain from America to Europe was based upon the sale of exchange in America, and it had long been a well-recognised usage or custom for shippers of grain from America to sell or

negotiate the exchange to or with an exchange buyer in America, and the sale of goods provided for in the contracts in question could not be carried out unless such exchange were possible, and it was an implied term and/or condition of the contracts in question that the sellers should at all material times be able to sell or negotiate the exchange. (ii) The buyers were aware of the above usage or custom at the time the contracts were made. (iii) The sellers shipped all the goods under the said contracts in accordance with their tenders. (iv) From Aug. 1 to 6, 1914, inclusive, when the sellers claimed to cancel the contracts, they were unable to sell exchange on Antwerp or Rotterdam. (v) Such inability to sell exchange continued throughout the whole period for shipment provided by the said contracts. (vi) From Aug. 1 to 6, 1914, inclusive, no war insurance could have been effected by the sellers on the said shipments. . . . (xii) That the commercial purpose of the adventure, so far as the sellers were concerned, became frustrated by the impossibility in the circumstances prevailing of their being able to sell or negotiate exchange in America. (xiii) That such impossibility and the circumstances prevailing were caused by hostilities. (xiv) That shipment was prevented by hostilities within the meaning of the prohibition clause in the contracts. The appeal committee confirmed the award of the arbitrators, subject to the opinion of the court. Should the court be of opinion that the award was wrong, then they set aside the award of the arbitrators, and awarded that there was a breach by the sellers of the contracts, and that the buyers were entitled to damages, which they assessed at 101,382 francs.

Bailhache, J., in giving judgment, said: I will deal with the express exception clause first; but before doing so, in order to make my judgment more intelligible, I will state what the sale of exchange in such a case as this means. The seller upon shipment of the goods, procures a bill of lading. He makes out an invoice, and draws a draft upon the buyer of the goods, in this case presumably payable at sight, as the terms of payment are net cash on presentation of the bill of lading. He also effects an insurance policy. Armed with these documents, he goes to a buyer of exchange and sells the draft to him. The bill of lading is attached to the draft, and the exchange buyer sends the documents to his agent at the buyer of the goods' end. The buyer of the goods, if the documents are in order, pays or accepts the draft, as the case may be, takes the bill of lading and invoice, and the transaction is ended. The object of the seller of the goods is to get his money as soon as the goods are shipped and without waiting until the documents reach the buyer of the goods. The exchange buyer does not buy the goods or the bill of lading. The latter he holds as security until the buyer of the goods honours the draft upon him. The risks the exchange buyer runs are the inability of the goods buyer to take up the draft and the further risk that the documents may be refused as not being in order—for example, the bill of lading may be out of due date. It is most material, therefore, to the exchange buyer that he should be fully secured by the goods the subject-matter of the draft. This, of course, he cannot be without a policy of insurance; and it is obvious that in time of war he will want a policy which covers war as well as marine risks. It is thus easy to see how the inability of the sellers to procure a war risks policy prevented their selling the exchange. The buyer has no concern with this selling of exchange. It does not affect his position in any way. His contract with his seller is not varied by it in any degree. The sale of exchange is purely a matter of the financial arrangements which the seller makes to enable him to carry on his business. It will be observed that the buyer of exchange does not come on the scene until after the goods have been shipped and insured; for he must have both bill of lading and insurance policies before he will look at the draft he is asked to buy.

I proceed to inquire whether the inability to sell exchange comes within the exception clause in these contracts. The words are: "In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract . . . shall be at an end." So there was nothing in this case to prevent shipment,

except the inability to sell exchange, and the arbitrators, in finding that "shipment was prevented by hostilities within the meaning of the prohibition clause," must be basing themselves upon this inability. If I give to the word "shipment" the widest meaning of which it is capable, it cannot mean more than bringing the goods to the shipping port and then loading them on board a ship prepared to carry them to their contractual destination. It is this, or some part of this, which has to be prevented by hostilities, to bring the sellers within the clause. The remaining question is: What does "prevent" in this connection mean? Both upon authority, and as a matter of construction apart from authority, I am of opinion that as used in this clause "prevention" means either physical or legal prevention. Inability to sell exchange is neither the one nor the other. Moreover, as I have pointed out, inability to sell exchange does not arise in respect to any given cargo until such cargo is shipped. I think the finding of the arbitrators on this point is wrong.

It remains to consider the frustration of adventure point. This is more difficult, because one has to speculate upon what would have happened if the parties had discussed a difficulty which it is quite possible in some cases, at any rate, was not present to the minds of either of them. In embarking upon this speculation, one must bear in mind that impossibility of performance by one party, not due to supervening illegality, is not of itself a ground for holding that the commercial object of the venture is frustrated. Nothing, in my opinion, is more dangerous in commercial contracts than to allow an easy escape from obligations undertaken; and I desire to reiterate what the older judges have so often said, that parties must be held strictly to their contracts; it is their own fault if they have not adequately protected themselves by suitable language. Another thing to be remembered is that, the doctrine of frustration depending as it does upon implied contract, the question the court has to ask itself is: Would two reasonable men making the contract in question have both agreed, if asked at the time of making it, that in the events which have happened the contract, or its further performance, was to be considered at an end, for frustration puts an end to the contract and absolves both parties from further liabilities under it? Bearing these principles in mind, I ask myself: Would the sellers and buyers in this case have both agreed that, if the sellers were unable to sell exchange, the contract was to be at an end? I notice that the arbitrators do not find that the commercial purpose of the adventure was frustrated, but limit themselves to saying "so far as the sellers were concerned." I do not see how they could do otherwise, but a finding so limited does not go far enough; it is necessary that there should be frustration of the common purpose of the adventure. I know of no case where the doctrine of frustration has been applied where the event relied on as frustration has related to a purpose or object which one of the contracting parties had in mind as necessary to the fulfilment of his contract to the knowledge of the other, but whose attainment was no part of the contract to the performance of which both parties had expressly bound themselves; and the attainment or non-attainment of which purpose would not in any material respect alter any of the obligations which the parties had inter se mutually undertaken, but would leave the performance of the contract as between the parties to it essentially unchanged. I ought, perhaps, to notice that the clause as to war risks insurance precludes the suggestion that the parties to these contracts were relying upon the continuance of a state of peace, although I think in this case the point is immaterial. In my judgment, there was no such implied term as the arbitrators find, and the doctrine of frustration does not apply for the reasons I have given. I think the award was wrong as made, and that the alternative award made in favour of the buyers must stand, and I give judgment in the form of the alternative award.

The sellers appealed.

Stuart Bevan, K.C., and *C. Paley Scott* for the sellers.
C. W. Lilley for the buyers.

Cur. adv. vult.

Nov. 20, 1919. The following judgments were read.

BANKES, L.J.—This is an appeal from BAILHACHE, J. The question which the learned judge had to decide was whether certain contracts for the sale of wheat had in the events which had happened been dissolved or whether they were still binding upon the appellants. The contracts are eight in number, and by them the sellers sold to the buyers a large quantity of wheat. The contracts were dated June 23 and July 13, 14, 27, 28 and 30, 1914. The wheat was to be shipped during August and up to September, 1914, from an Atlantic and/or Canadian port or ports at sellers' option. The price was a price free on board including freight and insurance. The contracts also contained the following provisions: [the lord justice read the clauses which have been set out]. The contracts also provided for arbitration in London under the Arbitration Rules of the London Corn Trade Association. On Aug. 1 and 5 the sellers cabled the buyers tendering certain vessels to fulfil all the eight contracts, and they apparently shipped all the wheat upon those vessels. On the last-mentioned date they also cabled that it was impossible to insure the war risks, and that if no immediate remittance was made to New York they would cancel the contracts. On Aug. 24 they cabled that they considered the contracts as at an end. The buyers thereupon claimed arbitration. The dispute was referred to two arbitrators and an umpire, who decided in favour of the sellers. The buyers appealed to the appeal committee of the association who confirmed the award, subject to the statement of a Special Case. BAILHACHE, J., on the hearing of the Case decided against the sellers who now appeal to this court.

The contentions of the sellers are set out in the Special Case. They may be reduced to two: (i) That within the meaning of the exception clause in the contracts they were prevented by hostilities from shipping any of the wheat. (ii) That in the events which happened the contracts were dissolved, either because of the frustration of the adventure, or because of an implied term in the contracts to that effect.

I think that the view taken by BAILHACHE, J., with regard to the first point is the correct one. He held first of all that "shipment" referred to a putting of the goods on board, and not to the wider question of a fulfilment of a contract which consisted partly only of putting goods on board. In this, I think, he was right. He also held that the prevention referred to in the exception clause referred to a physical or legal prevention. In this also I think that he was right. I cannot usefully add anything to the reasons given by the learned judge for his decision on this part of the case.

The other contention of the sellers raises a more difficult question. Having regard to the facts of the present case I do not think that the question of the frustration of the adventure, and the question whether the contracts contained an implied condition that they should in certain events be dissolved, need be considered separately. The present is a case in which it seems to me clear that the view taken by LINDLEY, L.J., in *Turner* v. *Goldsmith* (1) and by LORD SUMNER in *Bank Line, Ltd.* v. *Capel & Co.* (2) applies—namely, that the so-called doctrine of the frustration of an adventure rests on an implied condition in the contract between the parties. LINDLEY, L.J., after referring to BLACKBURN, J.'s observations in *Taylor* v. *Caldwell* (3) (3 B. & S. at p. 833), states the rule thus ([1891] 1 Q.B. at p. 550):

> "The substance of that is that the contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done."

In LORD SUMNER'S words (ante p. 514):

"The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties."

If this is the correct view, it follows that the question whether the implication is to be made is a question of law for the court and not a question of fact for the arbitrators to determine. The rules by which the court must be guided are well established. In *Hamlyn & Co.* v. *Wood & Co.* (4) LORD ESHER lays down the rule thus ([1891] 2 Q.B. at p. 491):

"I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulations should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

LORD WATSON in *Dahl* v. *Nelson, Donkin & Co.* (5) indicates how the rule should be applied. He says (6 App. Cas. at p. 59):

"I have always understood that, when the parties to a mercantile contract such as that of affreightment have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

In the present case the court is bound to consider the question in reference to the facts as found in the Special Case. The material facts as found by the appeal committee are as follows: (i) That the business of exporting grain from America to Europe is based upon the sale of exchange in America, and it has long been a well-recognised usage or custom for shippers of grain from America to sell or negotiate the exchange to or with an exchange buyer in America. (ii) That the buyers were aware of this usage or custom at the time the contracts were made. (iii) That in no circumstances would the banks in New York buy exchange on Rotterdam or Antwerp unless the goods shipped were insured against war risks. (iv) That from Aug. 1 to Aug. 6, when the sellers claimed to cancel the contracts, no war insurance could have been effected by the sellers on the shipments. (v) That between the same dates both inclusive the sellers were unable to sell exchange on Antwerp or Rotterdam. (vi) That the sale of goods provided for in the contracts in question could not be carried out unless a sale of exchange were possible. (vii) That the impossibility of procuring war insurance or of selling the exchange was caused by hostilities.

As was pointed out by BAILHACHE, J., in his judgment, the selling of exchange is a method by which the seller of goods secures payment for them as soon as they are put on board, instead of having to wait until the goods themselves, or the documents representing the goods, reach the buyer. Primâ facie, therefore, the question is one which concerns the seller only. It is obvious that there may be many causes which prevent the selling of exchange, and in some cases these causes may be due to the default of the seller himself. If the Special Case was intended

A to set up a usage or custom that contracts should be cancelled, whatever the cause might be which prevented the selling of exchange, I should have no hesitation in saying that no term to that effect could be implied in any contract. I read the findings of the appeal committee, however, as limiting the present case to a contention that the contracts would be dissolved if the selling of exchange was rendered impossible owing to hostilities. Reading the findings in that light it is, B to my mind, all important to realise exactly what the findings are. The finding as to the custom or usage on which the business of exporting grain is based has reference clearly to the export business in grain generally. The committee find that the buyers had knowledge of this usage or custom at the time the contracts were made. There is a most material distinction between the impossibility of carrying on the huge export business in grain generally unless sales of exchange C are possible, and the impossibility of carrying out particular contracts unless the seller can sell the exchange in respect of those particular contracts. A careful reading of the precise language used by the committee in reference to this point, where they find that "the sale of goods provided for in the contracts in question could not be carried out unless such exchange were possible," has reference, I think, to sales of wheat generally, and the committee appear to me to have D advisedly stopped short of holding that the sellers could not have carried out these particular contracts, had they been so minded, even though they could not have sold the exchange. If this is the true state of the facts, what must one assume the parties would have said and done had the question of the possible breaking out of hostilities been discussed? The sellers would have said (as from the terms of the contracts it must be assumed that they did say): "You know the way in which E the export business in grain from the United States is carried on, and the importance of being able to cover war risks in order to enable the exchange to be sold, and you must allow us to protect ourselves in that respect." The buyers would have said (and from the terms of the contracts, it must be assumed that they did say): "Yes, we know all about that, and in the event of our not doing so you may cover the war risks at our expense if you wish to do so and are able to do so." Is F any further agreement on the point to be assumed? Is it to be assumed that the sellers said to the buyers: "If we are not able to do so we shall not be able to fulfil our contracts, and you must agree to the contracts being dissolved if we cannot sell the exchange"? I think not. The fact that the special stipulation in the contracts dealing with war risk insurance leaves it optional with the sellers whether to cover the war risk or not, and stops short of providing for what is to happen if G neither party can effect a war risk insurance, is in itself insignificant, and looking at the facts as I understand them to have been found by the committee I am of opinion that it cannot under the circumstances be assumed that either party to these contracts, and still less both parties, must have intended that in the event of the sellers being unable to sell the exchange, the contracts would ipso facto be dissolved. I think, therefore, that the judgment of BAILHACHE, J., was right, and H the appeal must be dismissed with costs.

Had the appeal committee found as a fact that the buyers knew at the time the contracts were entered into that the sellers could not carry them out if prevented by hostilities from selling the exchange, the question whether the suggested implication should be made would have presented greater difficulty. As I have stated above, I do not consider that they have so found.

I It was contended for the sellers that the committee were entitled to find as a fact that the adventure was frustrated, and that as the committee have so found the sellers are entitled to a decision in their favour. This argument was based upon the form of the question which was put to the jury in *Jackson* v. *Union Marine Insurance Co., Ltd.* (6), and was approved by BRAMWELL, B., in the Exchequer Chamber (L.R. 10 C.P. at p. 141). In that particular case the putting of the particular form of question was no doubt a convenient way of ascertaining the facts which were material to be known. I cannot agree, however, with the conclusion which is sought to be derived from the way in which that case was tried.

The question whether the doctrine of "frustrated adventure" applies to any particular state of facts must, I consider, always be a question of law to be decided by the court upon the facts. What amount of assistance the court may require from a jury in order to ascertain the facts must depend upon the circumstances of each particular case. The fact that the court in *Jackson* v. *Union Marine Insurance Co., Ltd.* (6) sought the assistance of the jury in the particular form adopted in that case does not, in my opinion, justify the inference which it is sought to draw from the approval of the form of question by the Exchequer Chamber.

WARRINGTON, L.J.—The question in this case arises between buyers and sellers of American wheat. The buyers are merchants carrying on business in Antwerp. The sellers are merchants carrying on business in New York. On certain dates, the first of which was June 23, 1914, and the last July 30, 1914, eight contracts were made between the parties for the sale and purchase of a quantity of wheat to be shipped during August and not later than Sept. 14, 1914. In the first contract the port of discharge was Rotterdam; in the others it was Antwerp. The price was f.o.b. including freight and insurance, and was to be paid net cash on presentation of bills of lading and/or delivery order. Provision was made for the furnishing by the sellers of policies of marine insurance not covering war risks, and the following clause was inserted immediately after that provision:

> "In the event of war should sellers not have received from buyers approved English and/or American policies (if American, losses shall be payable in England) for approximate invoice amount covering war risk three days prior to shipment, sellers shall have the right, if they think fit, and are able, to cover war risk for account and risk of buyers."

The contracts also contained the following clause:

> "In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end."

The goods the subject of these contracts were all shipped by the sellers, but they were not consigned to the buyers, the sellers having on Aug. 6 notified the buyers that they cancelled the contracts. They did so on the ground that they were unable to sell in New York exchange on Rotterdam or Antwerp, and were thus prevented by hostilities from making the shipments. The buyers insisted that they were entitled to have the goods delivered, and the matter went to arbitration under a clause in the contracts. It came eventually before the appeal committee of the London Corn Trade Association, who stated their award in the form of a Special Case in favour of the sellers, with an alternative award in favour of the buyers in case the court should be of opinion that their award in favour of the sellers was wrong. BAILHACHE, J., has made an order to the effect that the alternative award is the correct one. The sellers appeal.

The appeal raises two questions. First, whether upon the true construction of the written contracts, and in the events which have happened, the shipment was prevented by hostilities so as to bring into operation the clause determining the contract. Secondly, whether the contracts are to be taken to be subject to an implied term or condition that if the sellers should be unable to sell the exchange in New York the contracts should be at an end. As to the first question I agree with BAILHACHE, J., in the opinion he has expressed in favour of the buyers and for the reasons he has given, and I see no necessity for adding anything on this point.

The second question is more difficult and requires careful consideration. The arbitrators found the following facts material to this point: (i) The business of exporting grain from America to Europe is based upon the sale of exchange in America, and it has long been a well-recognised usage or custom for shippers of grain from America to sell or negotiate the exchange to or with an exchange buyer

A in America, and the sale of goods provided for in the contracts in question could not be carried out unless such exchange were possible. (ii) The buyers were aware of the above usage or custom at the time the contracts were made. (iii) The sellers shipped all the goods under the said contracts in accordance with their tenders. (iv) From Aug. 1 to 6, 1914, inclusive, when the sellers claimed to cancel the contracts, they were unable to sell exchange on Antwerp or Rotterdam. (v) Such B inability continued during the whole period of shipment provided by the said contracts. (vi) From Aug. 1 to 6, 1914, inclusive, no war insurance could have been effected by the sellers on the said shipments. . . . (xii) That the commercial purpose of the adventure, so far as the sellers were concerned, became frustrated by the impossibility in the circumstances prevailing of their being able to sell or negotiate exchange in America. They also added to the first of the above findings C a statement that it was an implied term and/or condition of the contracts in question that the sellers should at all material times be able to sell or negotiate the exchange. This last statement is, in my opinion, an inference of law as to the proper legal result of the facts as found, and is, therefore, open to review, and the learned judge has expressed a view to the contrary effect. The question whether such inference could properly be drawn is the very question left to the D court, and now to be decided by us. That the question whether the contract is subject to an implied term or condition putting an end to it in certain events, or providing that in certain events it shall have no operation, is a question of law is, I think, clear. The question is what is the legal effect of the existence of certain facts; just as it is for the court to determine whether communications, written or verbal, constitute in law an express contract, so, in my opinion, it is with the E question whether certain facts require the addition to a written contract of an implied term or condition. I think the authorities on the subject recognise this in that we find various tests suggested by reference to which judges are to determine whether such an implied term or condition exists or not.

We have, then, to determine whether on the facts found by the arbitrators the contracts were subject to an implied term that in a certain event the contracts F should be at an end. The event suggested is the impossibility, for reasons not personal to the sellers, of selling or negotiating the exchange in America, i.e., of selling or negotiating in America bills drawn there on the buyers with bills of lading and insurance policies or certificates of insurance attached. What is said is that the whole business of exporting grain from America to Europe is based upon the sale of exchange in America, and that it has long been the recognised G usage or custom for shippers to sell or negotiate the exchange accordingly, and that this usage or custom was known to the buyers and becomes "the basis of the contract in the mind and intention of the contracting parties": per LORD SHAW in *Horlock* v. *Beal* (7), [1916] A.C. at p. 512; so that the impossibility of putting it in practice in the particular case has the effect of determining the contract. In my opinion, it does not follow that, because the export business depends on the H sale of exchange, therefore the usage or custom relating thereto becomes the basis of the contract in the minds of both parties. The buyer has no concern with the mode in which the seller finances his business; under the express contract he buys the goods from the seller and is entitled to delivery thereof on payment of the purchase money in cash. I think when it is said in the award that the business of exporting grain is based on the sale of exchange what is meant is that the I exporters base their transactions as a whole on that footing, and could not otherwise carry on the business involving, as it no doubt does, the purchase in America of enormous quantities of grain requiring the supply of the necessary money without waiting for payment according to contract. It is true that the arbitrators find that the particular sales of goods could not be carried out unless such exchange were possible; but I think, comparing this finding with the finding that the sellers shipped the goods the subject of the particular sales, it must I think mean only that the particular sales as part of and in connection with the general export transactions of the sellers could not be carried out. Indeed, the arbitrators themselves

appear to have taken the same view, for they find, not that the commercial purpose of the adventure was frustrated as regards both parties, but only "so far as the sellers were concerned." These contracts if regarded by themselves could have been carried out, for the goods were actually shipped, though not delivered to the buyers. A

I think, therefore, that the contention that, as the result of the failure of something which is not the basis of the contract in the minds of both the contracting parties, the contract is at an end cannot be supported. As to the suggestion that the inference should be drawn from the presumed intention of the parties: see *The Moorcock* (8), 14 P.D. at p. 68. I cannot say that each party must have intended that the contract should be subject to such a term or condition. The event which causes the difficulty is not war alone, but may be any event not personal to the parties. Is the buyer to be presumed to agree to lose his right to grain he is ready to pay for because, owing to financial trouble in New York, the seller cannot sell there a bill for the price? Again, it might be that it would be to the interest of the seller to carry out a profitable contract even although he has been unable to sell the exchange; is he to be presumed to agree that the buyer may insist on the determination of the contract for a reason with which he has no concern? In the present case the impossibility of selling the exchange arose from the war and, as I gather, directly from the inability of the seller to obtain insurance against war risks. In such a case I agree with BAILHACHE, J., that the clause already mentioned as to insurance against war risks is a guide, and I am bound to say, in my opinion, something more than a guide, in determining whether they had the intention we are asked to presume. The possibility of war was contemplated, a certain provision was made in that event, and it was recognised that the sellers might not be able to effect a war insurance. In the face of this clause I find great difficulty in presuming that the parties intended that the whole contract should be at an end if in the event of war the sellers should be unable to sell the exchange by reason of their inability to effect a war insurance. On the whole I agree with the judgment of BAILHACHE, J., and think that this appeal should be dismissed with costs. B C D E F

SCRUTTON, L.J.—In this case I might content myself with saying that with one or two small exceptions I entirely agree with the very careful and closely reasoned judgment of BAILHACHE, J., but as the case may go higher and is of considerable general importance I express my judgment in my own words.

The sellers had eight contracts with the buyers for the supply of wheat from the United States, one contract for Rotterdam and the remainder for Antwerp. In shipments from the United States, where payment by the contract is on the other side of the Atlantic, it is very usual, almost universal, for the seller to obtain his money in advance of the contract time by "selling the exchange." I have stated the reasons of this practice, which is also common in the cotton trade, in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (9), and BAILHACHE, J., has stated them in his judgment in this case. The only point on which I differ from BAILHACHE, J., is that he treats selling the exchange as a matter arising after shipment and insurance, whereas I think it is generally provided for by contracts of sale, covers or credits effected beforehand by the seller. For instance, in the miscellaneous documents treated as evidence in this case by the arbitrators will be found statements: "Equitable Trust Co. to whom we have sold our bills against contracts advised they could not accept bills for the present"—"International bankers will not accept bills in old engagements"—"American Express Company repudiate exchange contract"—"Banks here have refused honour exchange, although war risk covered and exchange sold them prior European hostilities"—"Banks refused accept exchange previously sold." The truth is that the system is a way to finance a general selling business, not to render any one transaction possible. Any one transaction could be carried through without exchange, but the seller would be out of money for some time, and so hampered in subsequent operations. Its justifica- G H I

A tion is the general volume of business, not the particular transaction. In this case the sellers had steamers chartered to carry the goods to Antwerp and Rotterdam. There is no finding whether the steamers refused to proceed to Antwerp or Rotterdam, and there are no materials for deciding whether, if they did refuse, they were in the right under their charters. We have had cases in these courts where shipowners have been held to be in the wrong in refusing to proceed to Dutch or
B Belgian ports for fear of hostilities. But it is proved and found that exchange houses in New York refused to buy exchange on these steamers, and that this inability continued from Aug. 1 till the middle of September, the period of shipment covered by these contracts. There is also a finding that from Aug. 1 to 6, when the sellers cancelled the contracts, no war risk insurance was procurable on these voyages, and this was at any rate one of the reasons why the purchase of
C exchange could not be effected. We are not told whether the sellers had any general contracts or covers for exchange, and if so whether their terms allowed the bankers or exchange houses to refuse documents in the events that happened. Anyhow the sellers did on Aug. 6 cancel these contracts of sale, and send the steamers with the goods on board to other destinations.

Thereupon the matter went to the arbitration tribunal of the Corn Trade Asso-
D ciation who have decided against the buyers, but stated a Special Case. Anyone who compares the findings of fact in this case with those in the case which came before SANKEY, J.: *Bassano Zucotti & Co.* v. *Carruthers & Co.* (10), will be struck by the way in which findings of commercial custom made by commercial arbitrators grow to meet difficulties raised in the courts. The arbitrators who have decided in favour of the sellers have apparently rested their decision on three grounds which
E they treat as findings of fact. (i) That shipment was prevented by hostilities. (ii) That the sale of goods provided for in the contracts in question could not be carried out unless sale of exchange was possible, and it was an implied term of the contracts that the sellers at all material times should be able to sell exchange. (iii) That the commercial purpose of the adventure, so far as the sellers were concerned, was frustrated by this impossibility.

F First, as to the prevention of shipment by hostilities, it is remarkable that the arbitrators, who find this as a fact, also find that the sellers shipped all the goods under their contracts in accordance with their tenders. They had obviously, in my view, put a very wide and erroneous meaning on the word "prevention." Economic unprofitableness is not "prevention," though a very high price for the article sold may be evidence of such a physical scarcity due to hostilities as amounts
G to prevention by hostilities. They have not considered whether the ships in which the contract goods were placed could physically go to the contract ports, but have rested themselves on the fact that the voyage might be financially unprofitable for the sellers, if they were not insured against war risk and financed from shipment till payment. I agree with the judge below that no facts are found which amount to prevention by hostilities in the true meaning of that term.

H Secondly, there is a finding as to an implied term of the contract, that it shall be possible to sell exchange. It was argued that the question what term was to be implied in the contract or whether the commercial purpose of the adventure was frustrated so that the contract was at an end (a question which again involves what contract on the subject was to be implied), was a question of fact, not of law, and that the decision of the arbitrators on the facts was conclusive. In my
I opinion, the question what contract is to be implied, or whether a term in the contract is a condition precedent so that its untruth invalidates the contract, or is only a promise whose breach gives rise to a claim for damages, is a question of construction and law for the court, though the circumstances under which the contract was made, which the court is entitled to know in construing the contract, are facts to be found by the jury, and their importance to the commercial adventure may be a fact which assists the court materially in coming to a conclusion. This appears to be the view of the Exchequer Chamber in *Behn* v. *Burness* (11). There the court says (3 B. & S. at pp. 754, 756):

> "A question, however, may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the court, and not the jury, must determine . . . it was no part of the judge's duty to leave to the jury any question as to the construction of the contract, or the materiality of any of its statements. It was his function to construe the contract with the aid of the surrounding circumstances found by the jury and to decide for himself whether the statement . . . was an essential part of the contract."

The judgment continues by pointing out that the court considering circumstances so found might then find a term of the contract to be a condition. In *Oppenheim* v. *Fraser* (12) BLACKBURN, J., says (34 L.T. at p. 525):

> "It is never a fact to go to the jury what the words of a contract mean, but it is a fact to go to them under what circumstances are they made and to what to they relate."

LUSH, J., gives the fanciful illustration that a judge, who might not otherwise construe the statement in a charter that a ship had a red figure-head as a condition precedent, might do so if the jury told him that her voyage was among pirates who for superstitious reason never attacked a ship with a red figure-head. Exactly the same considerations seem to me to apply to the implication of a term which the parties have not expressed. The court, and not the jury, are the tribunal to find such a term; they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted. LORD SUMNER in *Bank Line, Ltd.* v. *Capel & Co.* (2) says (ante p. 514):

> "The theory of dissolution of a contract by the frustration of its commercial object rests on an implication which arises from the presumed common intention of the parties. . . . This is a matter of construction."

Again:

> "The court can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted":

per LORD LOREBURN in *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (13), [1916] 2 A.C. at p. 404. Being told the surrounding circumstances and any facts showing their importance, the court must determine whether the parties must have intended that the contract should only continue in force if certain circumstances continued to exist, which the parties must have treated as essential to performance, or to the necessary common purpose of the parties in performance. I expressed my views fully on this subject in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (14) ([1917] 2 K.B. at pp. 28–37), and do not repeat them.

Now, on the facts found by the arbitrators can the court say that the parties to these contracts must both necessarily have intended that the power to sell exchange was a condition precedent to the continuance of the contract? It seems clear that inability to sell exchange from every cause is not included. The financial weakness or insolvency of the seller can hardly have been meant. Will financial panic in the New York market arising from over-speculation and calling in of loans and preventing exchange being sold put an end to the contract? Can either party insist on the contract being at an end, if exchange cannot be sold? Though the seller is strong enough to finance the particular contract without selling exchange, can the buyer refuse the goods if exchange cannot be sold? One of the counsel for the sellers thought he could; one thought he could not. How can the court say

A that the parties to the contract must necessarily have agreed on such a term, and what is the exact wording and extent of the term on which they must have agreed? There is no doubt that, if war breaks out, failure to obtain war risk insurance may be important for both parties. The seller under such a contract usually takes the bill of lading to his own order to keep a proprietary hold on the goods till he is paid, or has a security for payment satisfactory to him; he, therefore, may want B war risk insurance to cover his proprietary interest, as of course may the buyer. It is important to notice that the parties have thought of this, and have expressed certain terms about it. They have contemplated a war; they have provided that, if the buyer does not provide war risk insurance, the seller may insure, if he can, on buyer's account. But though they have contemplated inability to effect war risk insurance they have said nothing about the effect of that inability on the C contract. This may be because they did not think about it; it may be because they could not agree what the effect should be; but why should the court assume that there is a term which they must have contemplated, rather than a failure on their part to think about or agree on the matter? And if they have not expressed a term about the effect on the contract of inability to get war risk insurance, which they have mentioned, can the court infer what they would have agreed about a D matter they have not mentioned and a more remote result, failure to sell exchange because of failure to obtain war risk insurance? It seems to me one thing to say that the buyer knew that the seller usually made his financial arrangements in a particular way, and quite a different thing to say that the buyer agreed that the contract should be off if the seller could not make his usual financial arrangements. Many buyers arrange to get control of the goods before they pay for them by E tendering a bank of first-class standing as acceptor of the documentary bills, but I think sellers would be astonished to hear that their contracts were at an end if their buyers could not make their usual financial arrangements. The power of implying terms which the parties have not expressed should be exercised by the courts very sparingly and only in cases of necessity. In this case I agree with the judge below that there are no facts establishing the necessity of such an implication. F This view really involves the negative of the arbitrators' third ground of decision, commercial frustration of the adventure. This does not mean that it is unprofitable to one party to carry the adventure out in the events which have happened. It means that the contract implies and involves the continued existence of a state of subject-matter, of place, or of time, so that if such a state of things cease to exist the contract is impliedly at an end. The occurrence of war makes a difference G to the performance of most contracts, but there is no general implication that contracts are at an end if any war affects their performance. The finding of the arbitrators in this case appears to me to carry the doctrine of commercial frustration further than it has ever been carried, or that it can legitimately be carried.

For these reasons, and for the reasons expressed in the judgment itself, which I entirely accept, I think the judgment of BAILHACHE, J., should be affirmed and the H appeal dismissed with costs here and below.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co.*; *Henry Hilbery & Son.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

BRITISH AND FOREIGN STEAMSHIP CO., LTD. *v.* R.

[Court of Appeal (Swinfen Eady, M.R., Scrutton and Duke, L.JJ.), June 20, 21, 28, 1918]

[Reported [1918] 2 K.B. 879; 87 L.J.K.B. 910; 118 L.T. 640; 34 T.L.R. 546; 62 Sol. Jo. 701; 14 Asp.M.L.C. 270]

Insurance—Marine insurance—War risk—Warlike operation—Collision while steaming without lights at full speed—Collision with allied vessel—Intervening cause of collision—Manœuvre undertaken in hope of avoiding collision.

A steamship was requisitioned by the Admiralty under the terms of charter-party T. 99, of which cl. 24 provided that the Admiralty should not be held liable if the vessel should be lost (inter alia) through collision or any other cause arising as a sea risk, and cl. 25 provided that the Admiralty took those risks which would be excluded from an ordinary English policy of marine insurance by an f.c. and s. clause in the usual terms. While employed as a troop transport at night on Dec. 31, 1915, and, in accordance with Admiralty instructions, steaming without lights and at full speed, the ship was in collision with a French battleship which was also steaming at a good speed without lights and was sunk.

Held: the fact that the collision was between two vessels of allied Powers did not prevent it from being the consequence of warlike operations; an apparently wrong manœuvre just before the collision, which was undertaken in the hope of avoiding it, could not be regarded as a new and independent cause of the collision; and, therefore, without deciding that every collision in time of war where the vessels were steaming without lights was a war risk or that steaming without lights by Admiralty orders was always a warlike operation, the collision in the present case was a consequence of a warlike operation, being caused by the absence of lights on the vessels and the speed at which they were going, and so the owners of the ship were entitled to recover under cl. 25 of the charter.

Decision of Rowlatt, J., [1917] 2 K.B. 769, affirmed.

Notes. Distinguished: *S.S. Larchgrove* v. *R.* (1919), 36 T.L.R. 108; *Britain Steamship Co.* v. *Regem*, *Green* v. *British India Steam Navigation Co.*, *British India Steam Navigation Co.* v. *Liverpool and London War Risks Insurance Association, Ltd.*, [1920] All E.R.Rep. 296; *Harrisons* v. *Shipping Controller*, [1921] 1 K.B. 122. Considered and Criticised: *A.-G.* v. *Ard Coasters, Ltd.*, *Liverpool and London War Risks Insurance Association, Ltd.* v. *Marine Underwriters of S.S. Richard de Larrinaga*, [1921] All E.R.Rep. 72. Considered: *A.-G.* v. *Adelaide Steamship Co.*, [1923] All E.R.Rep. 32; *Clan Line Steamers* v. *Board of Trade*, [1928] 2 K.B. 557; *Wharton (Shipping), Ltd.* v. *Mortleman*, [1941] 1 All E.R. 175. Referred to: *Atlantic Transport Co.* v. *Transports Director* (1921), 38 T.L.R. 160; *Charente Steamship Co.* v. *Transports Director* (1921), 38 T.L.R. 148; *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*, [1922] All E.R.Rep. 207.

As to proximate cause of loss under marine policies, see 22 Halsbury's Laws (3rd Edn.) 90–92; and for cases see 29 Digest 205–212, 215 et seq.

Cases referred to:

(1) *Ionides* v. *Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur.N.S. 18; 11 W.R. 858; 1 Mar.L.C. 353; 143 E.R. 445; 29 Digest 229, *1854*.

(2) *William France, Fenwick & Co., Ltd.* v. *North of England Protecting and Indemnity Association*, [1917] 2 K.B. 522; 86 L.J.K.B. 1109; 116 L.T. 684; 33 T.L.R. 437; 61 Sol. Jo. 577; 14 Asp.M.L.C. 92; 23 Com. Cas. 37; 29 Digest 203, *1628*.

(3) *Becker, Gray & Co.* v. *London Assurance Corpn.*, [1918] A.C. 101; 87 L.J.K.B. 69; 117 L.T. 609; 34 T.L.R. 36; 62 Sol. Jo. 35; 14 Asp.M.L.C. 156; 23 Com. Cas. 205, H.L.; 29 Digest 208, *1675.*

(4) *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society*, ante p. 443; [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp.M.L.C. 258, H.L.; 29 Digest 229, *1858.*

(5) *Hadkinson* v. *Robinson* (1803), 3 Bos. & P. 388; 127 E.R. 212; 29 Digest 208, *1671.*

(6) *Walker* v. *Maitland* (1821), 5 B. & Ald. 171; 106 E.R. 1155; 29 Digest 206, *1654*

(7) *Gordon* v. *Rimmington* (1807), 1 Camp. 123, N.P.; 29 Digest 215, *1717.*

(8) *Cory* v. *Burr* (1883), 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78; 31 W.R. 894; 5 Asp.M.L.C. 109, H.L.; 29 Digest 217, *1736.*

(9) *Wilson, Sons & Co.* v. *Xantho* (*Cargo Owners*), *The Xantho* (1886), 11 P.D. 170; 55 L.J.P. 65; 55 L.T. 203; 35 W.R. 23; 2 T.L.R. 704, C.A.; reversed (1887), 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 766; 6 Asp.M.L.C. 207, H.L.; 41 Digest 414, *2573.*

(10) *Pandorf & Co.* v. *Hamilton, Fraser & Co.* (1885), 16 Q.B.D. 629; 54 L.T. 536; 34 W.R. 488; 2 T.L.R. 228; 5 Asp.M.L.C. 568; reversed (1886), 17 Q.B.D. 670; 55 L.J.Q.B. 546; 55 L.T. 499; 35 W.R. 70; 2 T.L.R. 891; reversed sub nom. *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518; 57 L.J.Q.B. 24; 57 L.T. 726; 52 J.P. 196; 36 W.R. 369; 3 T.L.R. 768; 6 Asp.M.L.C. 212, H.L.; 29 Digest 203, *1624*

Case referred to in argument:

Le Quellec et Fils v. *Thomson* (1916), 86 L.J.K.B. 712; 115 L.T. 224; 13 Asp.M.L.C. 445; 29 Digest 229, *1855.*

Appeal by the Crown from an order of ROWLATT, J., made on a petition of right in which the suppliants, shipowners, claimed against the Crown in respect of the loss of a ship owned by them, the *St. Oswald*, which had been requisitioned by the Crown on the terms of the charterparty T.99.

The facts appear in the judgments.

The Solicitor-General (*Sir Gordon Hewart, K.C.*) and *G. W. Ricketts* (with them *Greer, K.C.*) for the Crown.

Leslie Scott, K.C., and *A. T. Miller* for the suppliants.

Cur. adv. vult.

June 28, 1918. The following judgments were read.

SWINFEN EADY, M.R.—This is the appeal by the Attorney-General on behalf of the King from the judgment of ROWLATT, J., in favour of the suppliants on the trial of a petition of right.

The suppliants were the owners of the steamship *St. Oswald*, which was sunk in the Mediterranean on the night of Dec. 31, 1915, after being in collision with the French battleship *Suffren*, and the question for decision is whether the loss was occasioned by a war risk or a sea risk. The *St. Oswald* was a steel single-screw steamship of 3,810 tons gross, and 2,411 tons net register and about 361 ft. long, and she was requisitioned by the Admiralty for use on government service when she was at Marseilles on Mar. 28, 1915. She was so taken up on the terms of a charterparty known as T. 99 and expressed to be made between the owners and the Director of Transports for and on behalf of the Admiralty. Clauses 21, 24, and 25 of the charterparty are as follows:

"21. The master shall obey all orders and instructions which he may receive from the Admiralty or from any officer authorised by them, and shall in all respects comply with the confidential instructions for masters of transports; but he shall be solely responsible (on behalf of the owners) for the management, handling, and navigation of the ship. 24. The Admiralty shall not be held liable if the vessel shall be lost, wrecked, or driven on shore,

injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk. 25. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar, but not more extensive, clause: Warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she shall be totally lost, at the time of such loss."

The steamship continued in the service of the Admiralty until she was lost. On Dec. 31, 1915, she was engaged as a transport in the Eastern Mediterranean, assisting in the evacuation of troops from Gallipoli. About 5.30 p.m. she left the harbour at Imbros bound for Helles, Gallipoli. She had no navigation or other lights showing and was proceeding at full speed (which was between seven and eight knots) pursuant to orders and instructions from officers of the Admiralty. Her side lights were in position and lighted, but obscured; her masthead light was lighted, but not hoisted or showing. The night was dark and there was no moon. After rounding Cape Kephalo the vessel was put on a course for Helles, S.E. ½ S. The chief officer shortly afterwards saw the loom of the *Suffren* bearing a little on his starboard bow, and almost immediately afterwards the *Suffren* displayed lights and he saw her masthead lights and her port light, whereupon he put his helm hard-a-port and uncovered his side lights and gave one blast, indicating that he was directing his course to starboard. Almost immediately afterwards he saw that the *Suffren* starboarded her helm; she gave two blasts; her green light came into view, and she struck and rammed the *St. Oswald* at an angle about 60 degrees on the port side, causing her to sink almost immediately. [His Lordship referred to the evidence.] On the facts I am of opinion that the collision was occasioned solely by the absence of lights and the speed at which the vessels were proceeding. They were unable to see one another in sufficient time to prevent a collision, which was inevitable at the moment when the vessels first perceived each other. The Solicitor-General urged that the absence of lights could not cause a collision, although the presence of lights might prevent one. Having regard to the speed of the vessels, I am of opinion that it was the absence of lights which caused the collision—caused it in this sense, that it prevented the vessels from seeing one another at such a distance apart as would have enabled them to take the ordinary steps dictated by good seamanship and steer a course by which each would have passed clear of the other.

It was urged that by the terms of the charterparty a collision is expressly named as a marine risk, and not as a war risk. This is true. But there is also a warranty, "from all consequences of hostilities or warlike operations," and, if there is a collision as such a consequence, it is covered by the warranty and excluded from being a loss by a sea risk. If a vessel chartered under T. 99 were rammed and sunk by a hostile warship, it cannot be doubted that such a loss, although arising as a result of a collision between two vessels, is a loss by warlike operations, and covered by the warranty. The fact that the collision was between two vessels of the allies does not prevent it from being a consequence of warlike operations. The illustration put by Erle, C.J., in *Ionides* v. *Universal Marine Insurance Co.* (1) (14 C.B.N.S. at p. 286) of a ship blown up by torpedoes placed to protect a port from hostile aggression was obviously the case of a friendly ship entering the port. But he pointed out that in that case the proximate cause of the loss would clearly be the consequence of hostilities, and so within the exception. In that case it was held that the proximate cause of the loss was not the extinguishment of the light on Cape Hatteras, but the fact of the captain having missed his reckoning and either not keeping a sufficient look-out, or not lying-to when his position was

doubtful, and so running ashore. In *William France, Fenwick & Co., Ltd.* v. *North of England Protecting and Indemnity Association* (2) the proximate cause of the loss was that the ship ran upon a sunken wreck, which is an ordinary marine peril. To embark upon an inquiry as to how the wreck came to be there, and whether it arose from the violence of the seas or as a consequence of warlike operation, would be to investigate, not the proximate, but a remote cause. In the present case the dispute is not determined by saying that the *St. Oswald* was lost through a collision, as the further question then arises: What occasioned the collision? And the answer is that it was solely occasioned by obedience to orders to sail without lights and to go at full speed. Such a proceeding was in defiance of the rules of good seamanship, but necessitated by the exigencies of the warlike operations then in progress. In my opinion, the *St. Oswald* was lost by the proximate direct and immediate consequence of warlike operations, and accordingly that the appeal fails and must be dismissed with costs.

SCRUTTON, L.J.—On Dec. 31, 1915, the steamship *St. Oswald*, while engaged under requisition by the Admiralty in evacuating British troops from the Gallipoli Peninsula, was run into and sunk by the French battleship *Suffren*. The *St. Oswald* till just before the collison was, by orders of the Admiralty, steaming without lights and at full speed. The *Suffren* till just before the collision was also steaming without lights.

The owners of the *St. Oswald* claimed her value from the Crown under the terms of the charter on which she was requisitioned. It was clear that the vessel was lost by collision. But the owners alleged that the loss and the collision were directly the consequence of hostilities or warlike operations, and were a risk of war for which the Admiralty was liable. We are relieved from considering in this case how far precautions against enemy action are "hostilities or warlike operations," for in the court below, on a question from the judge: "You do not dispute, of course, that sailing without lights is a military operation?" the Attorney-General, for the Crown, answered: "No, my Lord. . . . That is clear. I do not in the least dispute that it was a contributory cause." I deal with the case on this admission, and reserve the right to consider in any future case the exact meaning of the term "warlike operations."

The risks taken by the Admiralty under the charter are the risks which would be excluded from an ordinary Lloyd's policy by the clause known as the "f.c. and s." clause. This brings into operation the rule of construction usually expressed in the maxim Causa proxima non remota spectatur, a phrase which, after many years of service, now finds the accuracy of its language somewhat in question.

LORD SUMNER in *Becker, Gray & Co.* v. *London Assurance Corpn.* (3) ([1918] A.C. at p. 114) prefers the phrase the "direct" instead of the "proximate" cause. LORD DUNEDIN in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (4) (ante p. 450) favours the expression "the dominant cause." LORD SHAW (ante p. 453) uses indifferently the terms "real," "efficient," "predominant." LORD HALDANE (ante p. 449) uses the words "immediate cause." We appear to be back in the regions from which I had thought the rule of proximate cause was intended to save us, where it is necessary to select from a number of contributory causes the principal one which caused the loss. Whatever the language, I understand the plaintiffs do not dispute that it is not enough for them to prove that the loss happened in the course of a military operation, or that a military operation was one of the contributory causes which together produced the loss. The military operation must be the direct or dominant cause of the loss, and no new and independent cause must operate after the military operation alleged.

The question then is: Have the plaintiffs proved that the direct or dominant cause of the loss was military operations, without the intervention of any new and independent effective cause? There again the question in dispute is much limited by the attitude taken by the Crown at the trial. They did not affirmatively allege

any other cause; they did not affirmatively allege or suggest that either ship was negligent. The learned judge says in his judgment:

> "The Attorney-General declined to affirm (and I asked him specifically as to the *Suffren*) that either vessel did wrong under the circumstances. He merely said it was not affirmatively proved that the collision was the consequence of the warlike operations."

I agree that the plaintiff who proves a state of facts consistent with the liability or non-liability of the defendant fails. But the court cannot but be influenced by the fact that the defendant declines to allege any state of facts proving that he is not liable. The question then is: Have the plaintiffs in the present case proved that the loss and collision were directly caused by the military operation of steaming full speed at night without lights, in order to remove troops without attracting the attention of the enemy guns or submarines? The court is in the most unsatisfactory position of having to pass judgment in the circumstances of the collision without nautical assessors, and on evidence from one ship only. In my experience, it is unusual in a collision case for the evidence of one side accurately to state the whole facts, and it is obviously almost impossible for evidence from one vessel at night accurately to state the course of or the look-out on the other ship. And the position is not made easier when the defendant declines to make any affirmative suggestion as to the circumstances of the collision, but only says that the plaintiffs' evidence leaves the matter ambiguous.

Two witnesses were called for the plaintiffs. The mate first saw the *Suffren* two points on his starboard bow; he did nothing till the *Suffren* almost immediately afterwards showed a red light, when he quite properly ported and blew two blasts. That is, having an apparently crossing ship on his starboard side, he took steps to keep out of her way by passing red to red. The *St. Oswald*'s master, who was in the chart room below the bridge, came up at once on hearing the two blasts, and then saw the *Suffren* slightly on his port bow, just showing her green light. The collision took place almost directly and the *Suffren* struck the *St. Oswald* on the port bow by the foremast, at an angle of 60 degrees to the centre line leading aft. Those on the *St. Oswald* thought her head had altered five or six points. It is obvious, as the *Suffren*'s green light came into view, that she was acting under a starboard helm, and the angle of the blow, if the *St. Oswald* is right as to the alteration of her head, shows that the *Suffren* was originally a crossing ship and swung considerably under a starboard helm. It seems further clear that all these events happened in a very short time, probably in less than two minutes, and, as the boats were approaching at a joint speed of about twenty knots, that they probably saw each other at considerably less than a mile off. If the ships had been carrying the normal lights, it would seem on the evidence before us difficult to justify the *Suffren*'s action. As a crossing ship, with the other on her port side, she should have kept her course and speed. If by any chance the ships appeared to be meeting, of which there is no evidence, the *Suffren* should have passed port to port.

I have no doubt that, if we heard the *Suffren*'s case, we should hear a very different story. But it is one of the obvious results of steaming at night full speed without lights that ships may come on each other very suddenly, each with no sufficient indications of what the other ship is doing, and even of whether she is a steamship or sailing ship. And I am not disposed to treat an apparently wrong manœuvre in what has been called the agony of the moment, when the "agony" is produced by the order to steam full speed without lights, as a new and independent cause, preventing the original order from having its full effect. This is particularly so when the defendants themselves will not take the burden of alleging that the *Suffren* was negligent. I have come to the conclusion, therefore, that the appeal should be dismissed. But I desire to say that, in my view, this case must not be taken as deciding either that every collision where the vessels are steaming without

lights is a war risk, or that steaming without lights by Admiralty orders is always a warlike operation.

DUKE, L.J.—The decision of this case depends upon the true answer to the question whether the loss of the steamship *St. Oswald* was caused by "collision" within the meaning of cl. 24 of the charterparty made between the suppliants and the Admiralty, or was the consequence of "hostilities or warlike operations" within the meaning of cl. 25.

[HIS LORDSHIP dealt with the facts and continued:] The view of the facts taken by the learned judge in the court below was that when the vessels sighted each other they were in instant peril of collision, that neither vessel was to blame, and

> "that the manœuvres which they executed did not constitute an intervening cause of the collision, but are merely to be regarded as an attempt which failed to escape from the existing peril. Escape or destruction depended upon sudden action which might be fortunate or disastrous, but which had to be taken."

The learned judge found accordingly that the cause of this loss was the warlike operation of navigating at night at a high speed and without lights, and he gave judgment for the suppliants. Counsel for the Crown relied, in supporting the appeal, upon the terms of the charterparty which leave with the owners the risks of collision, and the rule which is expressed in the maxim Causa proxima non remota spectatur. They contended that the evidence on the part of the suppliants did not prove the absence of lights to have been the proximate effective and immediate cause of the collision; that there was an evident and unexplained mistake on the part of the *Suffren* which was the direct cause of the collision; and that a mistake in the navigation of one of the two approaching ships is a peril of the sea, and not a risk from warlike operations. The case was likened to that of the *Linwood* in *Ionides* v. *Universal Marine Insurance Co.* (1). There is no lack of evidence as to the principle upon which the cause of loss in a case like the present is to be ascertained. The discussion covers at any rate the period from LORD BACON's time to the present year. LORD BACON made it the subject of Title I, in the treatise on the MAXIMS OF THE LAW, which he dedicated in 1596 to Queen Elizabeth. It has been expounded in the case in the House of Lords of *Becker, Gray & Co.* v. *London Assurance Corpn.* (3). "A peril insured against acting upon the subject insured immediately and not circuitously": per LORD ALVANLEY in *Hadkinson* v. *Robinson* (5), 3 Bos. & Pull. at p. 392; "the immediate cause": per ABBOTT, C.J., in *Walker* v. *Maitland* (6), 5 B. & A. at p. 174; causa causans: per LORD ELLENBOROUGH in *Gordon* v. *Rimmington* (7), 1 Camp. at p. 124; "the proximate and absolute certain cause and the proximate immediate cause": per WILLES, J., in *Ionides* v. *Universal Marine Insurance Co.* (1), 14 C.B.N.S. at p. 289; "the direct and immediate cause": per LORD FITZGERALD in *Cory* v. *Burr* (8), 8 App. Cas. at p. 408; "the real moving cause": per LORD ESHER in *The Xantho* (9), 11 P.D. at p. 172; and "the real effective cause": per LOPES, L.J., in *Pandorf & Co.* v. *Hamilton, Fraser & Co.* (10), are successive expressions of the same idea. In *Becker, Gray & Co.* v. *London Assurance Corpn.* (3) LORD SUMNER suggested that the cause to be ascertained is simply "the real and common-sense cause," and proposed to style it "the direct cause."

The cause of the loss which is here in question seems to me to be established in a manner which satisfies the requirements of the rule in all its modes of expression. I am satisfied, as ROWLATT, J., was satisfied, that the cause of the loss of the *St. Oswald* was the military or warlike operation in which she was engaged when she was sunk. She was purposely navigated at full speed without lights during the night in an area in which other vessels were being similarly navigated. Such a mode of navigation involves special risks of collision, and involves also the risk that in conditions of imminent peril collision will result from movements made by mistake in efforts to avoid collision. A collision which occurred in this way in

the course of a military operation brought about the loss of the *St. Oswald.* The risk began in the military operation, and the military operation gave to the risk its conclusive effect. I think, therefore, that the decisive question in the case ought to be answered in favour of the respondents, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor to the Treasury*; *Lightbound, Owen & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

WILD *v.* SIMPSON

[COURT OF APPEAL (Bankes, Duke and Atkin, L.JJ.), April 8, 9, 10, June 4, 1919]

[Reported [1919] 2 K.B. 544; 88 L.J.K.B. 1085; 121 L.T. 326; 35 T.L.R. 576; 63 Sol. Jo. 625]

Solicitor—Champerty—Agreement that client should pay percentage of amount recovered above specified sum—If client unsuccessful, solicitor to receive only out of pockets—Severance of illegal undertaking from other promises in agreement.

In 1908 a solicitor accepted a retainer from the defendant to act for him in an action brought against him in the King's Bench Division, in which the defendant had a counterclaim. In 1911 an agreement was made between the solicitor and the defendant whereby the defendant agreed to provide all out-of-pocket expenses in regard to the counterclaim and fees to counsel, and undertook, in the event of his recovering more than a certain sum to pay the solicitor a percentage of the amount recovered. It was further provided that the solicitor was not to look to the defendant for any costs of the counterclaim, except out-of-pockets, if the plaintiff in the action were successful. The defendant succeeded in the action, but failed to pay the solicitor any costs. The solicitor sued to recover his costs under the original retainer, and the defendant pleaded that the agreement made between him and the solicitor was champertous and so the solicitor could not successfully rely on it.

Held (DUKE, L.J., dissenting): the solicitor was compelled to rely on the agreement of 1911 since (per BANKES, L.J.) it was essential that he should negative the event on which he had agreed that he would get no costs, viz., if the defendant failed on the counterclaim, and since (per ATKIN, L.J.) that agreement superseded the retainer of 1908; the promises of the defendant in the agreement were not severable; and, therefore, the plaintiff's claim was tainted with illegality and must fail.

Contract—Quantum meruit—Failure of contract for illegality.

Per ATKIN, J.: A person employed on an express contract to do work for a remuneration which is illegal cannot, where the contract fails for illegality, recover on a quantum meruit.

Notes. Referred to: *Martell* v. *Consett Iron Co.*, [1955] 1 All E.R. 481.

As to champerty, see 1 HALSBURY'S LAWS (3rd Edn.) 41–43, and as to agreements by solicitors for the costs of contentious business, see ibid. (2nd Edn.), vol. 31, pp. 166, 167. For cases see 1 DIGEST 85–90, 42 DIGEST 126–132. For Solicitors Act, 1957, s. 65, see 37 HALSBURY'S STATUTES (2nd Edn.) 1106. As to recovery on a quantum meruit, see 8 HALSBURY'S LAWS (3rd Edn.) 110, 111; and for cases see 12 DIGEST (Repl.) 129–132.

A Cases referred to:

(1) *Jennings* v. *Johnson* (1873), L.R. 8 C.P. 425; 37 J.P. 695; 42 Digest 126, *1206*.

(2) *Re Attorneys and Solicitors Act, 1870* (1875), 1 Ch.D. 573; 45 L.J.Ch. 47; 24 W.R. 38; 42 Digest 130, *1245*.

(3) *Herman* v. *Jeuchner* (1885), 15 Q.B.D. 561; 54 L.J.Q.B. 340; 53 L.T. 94; 49 J.P. 502; 33 W.R. 606; 1 T.L.R. 445, C.A.; 12 Digest (Repl.) 266, *2052*.

B (4) *Simpson* v. *Bloss* (1816), 7 Taunt. 246; 2 Marsh. 542; 129 E.R. 99; 12 Digest (Repl.) 311, *2399*.

(5) *Scott* v. *Brown, Doering, McNab & Co., Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 41 W.R. 116; 8 T.L.R. 755; 36 Sol. Jo. 698; 4 R. 42, C.A.; 12 Digest (Repl.) 267, *2060*.

C (6) *Coburn* v. *Colledge*, [1897] 1 Q.B. 702; 66 L.J.Q.B. 462; 76 L.T. 608; 45 W.R. 488; 13 T.L.R. 321; 41 Sol. Jo. 408, C.A.; 32 Digest 339, *229*.

(7) *Grell* v. *Levy* (1864), 16 C.B.N.S. 73; 9 L.T. 721; 10 Jur.N.S. 210; 12 W.R. 378; 143 E.R. 1052; 1 Digest 85, *699*.

(8) *Holman* v. *Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, *2404*.

D (9) *Smith* v. *Andrews* (1649), Sty. 183; 82 E.R. 630; 32 Digest 39, *367*.

(10) *Pierson* v. *Hughes* (1672), 1 Freem.K.B. 71, 81; 89 E.R. 53, 60; sub nom. *Pearson* v. *Humes*, Cart. 229; sub nom. *Parson* v. *Hume*, 3 Keb. 140; sub nom. *Perce* v. *Hume*, 3 Keb. 153; 7 Digest 173, *110*.

(11) *Skapholme* v. *Hart* (1680), Cas. temp. Finch, 477; 1 Eq. Cas. Abr. 86, pl. 1; 23 E.R. 257; 7 Digest 173, *111*.

E (12) *Strachan* v. *Brander* (1759), 1 Eden, 303; 28 E.R. 701; 1 Digest 71, *594*.

(13) *Turwin* v. *Gibson* (1749), 3 Atk. 720; 26 E.R. 1212, L.C.; 42 Digest 288, *3232*.

(14) *Wood* v. *Downes* (1811), 18 Ves. 120; 34 E.R. 263; 1 Digest 85, *696*.

(15) *Pigot's Case* (1614), 11 Co. Rep. 26 b; 77 E.R. 1177; sub nom. *Winchcombe* v. *Pigot*, 2 Bulst. 246; sub nom. *Winscombe* v. *Piggott*, 1 Roll. Rep. 39; sub nom. *Anon.*, Moore, K.B. 835; 7 Digest 235, *770*.

F (16) *Pickering* v. *Ilfracombe Rail. Co.* (1868), L.R. 3 C.P. 235; 37 L.J.C.P. 118; 17 L.T. 650; 16 W.R. 458; 10 Digest (Repl.) 1274, *9001*.

(17) *Neville* v. *London "Express" Newspaper, Ltd.*, ante, p. 61; [1919] A.C. 368; 88 L.J.K.B. 282; 120 L.T. 299; 35 T.L.R. 167; 63 Sol. Jo. 213, H.L.; 17 Digest (Repl.) 168, *638*.

G Also referred to in argument:

Bourke v. *Blake* (1857), 2 Ir. Jur. 206; 7 I.C.L.R. 348; 12 Digest (Repl.) 326, **1242*.

Shackell v. *Rosier* (1836), 2 Bing.N.C. 634; 2 Hodg. 17; 3 Scott, 59; 5 L.J.C.P. 193; 132 E.R. 245; 12 Digest (Repl.) 266, *2050*.

Harrington v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549; 47 L.J.Q.B. 594; 39 L.T. 120; 42 J.P. 744; 26 W.R. 740; 12 Digest (Repl.) 327, *2530*.

H

Josephs v. *Pebrer* (1825), 3 B. & C. 639; 1 C. & P. 507; 5 Dow. & Ry.K.B. 542; 3 L.J.O.S.K.B. 102; 107 E.R. 870; 12 Digest (Repl.) 323, *2488*.

Allkins v. *Jupe* (1877), 2 C.P.D. 375; 46 L.J.Q.B. 824; 42 Digest 610, *106*.

Gaskell v. *King* (1809), 11 East, 165; 103 E.R. 967; 12 Digest (Repl.) 328, *2539*.

Price v. *Green* (1847), 16 M. & W. 346; 16 L.J.Ex. 108; 153 E.R. 1222; sub nom.

I *Green* v. *Price*, 9 L.T.O.S. 296, Ex. Ch.; 43 Digest 47, *486*.

William Robinson & Co., Ltd. v. *Heuer*, [1898] 2 Ch. 451; 67 L.J.Ch. 644; 79 L.T. 281; 47 W.R. 34; 42 Sol. Jo. 756, C.A.; 43 Digest 54, *560*.

Mallan v. *May* (1843), 11 M. & W. 653; 12 L.J.Ex. 376; 1 L.T.O.S. 110, 258; 7 Jur. 536; 152 E.R. 967; 43 Digest 32, *258*.

Nicholls v. *Stretton* (1847), 10 Q.B. 346; 11 Jur. 1008; 116 E.R. 134; 43 Digest 69, *725*.

Baines v. *Geary* (1887), 35 Ch.D. 154; 56 L.J.Ch. 935; 56 L.T. 567; 51 J.P. 628; 36 W.R. 98; 3 T.L.R. 523; 48 Digest 40, *394*.

Baker v. *Hedgecock* (1888), 39 Ch.D. 520; 57 L.J.Ch. 889; 59 L.T. 361; 36 W.R. 840; 4 T.L.R. 569; 43 Digest 44, *442*. A

Appeal by defendant from an order of ROWLATT, J., made on the trial of the action without a jury.

The action was brought by a solicitor by a specially indorsed writ, issued on Nov. 15, 1917, to recover the balance alleged to be due upon twenty-three separate bills of costs. As to a number of these bills of costs the defendant pleaded the Statute of Limitations. To take the case out of the statute the plaintiff relied upon a payment of £75 which was made to him on Nov. 15, 1911, as being a payment on account of his costs generally. The defendant disputed this contention, and alleged that the payment was in respect of one of the bills of costs only—namely, that relating to an action of *Simpson* v. *Simpson*. In reference to the claim for the amount of the bill of costs in the *Simpson* v. *Simpson* action the defendant raised two defences. He alleged that upon the true construction of an agreement made between himself and the plaintiff and dated Oct. 23, 1911, the plaintiff had agreed not to make any charge for his services in that action. He further alleged that the plaintiff could only sue upon the agreement of Oct. 23, 1911, for costs alleged to be due in that action, and that, as that agreement was a champertous agreement, the plaintiff could not recover anything. The learned judge decided all these points in the plaintiff's favour. B C D

In the early part of the year 1908 the defendant's brother brought an action against him in the King's Bench Division. The defendant was desirous of counterclaiming for a large amount. He asked the plaintiff to act as his solicitor in the matter. This the plaintiff agreed to do. The defendant was apparently in embarrassed circumstances, and a somewhat unusual arrangement was made to the effect that in addition to finding out-of-pocket expenses, the defendant was to pay the plaintiff £2 per week on account of profit costs. There appeared to be nothing to justify a conclusion that the original retainer of the plaintiff by the defendant to act as his solicitor in the action of *Simpson* v. *Simpson* was other than a perfectly legitimate and lawful retainer. The plaintiff acted under that retainer, and became the defendant's solicitor on the record. So matters continued down to October, 1911. During that period the defendant had been adjudicated bankrupt, obtaining his discharge in 1914, and the plaintiff had apparently experienced difficulty in getting any moneys required for out-of-pocket expenses in connection with the various matters in which he was acting for the defendant. On Oct. 23, 1911, the agreement was made in reference to which the main questions in the action arose. The agreement was headed "*Simpson* v. *Simpson*," and was in the following terms: E F G

> "Between George Darlington Simpson and William Wild. Agreed as follows: (i) G. Darlington Simpson to pay £60 on this date generally on account of costs other than the costs of the counterclaim in the above action. (ii) G. Darlington Simpson to provide all out-of-pockets in the above counterclaim as from this date as and when incurred and to provide the agreed fees to counsel. (iii) In the event of G. Darlington Simpson recovering more than sufficient to pay his creditors in full and all legal expenses, then G. Darlington Simpson will pay as and when received or paid by John Simpson to Wm. Wild 10 per cent. on the first £10,000 and 5 per cent. on the balance. (iv) Wm. Wild agrees to conduct the counterclaim to the end of the action upon the above terms and will not look to G. Darlington Simpson for any costs of the said counterclaim except out-of-pockets as aforesaid in the event of John Simpson winning the said action. [Signed] Darlington Simpson. William Wild." H I

At the trial of the action of *Simpson* v. *Simpson*, before PHILLIMORE, J., the defendant, G. D. Simpson was successful. The judgment was subsequently reversed by the Court of Appeal, but was restored by the House of Lords. It was stated that the defendant recovered nothing under the judgment. In the present action on the bill of costs ROWLATT, J., held on the question of champerty that where there

were several promises formed on a good consideration, and one of the promises was unlawful, that promise could not be sued upon, but the other promises were valid, and that the plaintiff was entitled to recover his lawful costs. The defendant appealed.

Schwabe, *K.C.*, and *Harney* for the defendant.

J. B. Matthews, *K.C.*, and *D. N. Pritt* for the plaintiff.

Cur. adv. vult.

June 4, 1919. The following judgments were read.

BANKES, L.J. [after stating the facts] : The first question is whether upon the true construction of cll. (iii) and (iv) of the agreement the plaintiff undertook not to make any charge for profit costs. The substance of the defendant's contention was that the agreement on the plaintiff's part to conduct the counterclaim to the end of the action "upon the above terms" meant that he would conduct it upon the above terms as to remuneration—namely, that in certain events he was to be paid a percentage of the amount recovered, and that such an agreement impliedly negatived the idea that he was to receive any other remuneration. I cannot agree with this contention. Apart altogether from the concluding words of cl. 4, I should not have been prepared to accept this construction. These concluding words, however, in my opinion make the matter quite clear. The provision that the plaintiff in the event of John Simpson winning the action was not to receive any costs other than out-of-pockets appears to me to provide for the event, and for the only event, in which the plaintiff was not to be entitled to his profit costs. As the event did not happen, the defendant, in my opinion, was rightly held by ROWLATT, J., to have failed on this point.

The other question in reference to this agreement raises a matter of importance and of difficulty. The agreement is admitted to be a champertous agreement, and as such it is unenforceable. I am not prepared to accept the view apparently held by ROWLATT, J., that the consideration for the agreement of Oct. 23, 1911, was a lawful consideration. There is authority for the proposition that s. 11 of the Attorneys and Solicitors Act, 1870 [repealed: see now Solicitors Act, 1957, s. 65 (1)], was inserted for the purpose of providing against champertous agreements with solicitors: see *Jennings* v. *Johnson* (1) and *Re Attorneys and Solicitors Act, 1870* (2). I cannot regard either the promise of a solicitor to act as solicitor in an action upon champertous terms, or the work done under such a promise, as a good consideration. I think that the language of BRETT, M.R., in *Herman* v. *Jeuchner* (3) applies to such a case. He lays down the rule in the following word (15 Q.B.D. at p. 563):

> "When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced."

The material question in the present case appears to me to be whether the plaintiff is entitled to recover his costs in *Simpson* v. *Simpson* without any aid from the champertous contract of Oct. 23, 1911. If the plaintiff cannot recover without such aid, he is not, in my opinion, entitled to succeed. The rule has been long established. It will be found in *Simpson* v. *Bloss* (4) (7 Taunt. at p. 249). In *Scott* v. *Brown, Doering, McNab & Co.* (5), A. L. SMITH, L.J., lays it down in these words ([1892] 2 Q.B. at p. 734):

> "If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action."

In the present case the plaintiff sues on his original retainer. It is the defendant who sets up the agreement as an answer to the claim. The original retainer still continued after, and in spite of, the agreement of Oct. 23, 1911. I have already stated that, in my opinion, in the events which happened, the plaintiff's right to profit costs under his original retainer was not extinguished by the agreement of

Oct. 23, 1911. The original retainer, though still subsisting, may, however, be so varied by that agreement that the plaintiff's cause of action may not be complete without reference to that agreement. It is here, I think, that the plaintiff's difficulty lies. After the making of the agreement it became an essential part of the plaintiff's cause of action that he should negative the event on which he was to get no costs—namely, the event of John Simpson winning the action: see *Coburn* v. *Colledge* (6) ([1897] 1 Q.B. at p. 707). The original retainer is, therefore, to that extent varied by the subsequent agreement of Oct. 23, 1911, and the plaintiff cannot recover without its aid.

For these reasons I consider that the plaintiff's claim, so far as it relates to the costs in *Simpson* v. *Simpson*, is tainted with illegality, and that the plaintiff is not entitled to recover. *Grell* v. *Levy* (7) was much relied on by the defendant. As reported in 16 C.B.N.S. 73 the decision is difficult to understand. A fuller report is to be found in 12 W.R. 378. It is clear from that report that in that particular case, where the client was seeking to compel the solicitor to hand over money received by him in the action, the court were prepared to assume the existence of a valid retainer, or, at any rate, to require the client to make good to the solicitor his proper charges for recovering the money. For the reasons I have already given I do not consider that it is possible to make any such assumption in the present case, and the facts do not admit of the introduction of any equitable doctrine which would assist the plaintiff. He must recover on his contract of employment or not at all.

There remains only the question of the Statute of Limitations. The facts in relation to that matter are shortly these. At the time the agreement of Oct. 23, 1911, was made it was also arranged that a Mr. Adler, a friend of the defendant, should provide a sum of £75 for costs in addition to the sum of £60 referred to in the agreement. Two matters seem to me material in connection with this question of the payment of the £75. The first is that Mr. Adler was paying the money for the defendant, and that the question is whether the £75 which Mr. Adler paid on Nov. 15 was, as between the plaintiff and the defendant, a payment on account of costs generally, or one on account of costs in *Simpson* v. *Simpson*. The second is that by the terms of the agreement of Oct. 23, 1911, it would be quite uncertain for a very considerable time whether the plaintiff would be entitled to any costs in *Simpson* v. *Simpson*. Bearing these considerations in mind, I agree with the conclusion arrived at by ROWLATT, J., that, as between the plaintiff and the defendant the payment should be treated as a payment on account of costs generally. Having regard to the decision of this court in reference to the costs in *Simpson* v. *Simpson* it is not necessary to express any opinion on the cross-notice of appeal.

The result is that the appeal succeeds so far as the claim relates to the costs in *Simpson* v. *Simpson*, and that the judgment, so far as it relates to those costs, must be set aside. The rest of the judgment for the plaintiff to stand, but the defendant to have the costs of the issue relating to the bill of costs in *Simpson* v. *Simpson*. There will be no costs of the cross-appeal, but the appellant will get the costs of his appeal. Liberty to apply as to the form of the judgment and as to costs of action after taxation of the bills of costs in respect of which the plaintiff recovers judgment. No enforcement of the order of the costs of the appeal until after liberty to apply disposed of.

DUKE, L.J.—The plaintiff brought his action to recover moneys which he alleged to be due to him for work done and moneys paid by him under the defendant's retainer by him as a solicitor. As to some bills of costs of small amount the defendant relied upon a plea of the Statute of Limitations, 1623. As to bills amounting in all to upwards of £2,900 he set upon agreement made between the parties on Oct. 23, 1911, upon which he founded two contentions—the one that it precluded any claim except for out-of-pocket expenses and counsel's fees which had been paid; the other that the agreement was champertous, and that this rendered the plaintiff's services in the action unlawful, and disentitled him to any

remuneration. In answer to the defendant's plea of the Statute of Limitations the plaintiff alleged a payment on account made within six years of the commencement of the action. In the opinion of the learned judge at the trial he made good this allegation. I agree with the view of the learned judge. The learned judge held further that upon the true construction of the agreement of Oct. 23, 1911, it was not an agreement to do the work in question for out-of-pocket expenses and counsel's fees. Clause (iii) of the agreement recognises that if the defendant were to succeed in the proceedings in question he would have legal expenses to pay, and that these would include legal expenses not necessarily recoverable from his antagonist. The provision in cl. (iv) that in case the defendant fails the plaintiff will not look to him for any costs beyond out-of-pockets, seems to me to mean that if the defendant succeeds he will pay the plaintiff's costs. Incidentally, it has the effect also of affirming inferentially the continuance of the relation of solicitor and client under the retainer of 1908. I think with the learned judge that the document contains no agreement limiting the plaintiff's claim in the events that have happened to his out-of-pocket expenses and counsel's fees.

The main topic of discussion before us, however, was the effect upon the relations of the parties as solicitor and client of the bargain in the agreement for a share of the proceeds of the litigation. That bargain was clearly champertous and illegal, and the defendant contended that it rendered the whole services of the plaintiff a series of illegal acts. If this contention is well founded, the consideration moving from the plaintiff was bad in law, and the character of the several promises of the defendant and the question of their divisibility would become immaterial.

The relevant facts in the case can be concisely stated. In March, 1908, the defendant was being sued by his brother in an action of *Simpson* v. *Simpson* upon a money claim which he admitted. The defendant had valid claims against his brother of very large amount, which were made the subject of a counterclaim and were ultimately established upon appeal to the House of Lords. On Mar. 16, 1908, the plaintiff became the defendant's solicitor on the record. He so remained at all material times. The defendant was made bankrupt during the proceedings, but his trustee in bankruptcy became a party to the litigation, and moneys on account of costs were provided by other persons. In October, 1911, the counterclaim was ready for trial. The defendant was indebted to the plaintiff as solicitor on various accounts, and was unable to pay the costs already due, or to provide for his accruing costs in the ordinary course. In these circumstances the agreement of Oct. 23 was made with provision in it for certain cash payments, and the bargain for remuneration which is now in question. The effect in law of the material parts of the agreement seems to me to have been this. In consideration that the plaintiff would continue his services as solicitor and in case of the failure of the counterclaim, he would charge the defendant no more than disbursements; the defendant would provide out-of-pockets and counsel's fees as the litigation proceeded; and in the event of success he would pay to the plaintiff his costs to be taxed and 10 per cent. of any proceeds of the counterclaim in excess of a certain amount. It is the last-mentioned promise which is said to convert the employment into an illegal service.

I am of opinion that the retainer of the plaintiff by the defendant made in 1908 was not determined by the agreement made in 1911, and that it was of full effect at all material times. The new agreement modified the terms of remuneration, but did not alter the obligations of service. These remained what they had always been. The solicitor was not newly employed. He consented to continue his services. The question, as I see it, is whether the new agreement so operated as to convert the old relationship of solicitor and client into an illegal relationship, and, if it did not, whether the defendant's several promises of remuneration are so interdependent that no valid claim can be made upon either of them. The defendant, in order to succeed in the action, must show, to quote the words of LORD MANSFIELD in *Holman* v. *Johnson* (8) (1 Cowp. at p. 343), that the plaintiff's cause of action arises "ex turpi causa or from the transgression of a

positive law of this country." It did so arise if the series of acts in respect of which the plaintiff claims his costs were acts of illegal maintenance. To make out this illegality it is necessary that the defendant should establish the existence of a rule of law whereby a champertous bargain between solicitor and client converts the retainer of a solicitor into an unlawful agreement, such, for example, as would exist where litigation was being knowingly carried on to effect a fraud. The argument for the defendant, as applied to such a case as the present, seems to me to take too little account of the exceptional position of legal practitioners under the common law in respect of the maintenance of actions not in themselves unlawful. What has first to be remembered is that maintenance of a lawful action by an attorney for reward was not within the prohibition of the common law. In *Smith* v. *Andrews* (9) ROLLE, C.J., speaks of the maintenance of actions at law by an attorney for reward in these words: "This is a special maintenance, for it is in the case of an attorney, and therefore lawful." LORD COKE's exposition of the law of maintenance in 2 Co. Inst. 212, 564, is to the same effect. Some light is thrown upon the matter also by the various arguments which took place in the Court of Common Pleas in 1672 in an action of *Pierson* v. *Hughes* (10). The status of an attorney at the time of the passing of the general statute against champerty (Articuli Super Chartas) appears in a plea set forth by COKE in 2 Co. Inst. 562. The statute deals specifically with the case of the legal practitioner on the footing that maintenance by him of actions at law for reward was lawful. What has to be determined here is whether the common law right or privilege is destroyed by any infringement by the practitioner of the provisions of the statutes against champerty. The terms of the statute Articuli Super Chartas are relevant to the discussion:

> "No officer nor any other (for to have part of the thing in plea) shall not take upon him the business that is in suit. . . . But it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of learned men in the law for his fee [counsaile des countours, et des sages gents pur son donant] or his parents and next friends."

The statute does not contain in express terms, and I think it does not imply, the rule of law which is asserted by the plaintiff in this appeal. LORD COKE's commentary upon the statute deduces from its terms the principle that the attorney may have no pecuniary interest in the litigation beyond his fee, but does not suggest the existence of the rule now contended for; and I have not been able to find any authority for the contention. Such decisions as I know of seem to me to have a contrary effect.

There is a series of cases in courts of equity commencing with *Skapholme* v. *Hart* (11) in 1680, in which the rights of the parties had to be determined as between solicitor and client, when the solicitor had acquired property of the client which was the subject of litigation under agreements alleged to be champertous: *Strachan* v. *Brander* (12) before LORD NORTHINGTON in 1759; *Turwin* v. *Gibson* (13) before LORD HARDWICKE in 1749; and *Wood* v. *Downes* (14) before LORD ELDON in 1811; are instances. In each case the transaction was held to be champertous and was set aside, but upon payment of the solicitor's costs. The decree in the last-mentioned case concludes with directions for delivery and taxation of the solicitor's bill for moneys paid and for his fees and disbursements as solicitor, and an order (so far as is here material) for reconveyance upon payment of what shall be found due. *Grell* v. *Levy* (7) was decided in the Court of Common Pleas in 1864, when the court consisted of ERLE, C.J., and WILLIAMS, WILLES, and KEATING, JJ. The plaintiff sought to recover from his solicitor moneys which had been recovered and retained under a champertous agreement. The plaintiff recovered judgment for the sum in question less the amount of the solicitor's proper costs. The ground of the decision was stated by ERLE, C.J., to be that the agreement was void, and the learned judge said that "the agreement being out of the way, the defendant is remitted to his ordinary rights upon his retainer as attorney for the plaintiffs." It has been suggested that in the cases in equity and, perhaps, in *Grell* v. *Levy* (7),

the various plaintiffs were required to "do equity" as a condition of obtaining relief of an equitable nature. I cannot see, however, that there could have been a right on the part of the solicitor in any of these cases to recover anything for costs if his employment was illegal in its nature; and if the rule exists for which the present defendant contends it seems to me incredible that it should have been overlooked by the very eminent judges who took part in the decision of the Court of Common Pleas in *Grell* v. *Levy* (7). I think there was no such rule before the Attorneys' Solicitors' Act, 1870, and that s. 11 of that Act does not alter the law.

Once it is established that the services of the plaintiff constituted a good consideration in law to support a promise of remuneration not in itself unlawful, the questions which remain are whether the plaintiff can sue on his original retainer or on the new agreement, notwithstanding the champertous nature of one of the promises it contains; and assuming he can sue, whether the defendant's promises are severable. For reasons I have already stated I think the plaintiff could sue on the original retainer. I am of opinion also that he does not require any aid from the illegal agreement in order to establish his case, and that, no matter who brings that agreement to the notice of the court, the defendant's promise to pay costs under his retainer and his promise to pay a champertous remuneration are distinct engagements, one of which is legal and can be enforced: *Pigot's Case* (15); *Pickering* v. *Ilfracombe Rail. Co.* (16). To what penalties the plaintiff has exposed himself by being party to a champertous bargain is not matter for decision here. He is entitled, in my view of the case, to retain the judgment given in his favour in the court below, and I think the defendant's appeal should be dismissed with costs.

ATKIN, L.J.—The plaintiff's claim upon the bill of costs in the action of *Simpson* v. *Simpson* is met by the defence that the plaintiff was employed as the defendant's solicitor upon the terms of a special contract in writing dated Oct. 23, 1911; that such contract was champertous and therefore illegal; and that by reason thereof the plaintiff cannot recover. The learned judge took the view that the illegality was severable, and that the plaintiff might recover on the promises which were not tainted with champerty. It is further contended that, even if the whole agreement is void for illegality, the plaintiff can treat it as a nullity, and sue upon the original retainer given some years before.

These contentions require an examination of the facts. In or about January, 1908, John Simpson, the brother of the defendant, commenced an action against him upon a money claim. The plaintiff did not at first act for the defendant in the action, but in March, 1908, he agreed to act for the defendant, and his name appeared on the record as the defendant's solicitor. In the action the defendant counterclaimed for a large sum on the ground of the wrongful dealings by John Simpson with the defendant's property. The terms of the original retainer of the plaintiff at the end of February, 1908, as deposed to by him, were that the defendant was to find him out-of-pocket expenses and £2 a week towards profit costs. In January, 1910, the defendant was adjudicated bankrupt on a petition by his brother John. I am not clear whether the counterclaim had already been delivered in the action, but in any case the defendant's trustee in bankruptcy was added as a party consenting to be joined upon provision being made for his costs. It is unnecessary to consider whether the bankruptcy of the client would under the circumstances have entitled the solicitor to treat the retainer as determined, for it is plain that in fact he continued to act. The fact that the defendant at all material times was an undischarged bankrupt is of some importance. It had some effect upon the plaintiff's mind, for on Jan. 24, 1910, he makes a suggestion in writing to the defendant that he should be employed in the future in the action upon the terms that he should be paid out-of-pocket expenses, and, in addition, 10 per cent. on the amount recovered from the plaintiff as soon as it appeared that the sum recovered exceeded the claims of the creditors in the bankruptcy. To these terms the defendant refused to accede, alleging that they were illegal, but rather, I think,

on the ground that they might offend against the bankruptcy law than on the ground of champerty. The action proceeded slowly, and concurrently with its progress occur repeated demands from the present plaintiff to be secured as to his costs. By October, 1911, the case appears to have been in a position where the solicitor and the client had to come to a definite understanding as to ways and means. Large out of pockets had to be found, for counsel had to be briefed; the client was a bankrupt, though possessing friends who were able and willing to render some assistance. The solicitor under the general law relating to a retainer in a common law action was under an obligation to act until the determination of the case, but only on condition that the client provided the necessary out-of-pocket expenses. On Oct. 3, 1911, the solicitor writes to his client as follows:

> "I am sorry to hear you are unwell and gone to Cornwall without coming to any arrangement with me respecting [the action of John Simpson] because it seems to me the present position of affairs is very serious. My requirements are payment of Mrs. Simpson's costs £5 Hamilton petition (attendances), £25 the present out-of-pocket expenses, security for £300 in respect of costs other than J. S. action, and as regards this I am prepared to accept a sporting offer. The action is practically in the same position as it was at the commencement of the Long Vacation, and, as I told you nearly two months ago, there it will remain until my very modest demands are complied with. I am in the cart to close upon £1,000, holding as security a few Malang shares which stand at about 9d. in the market, and I hear there is going to be trouble about this company for misrepresentations in the prospectus. I suppose it must be your charming personality that has induced me to stray from the strict paths of business, and treat you as I have never done any client before. However, it is all finished now so far as I am concerned. The future rests with you."

He then proceeds to deal with the steps that have to be taken with regard to the case being got ready for trial, and then he goes on to say:

> "If you are not going on with this case I ought to let Adler know, as he is your surety, and I must inform Fairbarn as he is the main defendant in the action, and is entitled to an opportunity of continuing the action himself, although I do not for a moment think he will do so. If you intend to fight any further I think I should return to town at once and commence work."

To that the defendant replied on Oct. 9:

> "It is no good beating about the bush or fancying what you have seen or know. I cannot meet the terms you have mentioned, so if you hold the pistol at my head at this grave crisis you must fire."

The answer is terse and clear. At this stage it appears to me that the solicitor is saying, "I am not going to continue this action until I can see that the money will be provided for the necessary costs"; but he intimates that he is prepared to make special terms as to this action, provided that he receives some payments on account in respect of other matters. The defendant's letter in reply is a non possumus. The solicitor was, I think, at this stage entitled to refuse to continue the action, and, at any rate, there was a bona fide claim to be entitled so to refuse. Moreover, in order to determine whether the parties intended to make a new contract on fresh consideration one has to disregard the question of illegality; and the agreement on both sides to vary the original terms of the retainer would in itself form sufficient consideration to support the mutual promises. For these reasons I conclude that a new contract of retainer was made for which, if otherwise legal, there was ample consideration, and that the new contract superseded the old. Part of the terms of the new contract at any rate are contained in the document dated Oct. 23, 1911, signed by both parties and relied on by the defendant. I say part, for it would appear from documents of about the same date that there was a further arrangement for other sums to be found by friends of the defendant towards general costs other than those in the action of *Simpson* v. *Simpson*. In

accordance with the bargain so made, Mr. Adler apparently on the same day sent to the plaintiff the cheque for £60 stipulated for in the first paragraph of the agreement. I think that there can be no doubt that both parties for the future considered themselves bound by it. I need only refer to the plaintiff's letter of Nov. 4, 1911, in which he asked for a cheque for certain out of pockets "according to our bargain." A question has arisen on the construction of the agreement as to whether the percentage mentioned in cl. (iii) was to be in addition to profit costs or not. I have great difficulty in construing the clause, but on this point in view of the reference to the defendant recovering sufficient to pay his creditors in full "and all legal expenses," I think the true view is that the percentage was to be in addition to the ordinary profit costs. Had the agreement been otherwise, the defendant would not have been entitled to tax his costs against his brother John Simpson in the action, as apparently he did through the present plaintiff.

One has now to consider the effect of the agreement that, in the event of the defendant being successful, the defendant in the event named would pay to the plaintiff 10 per cent. on the first £10,000, and 8 per cent. on the balance. It is not disputed before us that this stipulation was void for champerty. It was, however, contended that the consideration, namely, the performance by the plaintiff of the duties of a solicitor in conducting the action, was lawful; and that, the promises being severable, the illegal and champertous part can be eliminated, leaving the defendant liable to pay the ordinary profit costs. This view has commended itself to the learned judge. I am, however, unable to agree with him. Champerty is illegal and an indictable offence. It is a form of maintenance. "Champerty is a species of maintenance which is the genus": 2 Co. Inst. 208.

> "An action of maintenance did lie at the common law, and if maintenance in genere was against the common law, a fortiori champerty, for that of all maintenances is the worst": 2 Co. Inst. 208.

The definition by COKE is

> "to maintaine to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit; and this is called cambipartia, champertie": Co. Litt. 368b.

It is maintenance aggravated by an agreement to have a part of the thing in dispute. Maintenance is the unlawful intermeddling with litigation in which one has no concern: per LORD FINLAY, L.C., in *Neville* v. *London "Express" Newspaper, Ltd.* (17) ([1919] A.C. at p. 382). I think the reason for the rule which is clearly in existence, that an agreement by a solicitor to purchase part of the proceeds of the suit in which he is acting as a solicitor is void for champerty, is based upon the consideration of the above definitions. Obviously no one intermeddles more with litigation than the solicitor for one of the parties. As long as he confines himself to lawful terms of remuneration he has a lawful concern in the litigation. If, however, he is acting, not on ordinary professional terms, but has a direct interest to receive part of the proceeds of the litigation, he has altered his position and is deemed to be an unlawful intermeddler. The cases of champertous agreements by solicitors are often regarded merely as concerning the immediate client. Advantage may be taken of him, and oppressive terms exacted by a legal adviser who is in a commanding position by reason of his special knowledge. But the offence of maintenance, apart from the interest of the public generally, is directed primarily, not at the client maintained, but at the other party to the litigation. He has the right to be free from litigation conducted by the assistance of persons working for their own interests, and not in order to give lawful professional aid to the opposing litigant. A champertous agreement between solicitor and client is void therefore, not merely because of an abuse of the confidential relationship between solicitor and client, but because the agreement involves a continuing wrong—namely, the maintenance of the litigation against the opposing party. If this view is correct, it appears to me that it follows that in conducting a litigation under such an agreement as this the solicitor is performing an illegal

act, or rather a series of illegal acts, and cannot recover remuneration for such acts performed at his client's request. In other words, the consideration is illegal.

But, in fact, it matters not whether the consideration is illegal. The purpose of the contract is illegal—namely, the champertous maintenance of the litigation—and for services rendered to effectuate an illegal purpose no one in our courts can recover remuneration: *Scott* v. *Brown, Doering, McNab & Co.* (5). The brokers in that case had performed lawful services—namely, bought shares on the Stock Exchange and paid money on account of the defendant. Nevertheless, as they had so bought in pursuance of an agreement to which they and their client were privy to deceive the public as to the true price of the shares, the court refused to allow them to recover for money paid. It is said that, if maintenance and champerty are illegal in this sense, the proceedings in the litigation would be void. That they are not is clear. It is hardly necessary to cite authority, for it is undisputed that the measure of damages in an action for maintenance includes the costs which the plaintiff has incurred in the maintained action, and upon the decision in *Neville* v. *London "Express" Newspaper, Ltd.* (17), he cannot recover anything but nominal damages unless the action has been decided in his favour. This assumes that the litigation between the parties, though maintained on the one side, results in an effective and valid determination of rights. I can see no difficulty in this. The proceedings ex hypothesi are being maintained against an innocent party. They may result in advantage to him; in any case they are proceedings which involve the exercise by the court of its judicial authority. To set the procedure of the court in motion for a particular object may be unlawful; but the proceedings themselves remain valid. They vitally concern two parties at least not privy to the illegality—namely, the opposing litigant and the court itself. I should not expect, therefore, to find the proceedings, though unlawfully maintained, to be declared void; though I reserve my opinion whether the court, on being satisfied that pending proceedings are being unlawfully maintained, has not power to stay them as being vexatious and oppressive and an abuse of the process of the court, and to continue such stay until the court is satisfied that the proceedings are purged of the taint of illegality.

It is necessary to deal with *Grell* v. *Levy* (7), which was strongly relied on by the plaintiff. There an attorney had been given in France a written retainer to recover a debt in England. His sole remuneration was to be a half share of the amount recovered. He conducted the necessary litigation in England, and recovered from the defendant for the plaintiffs £500 for debt and £170 for costs. He subsequently paid over to the plaintiffs £300 retaining for himself £200 and the costs. This was the result of a subsequent agreement made between himself and the plaintiffs which the jury at the trial found to have been induced by the fraud of the defendant: see 12 W.R. at p. 379. The plaintiffs claimed from the defendant the balance of the sum received by him, i.e., £370. Verdict was entered at the trial for the defendant subject to leave to the plaintiff to move for judgment non obstante veredicto. Counsel for the plaintiffs obtained a rule to enter the judgment for them for alternative sums set out at p. 76 of the report in 16 C.B.N.S. On the hearing the court found that the agreement was illegal, and gave judgment for plaintiffs for the balance of £370 less £210, which consisted of £170 costs as between party and party and £40 costs as between solicitor and client. It is to be noticed that on the hearing of the rule counsel for the plaintiffs were not called on, and there appears to have been no argument whether the deduction should be allowed or not. The decision may be supported on the ground that the plaintiffs were the actors in the litigation; they were seeking in an action for money had and received to claim the proceeds of work done by the defendant, and the court may well have held that the plaintiffs could not approbate the acts of their agent the solicitor without compensating him for the services which procured for them the proceeds they claimed in the action. This explanation, I think, covers all the cases cited where (generally it must be said without discussion) courts of equity have allowed defendants their costs in relation to champertous proceedings. But in *Grell* v.

Levy (7) ERLE, C.J., after finding the agreement to be illegal, says (16 C.B.N.S. at p. 79): "The agreement being out of the way, the defendant is remitted to his ordinary rights upon his retainer as attorney for the plaintiffs." The only retainer suggested in the report is the agreement which confines the solicitor's remuneration expressly to a share of the amount recovered. The view of the learned Chief Justice seems to me, with all respect, contrary to principle, and if the case is an authority for the proposition that a person employed on an express contract to do work for a remuneration that is illegal can, where the special contract fails for illegality, recover upon a quantum meruit, I think it is wrong and should be overruled. The result would be to make the law of champerty as between solicitor and client of very little effect. A solicitor would only have to bargain to receive the champertous sum in addition to his ordinary costs. He would never be in a worse position financially for the illegality. He could always recover as much as an innocent solicitor, and would take his chance of also recovering the fruits of the wrongdoing.

In my opinion, as the common law retainer is admittedly a retainer for the complete action, the solicitor in this case cannot recover any remuneration. Up to the date of the illegal agreement his services are not complete, and if he is prevented by his own act in making an illegal agreement from completing the services lawfully, I see no ground upon which he can sue on a quantum meruit. If a cab is engaged to drive to a particular destination, and halfway the driver is informed by his fare that he is proceeding thither to execute a burglary, and the driver proceeds, can he recover the fare or half of it? I think not. The controversy in this case appears to me to be determined by the answer to the question whether champerty is a form of maintenance or not. It appears to me that there is a range of authority from SIR EDWARD COKE to LORD FINLAY which answers this in the affirmative. In the event the objection in this, as in most cases of illegality, may sound very ill in the mouth of the defendant. But, as LORD MANSFIELD said in *Holman* v. *Johnson* (8) (1 Cowp. at p. 343):

> "It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: Ex dolo malo non oritur actio. . . . It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

The result is, in my judgment, that the plaintiff fails upon his bill of costs in *Simpson* v. *Simpson*. I agree with the judgment of BANKES, L.J., on the other parts of the case and with the order stated by him.

Appeal allowed in part.

Solicitors: *Wild & Co.*; *Jacksons, Elwell & Curran.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re DUNSTAN. DUNSTAN *v.* DUNSTAN

[CHANCERY DIVISION (Neville, J.), July 22, 1918]

[Reported [1918] 2 Ch. 304; 87 L.J.Ch. 597; 119 L.T. 561; 63 Sol. Jo. 10]

Will—Repugnancy—Real estate—Successive limitations to devisees absolutely—First devisee predeceasing testator—Acceleration of later devise by failure of earlier devise.

Where real estate is devised by successive limitations to several persons absolutely the doctrine of repugnancy does not apply where the first devisee dies in the lifetime of the testator, and the failure of the earlier devise thus has the effect of accelerating, not destroying, the later devise.

Principle stated in *Re Lowman, Devenish* v. *Pester* (1), [1895] 2 Ch. 348, extended to real estate.

The testatrix devised to B., her executor, "the whole of my freehold properties . . . for his sole use and benefit absolutely, subject to the following bequests." There followed a bequest of an annuity of £10 to the testatrix's cousin and then the words, "I desire that after [B.'s] death whatever of my freehold properties shall remain shall be given to the Homes of Dr. Barnardo." B. predeceased the testatrix.

Held: though, if B. had survived the testatrix, the devise to Dr. Barnardo's Homes would have failed as being repugnant to the devise to B. absolutely, B. having predeceased the testatrix, the doctrine of repugnancy did not apply and the devise to Dr. Barnardo's Homes took effect absolutely subject to liability for the annuity.

Notes. As to variation of interests given by a will, see 34 HALSBURY'S LAWS (2nd Edn.) 338. For cases on the effect of a gift over of property undisposed of, see 44 DIGEST 962 et seq.

Case referred to:

(1) *Re Lowman, Devenish* v. *Pester*, [1895] 2 Ch. 348; 64 L.J.Ch. 567; 72 L.T. 816; 11 T.L.R. 396; 12 R. 362, C.A.; 44 Digest 428, *2575*.

Also referred to in argument:

Re Jones, Richards v. *Jones*, [1898] 1 Ch. 438; 67 L.J.Ch. 211; 78 L.T. 74; 46 W.R. 313; 42 Sol. Jo. 269, 44 Digest 964, *8171*.

Re Pounder, Williams v. *Pounder* (1886), 56 L.J.Ch. 113; 56 L.T. 104; 44 Digest 964, *8175*.

Constable v. *Bull* (1849), 3 De G. & Sm. 411; 18 L.J.Ch. 302; 13 Jur. 619.

Re Sanford, Sanford v. *Sanford*, [1901] 1 Ch. 939; 70 L.J.Ch. 591; 84 L.T. 456; 44 Digest 562, *3800*.

Originating Summons.

By her will, dated May 4, 1895, Agnes Dunstan directed her executor thereinafter named to pay her just debts and testamentary expenses as soon as convenient after her decease, and the will concluded:

"I give, devise, and bequeath to my dear cousin the Reverend James Hawkey Banfield . . . the whole of my freehold properties, bank shares, moneys, furniture, plate, pictures, silver, and whatsoever I may be possessed of at my death for his sole use and benefit absolutely, subject to the following bequests: First, I desire that my executor hereinafter named shall pay to my cousin Amelia Rosewarne . . . the sum of ten pounds per year to be paid quarterly out of my estate as long as she shall live. Secondly, I desire that after my executor's death whatever of my freehold properties shall remain shall be given to the Homes of Doctor Barnardo at Stepney and elsewhere for the sole benefit of the institution for ever. I nominate, constitute, and appoint my cousin

aforesaid, the Rev. James Hawkey Banfield . . . to be my sole executor to carry out these bequests to the best of his ability."

The Rev. James Hawkey Banfield died on Oct. 26, 1915, and the testatrix died on Feb. 28, 1917. On July 3, 1917, the plaintiffs, the legal personal representatives of the testatrix, took out this originating summons to determine whether the freehold properties of the testatrix, subject to due provision being made for the annuity bequeathed by her will, were undisposed of or whether the defendants, Dr. Barnardo's Homes, took any and what interest therein. The other defendants were the legal personal representatives of John Dunstan, who survived the testatrix, but had since died, and who claimed to be the heir-at-law and one of the next-of-kin of the testatrix.

Harman for the plaintiffs.
Luxmoore for the executors of the heir-at-law.
Fuller for Dr. Barnardo's Homes.

NEVILLE, J.—The testatrix, after directing payment of her debts and testamentary expenses and appointing an executor, gave to him the whole of her freehold properties, bank shares, moneys, furniture, plate, pictures, silver, and whatsoever she might be possessed of at her death for his sole use and benefit absolutely. Stopping there for a moment, that is an absolute gift. But then come the words "subject to the following bequests"; and, first, she desired that her executor should pay to her cousin £10 a year, to be paid out of her estate, and that, I think, may be a charge upon both the real and personal estate; then, secondly, that after her executor's death whatever of her freehold properties should remain should be given to the homes of Dr. Barnardo for the sole benefit of the institution for ever.

On the construction of the will I do not think that the absolute interest in the freeholds given to the executor is cut down to a life interest with a gift over to the charity, and I think that on the whole here it is difficult to say there is not a repugnancy between the two gifts in spite of the words "subject to the following bequests," and therefore if the executor, Banfield, had survived the testatrix I would have held that he took absolutely, and the gift to the Barnardo Homes would have failed. But, he having died in her lifetime, there arises the question whether the principle of the decision in *Re Lowman, Devenish* v. *Pester* (1) is applicable. That was a case of leaseholds, and LINDLEY, L.J., said ([1895] 2 Ch. at p. 354):

> "A bequest of personalty to a person in tail is a bequest to him absolutely; and a bequest to someone else, subject to the interest given to him, is repugnant and void if the legatee survives the testator; and it is contended that it is so even if he does not."

There the proposition is explicitly stated. Then the learned lord justice goes through the authorities, which are all cases of personal estate, and said (ibid. at p. 357):

> "The principle which I gather from these cases is, that where there are successive limitations of personal estate in favour of several persons absolutely, the first of them who survives the testator takes absolutely, although he would take nothing if any other legatee had survived and taken; or, in other words, in the case supposed, the effect of the failure of an earlier gift is to accelerate and not to destroy the later gift."

And then he states in clear and forcible language why the doctrine of repugnancy does not apply where the first legatee dies in the lifetime of the testator (ibid. at p. 358):

> "The doctrine of repugnancy has no application to gifts which fail; the doctrine does not come into operation until somebody takes, and it is only those limitations which defeat the interest someone takes that are void, on the ground that they are inconsistent with what is given to him."

Therefore, unless you have a previous taker, the doctrine of repugnancy is not applicable. Here the doctrine does not apply, because the first legatee did not survive the testatrix, and I think this, under the circumstances, amounts to a gift to the Barnardo Homes. But LINDLEY, L.J., expressly limited his decision to personal estate and said (ibid.):

> "Whether, if land be devised to A. in fee, with remainder to B. in fee, B. can take if A. dies in the testator's lifetime, is a question which does not arise on the present occasion, and on which I say nothing."

Having regard, however, to the judgments of the Court of Appeal in *Re Lowman, Devenish* v. *Pester* (1), I can see no sound distinction which can be drawn between real and personal estate, and, extending the principle of that decision, as I now do, to real estate, I come to the conclusion that, the first devisee of the freehold having died in the lifetime of the testatrix, the gift to Dr. Barnardo's Homes takes effect subject to any liability in respect of the payment of the annuity.

Solicitors: *Kingsford, Dorman & Co.*, for *C. L. Carlyon*, Truro; *Nisbet, Daw & Nisbet.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

DANIEL *v.* ROGERS. Ex parte FANTINI

[COURT OF APPEAL (Pickford, Bankes and Scrutton, L.JJ.), May 14, 1918]

[Reported [1918] 2 K.B. 228; 87 L.J.K.B. 1149; 119 L.T. 212; 62 Sol. Jo. 583]

Business Names—Registration—Default—Right arising under or out of business contract—Enforcement—Assignment of business and stock-in-trade to defaulter—Defaulter in possession of goods—Claim to goods by judgment creditor of assignor—Registration of Business Names Act, 1916 (6 *& 7 Geo.* 5, *c.* 58), *s.* 8 (1).

Section 8 (1) of the Registration of Business Names Act, 1916, provides that: "Where any . . . person by this Act required to furnish a statement of particulars . . . shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise. . . ."

By an assignment of Jan. 9, 1917, the claimant bought the goodwill and stock-in-trade of one R.'s business at No. 955, Fulham Road, and she took possession of the premises and stock-in-trade on Jan. 17. The claimant did not carry on business in her true name, and she had not registered, as was required, under s. 1 (b) of the Registration of Business Names Act, 1916. On June 12, 1917, the plaintiff, the judgment creditor of R., took in execution some of the stock-in-trade purchased by the claimant. In interpleader proceedings in which she claimed the goods the claimant produced the assignment of Jan. 9, but it was contended by the execution creditor that she was precluded by s. 8 (1) of the Act of 1916 from enforcing any right to the goods. The county court judge gave judgment for the claimant and his decision was upheld by the Divisional Court. On appeal by the judgment creditor,

Held: the claimant was not precluded by s. 8 (1) of the Act from enforcing her right to the goods as her right at the time of the execution was based on her common law title by possession and did not arise under or out of her contract with R.

Quære: whether s. 8 (1) was intended to apply to the enforcement of a contract except as between parties to it.

Notes. As to registration of business names, see 32 HALSBURY'S LAWS (2nd Edn.) 634 et seq.; and for cases see 43 DIGEST 268 et seq. For the Registration of Business Names Act, 1916, s. 8, see 25 HALSBURY'S STATUTES (2nd Edn.) 1151.

Cases referred to:

(1) *Gadsden* v. *Barrow* (1854), 9 Exch. 514; 2 C.L.R. 1063; 23 L.J.Ex. 134; 2 W.R. 241; 156 E.R. 220; 43 Digest 515, *529*.

(2) *Armory* v. *Delamirie* (1722), 1 Stra. 505; 93 E.R. 664; 43 Digest 520, *579*.

(3) *Burton* v. *Hughes* (1824), 2 Bing. 173; 9 Moore, C.P. 334; 3 L.J.O.S.C.P. 241; 130 E.R. 272; 3 Digest (Repl.) 120, *394*.

(4) *Sutton* v. *Buck* (1810), 2 Taunt. 302; 127 E.R. 1094; 3 Digest (Repl.) 120, *387*.

Also referred to in argument:

Kemp v. *Lewis*, [1914] 3 K.B. 543; 83 L.J.K.B. 1535; 111 L.T. 699; 7 B.W.C.C. 422, C.A.; 24 Digest (Repl.) 1100, *474*.

Appeal by the plaintiff from a decision of the Divisional Court.

The plaintiff obtained judgment on Jan. 31, 1917, against the defendant, one Rogers, who carried on business at No. 955, Fulham Road. By an assignment of Jan. 9, 1917, the defendant had assigned to the claimant, whose true name was Miss Fantini, the goodwill and stock-in-trade of his business, and had ceased to have any further connection with the business, though his name remained over the door of the premises till towards the end of May, 1917. On Jan. 17, 1917, the claimant, who carried on a business as a costume maker elsewhere under the name of Laurette, went into occupation of the premises at No. 955 Fulham Road, and carried on business there under the name of Laurette, combining the new business with her former business. The claimant had not registered herself under the Registration of Business Names Act, 1916, as she was required to do by s. 1 (b) of the Act. On June 12, almost six months after the claimant had been in possession of the goods, the plaintiff, the execution creditor of the defendant, put in an execution at No. 955, Fulham Road, on the stock-in-trade assigned by the defendant to the claimant. The claimant claimed the goods, and at a trial of an interpleader issue put in evidence the assignment of Jan. 9. The county court judge found that there had been a genuine sale of the business followed by actual possession by the claimant before the execution, and he held that the claimant was not precluded by s. 8 (1) of the Act of 1916 from enforcing any right to the goods, and he gave judgment for her. His decision was affirmed by the Divisional Court. The plaintiff, the execution creditor, appealed.

The Registration of Business Names Act, 1916, provides as follows:

"Section 1 (b). Every individual having a place of business in the United Kingdom and carrying on business under a business name which does not consist of his true surname without any addition other than his true Christian names or the initials thereof . . . shall be registered in the manner directed by this Act."

Section 7 imposed a penalty for default in registration.

"Section 8 (1). Where any firm or person by this Act required to furnish a statement of particulars or of any change in particulars shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required

to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise: Provided always as follows: (a) The defaulter may apply to the court for relief against the disability imposed by this section, and the court . . . may grant such relief [on certain conditions]. (b) Nothing herein shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid."

David, K.C., and *Coumbe* for the execution creditor.
Woolf, for the claimant, was not called upon to argue.

PICKFORD, L.J.—In the interpleader proceedings the execution creditor contended that the claimant, Miss Fantini, who was carrying on business as Laurette, but was not registered under the Registration of Business Names Act, 1916, as she should have been, was not entitled to claim the goods, because the contract having been entered into in relation to the business could not be enforced against him. The county court judge and the Divisional Court held, I think rightly, that the claimant was not enforcing or claiming to enforce this contract or any right under or arising out of it against the execution creditor, but that she merely said: "These are my goods: I bought them; I have been in possession of them six months, and you, the execution creditor, have no right to take them; and it does not matter so far as you are concerned whether the contract by which I got them from Rogers is or is not enforceable as between him and me."

I entertain considerable doubt whether this Act was ever intended to apply to the enforcement of a contract except as between the parties to it. The provisos to s. 8 (1) seemed to me to point in that direction, certainly provisos (a) and (c) do so, but it is unnecessary, and I do not propose to decide this point, and, even assuming, however, that the application of s. 8 extends beyond the immediate parties to a contract, I am of opinion that the claimant was not enforcing a right under or arising out of the contract against the creditor. On her behalf it is said that she was in possession of the goods, and the fact that she was in possession of them by virtue of a contract which she could not enforce is quite immaterial as regards the creditor. On behalf of the creditor the case was argued as if the Act said that a contract in the circumstances of this case was void, but it does not say so. If the contract were void, the claimant would have to rely on bare possession. I do not say that would not be enough, until it was displaced. If the contract were void it might possibly be open to the creditor to say that the goods in question belonged to Rogers. That point, however, does not arise, for Parliament, when it desires to say that a particular contract shall be void, knows how to say so, and has not said so here.

In his judgment in the Divisional Court A. T. Lawrence, J., said ([1918] 1 K.B. at p. 152):

"Miss Fantini is not claiming to enforce rights arising out of or under that contract. She is saying that the goods are her goods, that she was in possession of them, and that the seizure was wrongful because the goods were hers. She is right if she is not enforcing rights under or arising out of the contract. It is true that by way of historical narrative, and to show the bona fides of the transaction, she produced the assignment and the other facts which I have mentioned were proved, but she was not seeking to enforce rights under or out of the contract";

and Shearman, J., said (ibid. at p. 154):

"She was not enforcing a right 'under or arising out of any contract,' words which must mean springing immediately out of the contract, and at the particular moment the claimant's right did not arise out of the contract. Her right rested originally on the contract, but at the time in question it rested on her common law right of property."

I agree with those passages. The appeal must be dismissed.

BANKES, L.J.—I agree. Counsel for the execution creditor contended, first, that the effect of ss. 1 and 7 of the Act was to render void the contract as between the claimant, Miss Fantini, and Rogers. I do not agree. Those sections are dealing with the necessity for registration and the imposition of a penalty in respect of any failure to register; they are silent as to the effect of non-registration upon any contract made by a person before registration. Section 2 of the Moneylenders Act, 1900, contains a provision that a moneylender shall be registered, and imposes a penalty for non-registration; but it also provides that he shall not enter into any agreement in the course of his business as a moneylender otherwise than in his registered name. If this Act had contained any analogous provision the contract between the claimant and Rogers might be void, but there is none. Section 8 says that where a person who ought to be but is not registered enters into a contract, his rights under or arising out of it shall not be enforceable by action or other legal proceeding. In my opinion, those words do not cover a case like this. Primâ facie they mean that the rights under or arising out of the contract are not to be enforceable against the other party to the contract. The section is dealing with cases where there is a refusal to perform the contract or something of that kind. I do not say that the section may not apply to cases other than those arising between the immediate parties—that we have not had fully discussed—but, in my opinion, it does not apply where, as here, it is sought to avoid the contract in the interests of a person not a party to it. The contention for the creditor amounts to this, that where the section uses the words "the rights of that defaulter under or arising out of any contract," it means to say "the rights of that defaulter created by any contract." I do not accept that contention. I agree with SHEARMAN, J., that Miss Fantini was not claiming a right under or arising out of any contract, but a right which had been created by a past contract, and that at the material time her claim rested on her common law right of property.

SCRUTTON, L.J.—Miss Fantini carries on a dressmaker's business under the name of Laurette. She bought the goodwill and stock-in-trade of a similar business from one Rogers, paid for it, and went into possession. It is not suggested that the transaction was fraudulent. A creditor of Rogers then put in execution upon the goods which Miss Fantini had bought, and as I understand the argument, it is said that inasmuch as Miss Fantini was not registered under the Registration of Business Names Act, 1916, she is not entitled to protect the goods against him or anyone else. I think the answer to this argument made by the Divisional Court is right. They said that while the Act prevents a person in default from enforcing, by action or other legal proceeding, any rights arising under or arising out of the contract, Miss Fantini was not enforcing rights under or arising out of the contract, and was entitled to claim the goods by virtue of her common law rights, which arose independently of any contract.

Counsel for the execution creditor questions this on the strength of certain observations of PARKE, B., in *Gadsden* v. *Barrow* (1) (9 Exch. at p. 515). Since *Armory* v. *Delamirie* (2) it has been well established that mere possession is enough to entitle a person to sue, and that he need not show the manner in which possession was obtained. In *Burton* v. *Hughes* (3) trover was brought for certain articles of furniture seized by the defendants under a commission of bankruptcy against one Cross. The plaintiff claimed the goods as being in his possession. In answer, it was said that he obtained possession of them under a written agreement, and that as he failed to produce it he was not entitled to maintain the action. The court held that it was immaterial that the plaintiff's possession arose under the written agreement, because his possession was sufficient to support trover without ascertaining the nature of his interest. That case was decided on the authority of *Sutton* v. *Buck* (4), which is nearer the present case. There it was held that possession of a ship under a transfer, void for non-compliance with the register Acts, was a sufficient title in trover against a stranger for parts of the ship which had been wrecked.

The view taken in this case by the Divisional Court is in accordance with the doctrine of the common law. That is independent of what the statute means, but I desire to say, although it is not necessary finally to decide the point, that in my view the application of s. 8 is limited to proceedings between the parties to the contract. It is quite true that the words are general, but one is always at liberty to limit general words by a consideration of consequences that would follow if too wide a meaning were given to them. If the contention of counsel for the execution creditor is right, a foreign butcher, carrying on business here under an English name and not registered under this Act, might find people walking into his shop and taking his meat, and he would be unable to make them pay for it. Or, again, a foreign market gardener who had bought a piece of land of which he had been in possession for a number of years would, if trading under a different name and not registered under the Act, be unable, if people trespassed on his land, to protect himself, because, according to the argument, he would be enforcing a right under or arising out of the contract by which he purchased the land. Unless very strong words are used compelling us to accept that construction, I should be slow to believe that the legislature intended anything so startling. The language of the section seems to me to be amply satisfied by applying it only to proceedings between the parties to the contract, but it is sufficient to affirm the decision on the same ground as that taken by the Divisional Court, which is independent of the exact meaning of the words of the section.

Appeal dismissed.

Solicitors: *C. V. Whitgreave*; *Merton & Steel.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

Re SAVAGE. CULL *v.* HOWARD

[Chancery Division (Sargant, J.), May 28, 1918]

[Reported [1918] 2 Ch. 146; 87 L.J.Ch. 599; 119 L.T. 337; 65 Sol. Jo. 620]

Executor—Retainer—Retainer of amount of debt against specific legacy of stock.

By her will, S. specifically bequeathed sums of colonial stock to H., who had borrowed money from her.

Held: S.'s executor had no right to retain the amount of H.'s debt out of the stock since it was not money, although it was something like money or which might easily be turned into money.

Per **Curiam**: an executor's right where a legacy has been given to a debtor of the testator is, notwithstanding observations by Kekewich, J., in *Re Akerman* (1), [1891] 3 Ch. 212, properly called a right of retainer.

Notes. As to the right of retainer, see 16 Halsbury's Laws (3rd Edn.) 307 et seq.; and for cases see 23 Digest (Repl.) 373 et seq.

Cases referred to:

(1) *Re Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 212; 61 L.J.Ch. 34; 65 L.T. 194; 40 W.R. 12; 23 Digest (Repl.) 448, *5163*.

(2) *Cherry* v. *Boultbee* (1839), 2 Keen, 319; 4 My. & Cr. 442; 9 L.J.Ch. 118; 3 Jur. 1116; 41 E.R. 171, L.C.; 4 Digest (Repl.) 452, *3967*.

(3) *Re Taylor*, *Taylor* v. *Wade*, [1894] 1 Ch. 671; 63 L.J.Ch. 424; 70 L.T. 556; 42 W.R. 373; 38 Sol. Jo. 288; 8 R. 186; 23 Digest (Repl.) 448, *5164*.

Also referred to in argument:

Re Milnes, Milnes v. *Sherwin* (1885), 53 L.T. 534; 33 W.R. 927; 23 Digest (Repl.) 450, *5187.*

Ballard v. *Marsden* (1880), 14 Ch.D. 374; 49 L.J.Ch. 614; 42 L.T. 763; 28 W.R. 914; 23 Digest (Repl.) 448, *5162.*

Re Peruvian Railway Construction Co., Ltd., [1915] 2 Ch. 442; 85 L.J.Ch. 129; 113 L.T. 1176; 32 T.L.R. 46; 60 Sol. Jo. 25, C.A.; 10 Digest (Repl.) 1075, *7434.*

Re Dacre, Whitaker v. *Dacre*, [1916] 1 Ch. 344; 85 L.J.Ch. 274; 114 L.T. 387; 60 Sol. Jo. 306, C.A.; 23 Digest (Repl.) 455, *5243.*

Courtnay v. *Williams* (1844), 3 Hare, 539; affirmed, 15 L.J.Ch. 204; 6 L.T.O.S. 517, L.C.; 23 Digest (Repl.) 449, *5179.*

Campbell v. *Graham* (1831), 1 Russ. & M. 453; 9 L.J.O.S.Ch. 234; 39 E.R. 175; on appeal, sub nom. *Campbell* v. *Sandford* (1834), 8 Bli.N.S. 622, H.L.; 23 Digest (Repl.) 446, *5147.*

Originating Summons.

In 1896, A. Savage, a spinster, by her will bequeathed to A. K. Howard her investments of £1,150 in Queensland Stock and Victorian Inscribed Government Stock, for her sole use and benefit absolutely, and, after certain other bequests, gave her residuary estate to A. S. Cull, and, if A. S. Cull predeceased her, then to her children. A. S. Cull predeceased the testatrix leaving children who survived the testatrix. A. K. Howard, who was the testatrix's intimate friend, got into financial difficulties and in 1903 borrowed £500 from the testatrix on a promissory note. She paid interest in 1904, but her business shortly after failed and she paid no more interest, and the evidence was that the testatrix never asked her for it and said she need not worry as she would destroy the note. After the death of the testatrix, the executor found the note and issued this summons to determine the question whether he, as executor, ought to retain any, and what, portions of the stocks specifically bequeathed to A. K. Howard so as to answer that legatee's debt to the testatrix.

J. Israel for the plaintiff, the executor.
Romer, K.C., and *Ashton Cross* for Mrs. Howard.
Rolt, K.C., and *Dighton Pollock* for the residuary legatees.

SARGANT, J., stated the facts, and continued: The question is whether the executor can retain the Queensland and Victoria stocks to satisfy Mrs. Howard's indebtedness to the testatrix.

Notwithstanding what was said by KEKEWICH, J., in *Re Akerman* (1), I think that the right, where it exists, is properly called one of "retainer." In *Cherry* v. *Boultbee* (2) (4 My. & Cr. at p. 447), LORD COTTENHAM, L.C., says:

> "It must be observed that the term 'set-off' is very inaccurately used in cases of this kind. In its proper use, it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by a creditor to the debtor, to pay a debt due from him to the creditor's estate, is rather a right to pay out of the fund in hand than a right of set-off."

"Pay out of" there means pay himself out of. LORD COTTENHAM then says:

> "Such right of payment, therefore, can only arise where there is a right to receive the debt so to be paid; and the legacy or fund, so to be applied in payment of the debt, must be payable by the person entitled to receive the debt."

You can, therefore, only exercise the right of retainer in respect of a debt which is due and a fund which is payable in the other direction. In *Re Akerman* (1), KEKEWICH, J., held that the right—he objected to the expression "right of retainer"—applied not only where the debtors to the estate were entitled to shares in the

residuary personalty, but also where they were entitled to share in the proceeds of the residuary realty—there being there a common residue of realty and personalty. But he recognised that there was no right of retainer out of a specific legacy or out of a specific gift of freehold or leasehold property. Throughout his judgment in *Re Taylor* (3), CHITTY, J., although *Re Akerman* (1) had been cited to him, deliberately used the expression "right of retainer" or "doctrine of retainer." He says ([1891] 3 Ch. at p. 219):

> "The law is settled that as against a specific devise which is outside the duties of the executors there is no retainer. It is equally plain that in the case of a specific bequest of leaseholds there is likewise no right of retainer. The two things cannot be measured one against the other, and the same rule prevails also in the case of specific chattels. If in such cases the right did exist it would be, not a right of retainer, but of lien."

Here CHITTY, J., recognises what is laid down by LORD COTTENHAM in the passage which I have quoted from *Cherry* v. *Boultbee* (2), that to have the right of retainer there must be money in the shape of a debt on the one side and money on the other side. If what the executor holds is not money, he cannot pay himself the debt out of it by way of retainer, or if the right existed otherwise than by way of something like a lien.

Counsel for the residuary legatees has argued that the stock can easily be sold, and, therefore, that immeasurability does not exist here. His argument is ingenious, but inconsistent with what has been laid down in previous cases. You must have money against money, and the fact that the gift to the debtor is something like money, or something which may be easily turned into money, does not give the executor the right claimed. I hold, therefore, that the executor in this case is not entitled to retain the stocks bequeathed to Mrs. Howard, or any part of them, against her debt to the testatrix.

Solicitors: *Bertie F. Browne*; *T. H. Hiscott*; *A. J. Carruthers.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

PEARL MILL CO., LTD. *v.* IVY TANNERY CO., LTD.

[KING'S BENCH DIVISION (Rowlatt and McCardie, JJ.), October 17, 1918]

[Reported [1919] 1 K.B. 78; 88 L.J.K.B. 134; 120 L.T. 28; 24 Com. Cas. 169]

Sale of Goods—Contract—Cancellation—"Delivery as required"—Part of goods delivered as required—No request by buyer for further deliveries during unreasonable time.

Where there is a contract for the sale of goods "delivery as required," and the seller delivers portions of the goods in successive instalments and then makes no further deliveries and the buyer does not request any further deliveries over an unreasonable space of time, the seller, before he can cancel the contract, is not bound to give notice to the buyer that, if the buyer does not request further deliveries, he (the seller) will cancel the contract.

Jones v. *Gibbons* (1) (1853), 8 Exch. 920, explained.

Notes. Considered: *Fisher, Ltd.* v. *Eastwoods, Ltd.*, [1936] 1 All E.R. 421. Referred to: *Hartley* v. *Hymans*, [1920] All E.R.Rep. 328.

As to delivery of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 91 et seq.; and for cases see 39 DIGEST 662 et seq.

Cases referred to:

(1) *Jones* v. *Gibbons* (1853), 8 Exch. 920; 1 C.L.R. 461; 22 L.J.Ex. 347; 1 W.R. 438; 155 E.R. 1626; 39 Digest 554, *1613*.

(2) *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 22 W.R. 370; 39 Digest 568, *1746*.

(3) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest 290, *1032*.

(4) *Cornish* v. *Abington* (1859), 4 H. & N. 549; 28 L.J.Ex. 262; 7 W.R. 504; 157 E.R. 956; 21 Digest 290, *1034*.

Appeal from Oldham County Court.

On Sept. 26, 1913, a contract in writing was made between the defendants, by their representative Mills, and the plaintiffs for the sale by the defendants to the plaintiffs of fifty dozen red Welsh roller skins at 27s. per dozen, "delivery as required." Under the contract, twenty dozen skins were delivered between Nov. 19, 1913, and Sept. 29, 1914, by the defendants to the plaintiffs, at the plaintiffs' request, in four lots of five dozen each, leaving thirty dozen skins undelivered. From Sept. 29, 1914, to July 13, 1917, no further deliveries were made by the defendants, nor were any requested by the plaintiffs, whose manager had forgotten the existence of the contract. Mills left the service of the defendants in June, 1915. In July, 1915, the plaintiffs gave Mills a personal order for fifty dozen skins of the same kind and at the same price as those in the contract of Sept. 26, 1913, of which they took delivery. Between June, 1915, and April, 1916, a representative of the defendants called on the plaintiffs and asked for further orders, but he received none. On Nov. 15, 1915, the defendants by letter offered to the plaintiffs a small parcel of skins similar to those previously supplied, but the plaintiffs replied that they had bought some time before their requirements for the next year. On July 13, 1917, the plaintiffs wrote to the defendants requesting the delivery of the remaining thirty dozen skins under the contract of 1913. On July 14, 1917, the defendants replied saying that the plaintiffs had taken delivery at the rate of five dozen skins per quarter up to Sept. 29, 1914, and that, as there had been no deliveries since then, the contract expired in March, 1916. On July 17, 1917, the plaintiffs replied that the delay was caused by the change in representatives, and insisting on delivery. As the defendants still contended that the contract was cancelled, the plaintiffs sued to recover £70 10s. as damages for breach of the contract, being the difference between the price of thirty dozen skins under the contract and the market price on July 14, 1917. The defendants gave no evidence that they at any time had requested the plaintiffs to take delivery of the remaining thirty dozen skins. The county court judge found that the plaintiffs had decided to abandon the contract, and, in any case, that they behaved in such a way that the defendants reasonably believed that the plaintiffs considered that the contract was at an end. He, therefore, gave judgment for the defendants. The plaintiffs appealed.

T. Eastham for the plaintiffs.
Claughton Scott for the defendants.

ROWLATT, J.—In my judgment, this appeal fails. The question is whether *Jones* v. *Gibbons* (1) in effect lays down the proposition that a contract of this kind cannot come to an end by reason of lapse of time without steps being taken such as the giving of a notice as in that case. I do not think that case does anything of the kind. It was decided on a demurrer to the replication, which raised the question of the goodness or badness of the plea. The plea simply stated that the plaintiff did not "within a reasonable time after the making of the contract request the defendant to deliver the iron." The first point decided was that, where goods were to be delivered as required, that requirement must be within a reasonable time. Then it was said, "but if the defendant wants to put an end to the contract on the ground that a reasonable time has expired, he must give notice to that

effect." That decision deals with the position where the only point taken is that the plaintiff is in default by not asking for delivery within a reasonable time. He may be anxious to keep the contract, but he will not come up to the point of making a demand for delivery. Then the defendant can bring him to the point by saying, "I shall cancel unless you ask for delivery by such and such a day," but he cannot bring the contract to an end by doing nothing and merely pleading that a reasonable time has elapsed. This is not that case. It does not turn in that sense on what is a reasonable time, but on a lapse of time which may be very much more than what would be a reasonable time for the purposes of the question in *Jones* v. *Gibbons* (1). It turns on a lapse of time allowed to pass by both sides so long as to raise the inference that both parties thought that each of them had treated this contract as at an end. As I understand it, the county court judge took that view. He said:

> "There are two entirely different ways in which a contract can be put an end to; one is by the machinery of *Jones* v. *Gibbons* (1), and the other is by the operation of the principles which, although the facts and the form of the application of the principles are entirely different, are to be found in cases like *Freeth* v. *Burr* (2)—that is to say, when both parties apprehend that the other abandons the contract."

He thought that the second principle applied, and that the time had been so long that it was not merely the lapse of a reasonable time, giving to the vendor the chance of getting rid of his contract by giving notice to the vendee, but that the lapse of time had been so long on both sides that the proper inference was that each party was justified in assuming that the matter was off altogether. If that is so, the only question is whether there were materials on which he could come to that conclusion. I think that there were. The time alone was really enough. It seems to me it was a pure question of fact, and, therefore, we cannot interfere with this decision.

MCCARDIE, J.—I agree. I think that the point before us is one of considerable commercial importance. The words "as required" appear in a very large number of commercial contracts throughout the country. Those words were interpreted in *Jones* v. *Gibbons* (1), and it was there held that, where they appear in a contract, the mere lapse of time did not entitle the vendor to put an end to the contract; before he could take that course he must give notice to the vendee. I regard *Jones* v. *Gibbons* (1) as a well-settled weighty authority, but, in my view, it in no way conflicts with other and well-known principles of law, such as that which permits parties to rescind, or that which leaves the court to infer the abandonment of contractual obligations. Contracts for the sale of goods frequently require the performance of acts by a vendee before the obligation of delivery falls or becomes imperative on the vendor—for example, where the class of goods, the size, the quantities, must be specified by the purchaser. In such a contract, where the words "as required," or like words, do not appear, then I infer that, on the passing of a reasonable time, the vendee will have lost his rights to call on the vendor to deliver; but where the words "as required" appear, then a particular duty is cast on the vendor by virtue of the decision in *Jones* v. *Gibbons* (1). Reasonable time is, of course, a matter which depends on the nature of the contract, its terms, the class of goods, the practice of the trade, and the general circumstances of the case. In my opinion, where the contract is one within *Jones* v. *Gibbons* (1), it is clear that the mere lapse of a reasonable time does not ipso facto deprive the vendee of his rights; but, as my brother has pointed out, that rule in no way prevents the operation of the other rules of law which are applicable to contracts. Mere delay or mere lapse of reasonable time is one thing, but an inordinate lapse of time is a wholly different thing. The former may not give rise to the implication of abandonment; the latter may do so.

In this case, I am satisfied that the judge has come to the conclusion that the lapse of time under the circumstances was so great as to lead him to the conclusion

that the parties had mutually abandoned the contract. The delay was indeed serious, and the circumstances pointed to the conclusion that neither party continued to have the contract in mind. I think there was ample evidence on which the judge could come to the conclusion as to abandonment.

There is one further ground on which, in my opinion, on the facts and documents proved, he could also find a judgment in favour of the defendants—that is, on the principle of estoppel which is represented by the well-known common law cases of *Pickard* v. *Sears* (3) and *Cornish* v. *Abington* (4), and similar authorities. I think, having regard to the documents in this case and to the facts which were proved before him, that the county court judge was entitled to find that the conduct of the plaintiffs was such as reasonably to lead the defendants to the conclusion that the plaintiffs had regarded the contract as at an end. Therefore, whether on the ground of abandonment or estopped, in my opinion, the learned judge was right in the conclusion at which he arrived.

The appeal will be dismissed with costs.

Solicitors: *Chester, Broome & Griffithes*, for *H. Booth & Sons*, Oldham; *Church, Adams, Prior & Balmer*, for *Cobbett, Wheeler & Cobbett*, Manchester.

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

LUCAS *v.* HODSON

[King's Bench Division (Darling, Avory and Salter, JJ.), October 17, 1918]

[Reported [1919] 1 K.B. 6; 88 L.J.K.B. 82; 119 L.T. 742; 83 J.P. 15; 35 T.L.R. 10; 16 L.G.R. 875; 26 Cox, C.C. 336]

Weights and Measures—Coal—Delivery by means of vehicle—No weight ticket—Weights and Measures Act, 1889 (52 & 53 *Vict.*, *c.* 21), *s.* 21.

The appellant, a coal dealer, was in charge of a horse and lorry in a street, the lorry having sacks of coal on it. On being asked by a purchaser to bring her three sacks of coal, the appellant and his assistant carried them from the lorry to the purchaser's house. Each of the sacks contained 1 cwt. and had on it a metal label to that effect. The appellant did not deliver to the purchaser any ticket or note showing the weight of the coal. By the Weights and Measures Act, 1899, s. 21, where any quantity of coal exceeding 2 cwt. is delivered to a purchaser by means of any vehicle, the seller of the coal must deliver therewith, or send by post or otherwise to the purchaser before any of the coal is unloaded, a weight ticket.

Held: there had been delivery by means of a vehicle, and, as the appellant had failed to deliver or send any weight ticket, he was guilty of an offence against s. 21 of the Act.

Notes. As to special provisions in relation to the sale of coal, see 33 Halsbury's Laws (2nd Edn.) 684 et seq.; and for cases see 44 Digest 138 et seq. For the Weights and Measures Act, 1889, s. 21, see 26 Halsbury's Statutes (2nd Edn.) 1266.

Cases referred to in argument:

Knowles & Sons v. *Sinclair*, [1898] 1 Q.B. 170; 67 L.J.Q.B. 67; 77 L.T. 624; 62 J.P. 102; 46 W.R. 188; 42 Sol. Jo. 116; 18 Cox, C.C. 681, D.C.; 44 Digest 140, *82*.

Kyle v. *Dunsdon*, [1908] 2 K.B. 293; 77 L.J.K.B. 547; 98 L.T. 752; 72 J.P. 292; 24 T.L.R. 505; 6 L.G.R. 578; 21 Cox, C.C. 587, D.C.; 44 Digest 140, *77*.

Case Stated by justices for Blackburn.

At a court of summary jurisdiction sitting at Blackburn on Feb. 27, 1918, the respondent, Christopher Hodson, Chief Constable of Blackburn, preferred an information against the appellant, William Lucas, charging that, on Jan. 15, 1918, the appellant, at Blackburn, being the seller of 3 cwt. of coal delivered by means of a vehicle to the purchaser, Geraldine Cunningham, unlawfully did not therewith cause to be delivered to the purchaser, before any part of the coal was unloaded, a ticket according to the form set out in Sched. III to the Weights and Measures Act, 1889, contrary to s. 21 of that Act.

On the hearing of the information the following facts were admitted or proved: On Jan. 15, 1918, the appellant was in charge of a horse and lorry in Nightingale Street, Blackburn. On the lorry were eight sacks of coal, each containing 1 cwt. Three of the sacks were carried by the appellant and his assistant from the vehicle to No. 48, Joseph Street (close to where the vehicle was standing), the purchaser's house, and there delivered. After the delivery, the appellant was asked by a police inspector if he had left a delivery note. The appellant said, "No, it is a mistake; I should have done so." He was told he would be reported for not having delivered a ticket with the weight thereon, and he replied, "Well, it is carelessness on my part." The purchaser had purchased coal from the appellant for about twelve months (3 cwt. each time in sacks each containing 1 cwt.); on the day in question she shouted to the appellant (who was then close to her house with his vehicle) to bring her three sacks of coal, which the appellant delivered, each sack containing a metal label showing that the sack contained 1 cwt.; she paid 4s. 10d. for the coal, but received no weight ticket.

The respondent contended that the appellant, on selling the 3 cwt. of coal to the purchaser, was bound to deliver to the purchaser before any part of the coal was unloaded a ticket or note according to Sched. III, or according to a form to the like effect, and that the object of the Act was that the purchaser of coal exceeding 2 cwt. should have the opportunity of knowing the weight of coal he was to receive, and, when delivered in sacks, the weight in each sack. The appellant contended that the delivery alleged was not a delivery of a quantity of coal exceeding 2 cwt. by means of a vehicle to a purchaser under s. 21 of the Act, but was three separate deliveries of a sack containing 1 cwt. of coal with the metal tally attached to the sack indicating the weight of coal in the sack.

The justices convicted the appellant and fined him 5s. and ordered him to pay £2 7s. costs. The appellant now appealed.

By the Weights and Measures Act, 1889, s. 21:

> "(1) Where any quantity of coal exceeding 2 cwt. is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note according to the form in the Third Schedule to this Act, or according to a form to a like effect. (2) If default is made in complying with the requirements of this section with respect to the delivery or sending of a ticket or note, or if the quantity of coal delivered is less than the quantity expressed in the ticket or note, the seller of the coal shall be liable to a fine. . . ."

A. M. Latter for the appellant.

W. H. Moresby for the respondent.

DARLING, J.—I regret to come to the conclusion that this appeal must be dismissed, for it is perfectly plain that the appellant did nothing dishonest. The only question is whether he complied with the terms of the Weights and Measures Act, 1889, s. 21, and I think he did not. The answer to the question depends on whether he delivered the coal by means of a vehicle. If he did, it was obligatory on him to give the purchaser a ticket in the prescribed form. I think that he did deliver it by means of a vehicle. He brought it to the neighbourhood of the purchaser's house by means of a vehicle, and, therefore, the delivery was partly

effected by means of a vehicle, although it was also partly effected by the appellant himself. Although there are words in the section which seem to indicate that it was intended to refer to a case where the sale of the coal is complete before the vehicle starts, yet I do not think that the section is so plain as to compel us so to hold. The appeal must, therefore, be dismissed.

AVORY, J.—I agree that the evidence shows there was an offence and that the appeal must be dismissed, but I do not share the regret expressed by my Lord at that conclusion, and for this reason. It seems to me that s. 21 of the Weights and Measures Act, 1889, applies equally to honest and to dishonest vendors, for sub-s. (2) expressly provides that a vendor is liable to a penalty not only where he gives an incorrect ticket, but also where he fails to give a ticket at all. This is not the only instance of legislation of this kind, where an honest man is bound to comply with provisions which were enacted for the purpose of preventing dishonesty.

Neither do I assent to the view that s. 21 only applies to a case where a previous contract of sale is being carried out by delivery by means of a vehicle, nor do I agree that this coal was not in fact delivered by means of a vehicle. It has been contended that it was delivered by means of a man or two men. If that contention is sound, the section would only apply where the vehicle is backed up to the house, its contents being shot into the cellar. I am satisfied that that is not the meaning of the section, and, therefore, the conviction was right.

SALTER, J.—I agree. Section 21 is part of an Act which was intended to ensure that buyers of coal should get full weight. The statute effects that object in two ways, (i) by requiring the erection and use of weighing machines, and (ii) by requiring a statutory record of the weight to be delivered to the purchaser. This record is to be delivered or sent where more than 2 cwt. is delivered by means of a vehicle. The only doubt in this case is whether this coal could be said to have been delivered to the purchaser by means of the appellant's coal cart. On the whole, I think that it was so delivered, and, therefore, I agree that the conviction was right.

Appeal dismissed.

Solicitors: *Busk, Mellor & Norris*, for *Henry Backhouse*, Blackburn; *Haslewood, Hare & Co.*, for *Ratcliffes & Higginson*, Blackburn.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

JONES & SON *v.* WHITEHOUSE

[COURT OF APPEAL (Pickford, Warrington and Scrutton, L.JJ.), April 15, 16, 1918]

[Reported [1918] 2 K.B. 61; 87 L.J.K.B. 840; 119 L.T. 92; 62 Sol. Jo. 604]

Costs—Taxation—Action by solicitor to recover amount of bill—Bill delivered more than twelve months previously—No special circumstances—Leave to defend as regards particular items.

Where a solicitor sues by a specially endorsed writ to recover the amount of a bill of costs which has been delivered more than twelve months before action brought and to tax which no application has been made by the client, and the solicitor applies for leave to sign final judgment under R.S.C., Ord. 14, for the amount claimed, the client, where there are no special circumstances entitling him to taxation under s. 37 of the Solicitors Act, 1843, is not entitled to have the bill taxed as a whole; but if he shows a reasonable ground of objection to particular items in the bill as being unreasonable in amount, the court under its general jurisdiction will give leave to defend as regards those items, in order that they may be inquired into either by taxation or otherwise.

Re Park, Cole v. *Park* (1) (1889), 41 Ch.D. 326, applied.

Notes. The Solicitors Act, 1843, was repealed and replaced by the Solicitors Act, 1932, which has been repealed and replaced by the Solicitors Act, 1957. For s. 37 of the Act of 1843, see now s. 69 of the Act of 1957.

As to taxation of costs, see 33 HALSBURY'S LAWS (2nd Edn.) 182 et seq.; and for cases see 42 Digest 159 et seq.

Case referred to:

(1) *Re Park, Cole* v. *Park* (1888), 41 Ch.D. 326; 58 L.J.Ch. 128; 59 L.T. 925; affirmed (1889), 41 Ch.D. 336; 58 L.J.Ch. 547; 61 L.T. 173; 37 W.R. 742, C.A.; 42 Digest 166, *1710*.

Also referred to in argument:

Re Norman (1886), 16 Q.B.D. 673; 54 L.T. 143; 34 W.R. 313; 2 T.L.R. 272; sub nom. *Re Norman, Ex parte Bradwell*, 55 L.J.Q.B. 202, C.A.; 42 Digest 187, *2015*.

Re Boycott (1885), 29 Ch.D. 571; 55 L.J.Ch. 835; 52 L.T. 482; 34 W.R. 26, C.A.; 42 Digest 187, *2014*.

Re Cheesman, [1891] 2 Ch. 289; 60 L.J.Ch. 714; 64 L.T. 602; 39 W.R. 497; 42 Digest 187, *2016*.

Re Woods, Ex parte Ditton (1880), 13 Ch.D. 318; 42 L.T. 161; 28 W.R. 402, C.A.; 42 Digest 168, *1736*.

Hooper v. *Till* (1779), 1 Doug.K.B. 198; 99 E.R. 130; 42 Digest 179, *1882*.

Williams v. *Griffith* (1840), 6 M. & W. 32; 8 Dow. 414; 9 L.J.Ex. 185; 4 Jur. 803; 151 E.R. 310; 42 Digest 179, *1893*.

Cowdell v. *Neale* (1856), 1 C.B.N.S. 332; 26 L.J.C.P. 37; 28 L.T.O.S. 173; 21 J.P. 326; 2 Jur.N.S. 1248; 140 E.R. 137; 42 Digest 178, *1871*.

Re Dawson and Bryan (1860), 28 Beav. 605; 2 L.T. 686; 6 Jur.N.S. 878; 8 W.R. 554; 54 E.R. 498; 42 Digest 167, *1730*.

Storer and Co. v. *Johnson* (1890), 15 App. Cas. 203; 60 L.J.Ch. 31; 62 L.T. 710; 38 W.R. 756; 42 Digest 160, *1609*.

Appeal from an order of SALTER, J., in chambers.

The plaintiffs, a firm of solicitors, by a specially endorsed writ sued a client to recover £64 1s. 3d., the amount of a bill of costs. The bill was delivered in November, 1916, and no application to tax it had been made when the writ was issued in February, 1918. The plaintiffs applied for leave to sign final judgment under R.S.C., Ord. 14. The district registrar refused to refer the bill for taxation and gave leave to sign judgment. On appeal to the judge in chambers, the

defendant in an affidavit alleged that the charges generally were excessive, and, in particular, he objected to three items. The judge affirmed the registrar's decision, and the defendant appealed.

Powers for the defendant.

J. B. Matthews, K.C., and *C. E. Jones* for the plaintiffs.

PICKFORD, L.J.—This case raises a rather unusual point wth reference to R.S.C., Ord. 14. The plaintiffs sued to recover the amount of a solicitor's bill of costs, and took out a summons for leave to sign final judgment under Ord. 14 for the amount of the bill. The bill was delivered more than twelve months before the action was brought.

In my opinion, the contention on either side is put too high. The defendant's contention in effect is this, that, although the client has allowed twelve months to elapse since the bill was delivered without objecting to any of the items and without applying to have the bill taxed, still, even in the absence of special circumstances, if he can show a reasonably plausible objection to some of the items in the bill, he can claim to have the whole bill taxed, as if he had not allowed the twelve months to elapse. I can find no authority for that contention. On the other hand, the plaintiffs' contention seems to go almost to this length, that, if the client has allowed the twelve months to elapse without applying for taxation, and no special circumstances are shown, he cannot contest the reasonableness of any of the items in the bill. This contention seems to me to be contrary to the decision in *Re Park, Cole* v. *Park* (1).

In my opinion, no special circumstances have been shown, and, therefore, taxation of the bill cannot be obtained under the Solicitors Act, 1843. What is the position apart from the Act? At one time it seems that the common law courts would not have allowed an objection to the reasonableness of the items to be taken at nisi prius. That cannot be said to be the law since the decision in *Re Park, Cole* v. *Park* (1). In that case, a firm of solicitors carried in, in an administration action, a bill of costs, but the court treated the matter as if an action at law had been brought on the bill. More than twelve months had elapsed since the delivery of the bill; no special circumstances were shown, and no objection had been made to the bill, and the testator had made a payment on account. STIRLING, J., held that the executor was not estopped from disputing any of the items, and that it should be referred to the taxing master to inquire whether any of the items, which were objected to by the executor, were fair and proper to be allowed and to what amount. The order was as follows:

> "That it be referred to the taxing master to inquire and state whether any and which of the items to be marked by the plaintiff in red ink in the four several bills of costs (describing them), and which the plaintiff, the surviving creditor of the said J. C. Park, shall dispute, are fair and proper to be allowed, and to what amount respectively."

The items were referred to the taxing master as the most appropriate person to deal with them instead of the judge dealing with them himself. The Court of Appeal affirmed that decision. That case, therefore, decides that, although there was no right to have the bill taxed under the Act, if the client could point out any items as being extravagant, he could have those items, and those items alone, inquired into. That was the order made at what was the equivalent to the trial of the action. We have to deal with the matter on an application for leave to sign final judgment under Ord. 14. It seems to me that we must deal with it on the same principle, and we are not entitled to say that, if the defendant can point out items in the bill as being apparently unreasonable, that is enough to entitle him to have leave to defend as to the whole bill and to have the whole bill taxed. If he can specify certain items as being extravagant, and can thus show a plausible ground of defence as to them, he can have those items, and those items only, taxed, but not the whole bill. Though there is no right to have the bill taxed under the Act,

the court may still under its general jurisdiction order any of the items to be inquired into.

Coming to the facts of the present case, in my opinion the affidavit does not show a plausible ground of complaint as to any of the items. I cannot say, therefore, that the learned judge was wrong in deciding that no plausible ground of defence had been shown in respect of any of the items in the bill so as to entitle the defendant to an order to tax those items. The appeal must be dismissed.

WARRINGTON, L.J.—I agree. The sole question which we have to decide is whether the defendant should have leave to defend. The action was brought to recover the amount of a bill of costs. The period during which the bill could have been taxed under the Solicitors Act, 1843, has expired, and no special circumstances have been shown. In *Re Park*, *Cole* v. *Park* (1) the solicitor carried in a claim in an administration action on a bill of costs which had been delivered more than twelve months before, and, therefore, the period during which the client was entitled to have the bill taxed under the Act had expired. STIRLING, J., and the Court of Appeal dealt with the claim as if it were an action at law, and as if the court were dealing with it at the trial. On that footing, STIRLING, J., held that, at the trial, the defendant would be allowed to question the reasonableness of the particular items in the bill which were objected to, and to have those items settled by the tribunal. In what way they should be settled in any particular case is a mere matter of convenience. STIRLING, J., referred the items to the taxing master, and this court affirmed his order. Acting on that decision, if the defendant had shown some reasonable and probable ground for stating that some of the items were open to objection on the ground of unreasonableness or otherwise, he would have been allowed to defend for the purpose of questioning, not the bill as a whole, but the reasonableness of those items, and to have had them taxed. On the facts here, the defendant has not shown any reasonable and probable ground for contesting the reasonableness of any of the items. The appeal, therefore, fails.

SCRUTTON, L.J.—I agree.

Appeal dismissed.

Solicitors: *Doyle, Devonshire & Co.*, for *Jones & Son*, Colchester; *Rawson & Stevens*, for *F. S. Collinge*, Colchester.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re CAMPBELL (AN INFANT)

[Chancery Division (Eve, J.), July 25, 31, 1919]

[Reported [1920] 1 Ch. 35; 88 L.J.Ch. 319; 122 L.T. 151; 63 Sol. Jo. 750]

"Foreign Country"—Construction—R.S.C., Ord. 11.
Scotland—Not a "foreign country"—R.S.C., Ord. 11.

The ordinary and primary meaning of the words "a foreign country" in R.S.C., Ord. 11, r. 8 and r. 8A, is "a State or country outside the King's Dominions," and so Scotland is not "a foreign country."

Observations of Lord Alverstone, C.J., and Pickford, J., in *Re Akt. Robertsfors and Société Anonyme des Papeteries de L'AA.* (1), [1910] 2 K.B. 727, explained.

Notes. R.S.C., Ord. 11, has now been re-worded, and the expression "foreign country" now appears only in r. 8, r. 9, r. 11 and r. 13 thereof. The changes made, however, do not affect the proposition stated in the headnote.

As to words and expressions judicially interpreted, see 31 Halsbury's Laws (2nd Edn.) 473–475; and as to service out of the jurisdiction, see 30 Halsbury's Laws (3rd Edn.) 323–328.

Cases referred to:

(1) *Re Akt. Robertsfors and Société Anonyme des Papeteries de L'AA.*, [1910] 2 K.B. 727; 80 L.J.K.B. 13; 103 L.T. 503; 2 Digest (Repl.) 687, *2005.*

(2) *Rasch & Co.* v. *Wulfert*, [1904] 1 K.B. 118; 73 L.J.K.B. 20; 52 W.R. 145; 20 T.L.R. 70; 48 Sol. Jo. 82; sub nom. *Re Wulfert and Rasch & Co.*, 89 L.T. 493, C.A.; 2 Digest (Repl.) 701, *2132.*

Also referred to in argument:

Re Busfield, Whaley v. *Busfield* (1886), 32 Ch.D. 123, 131; 55 L.J.Ch. 467; 54 L.T. 220; 34 W.R. 372; 2 T.L.R. 373, C.A.; Digest (Practice) 337, *549.*

Re Hecquard, Ex parte Hecquard (1889), 24 Q.B.D. 71; 38 W.R. 148; 6 T.L.R. 32; 6 Morr. 282, C.A.; 4 Digest (Repl.) 25, *212.*

Re Nordenfelt, Ex parte Maxim Nordenfelt Guns and Ammunition Co., [1895] 1 Q.B. 151; 64 L.J.Q.B. 182; 71 L.T. 565; 11 T.L.R. 26; 2 Mans. 20; 14 R. 71, C.A.; 4 Digest (Repl.) 27, *227.*

Johnstone v. *Beattie* (1843), 10 Cl. & Fin. 42; 1 L.T.O.S. 250; 7 Jur. 1023; 8 E.R. 657, H.L.; 11 Digest (Repl.) 500, *1187.*

Ghikis v. *Musurus* (1909), 25 T.L.R. 225; Digest (Practice) 342, *598.*

Re De Penny, De Penny v. *Christie*, [1891] 2 Ch. 63, 71; 60 L.J.Ch. 518; 64 L.T. 521; 39 W.R. 571; Digest (Practice) 364, *755.*

Motion to set aside an order giving liberty to serve an originating summons out of the jurisdiction, namely in Scotland.

The respondent mother, as plaintiff, had caused an originating summons to be issued against the applicant father, her husband, asking for an order that the custody of Anne Elspeth Campbell, the infant child of their marriage, then with the mother, might be committed during her minority to the mother. The originating summons was issued on May 9, 1919, and, by an order dated May 28, 1919, liberty was given to serve the originating summons on the father at Broughty Ferry, Forfarshire, Scotland, out of the jurisdiction of the court.

The notice of motion, dated June 17, 1919, intituled "in the Matter of the Infant and in the Matter of the Guardianship of Infants Act, 1886," asked that the order of May 28, 1919, giving leave to serve the originating summons on the father out of the jurisdiction might be discharged on the grounds: (i) that the applicant was not domiciled or ordinarily resident within the jurisdiction of the court; (ii) that the relevant facts and circumstances which were within the knowledge of the respondent, Dorothy C. Campbell, were not fully or accurately set forth in the affidavit

in support of the application to serve the summons out of the jurisdiction; and (iii) that the subject-matter of the application did not fall within any of the cases in respect of which service out of the jurisdiction was allowed.

The Rules of the Supreme Court, 1883, Ord. 11 [since recast, see **Notes** ante], provided:

> "Rule 1. Service out of the jurisdiction of a writ of summons may be allowed by the court or a judge whenever . . . (c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or . . . (e) The action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland. . . . Rule 8. Where leave is given to serve notice of a writ of summons in any foreign country to which this rule may by order of the Lord Chancellor from time to time be applied [certain procedure is directed to be adopted]. Rule 8A. The court or a judge may direct that any summons, order, or notice shall be served on any party or person in a foreign country, and the procedure prescribed by Order XI, r. 8, with reference to serving notice of a writ of summons shall apply to the service of any summons, order, or notice so directed to be served."

Edward Clayton, K.C., and *Sheldon* for the applicant, the father.
Maugham, K.C., and *Henry Johnston* for the respondent, the mother.

Cur. adv. vult.

July 31, 1919. **EVE, J.,** read the following judgment.—This motion, whereby the applicant Colonel William Campbell, a domiciled Scotsman, seeks to have discharged an order of May 28 last giving liberty to serve on him out of the jurisdiction the originating summons issued by his wife under the above Act, raises the question whether the court or a judge has jurisdiction to order service of any summons other than a writ of summons on a party or person in Scotland.

It is clearly established that there can be no jurisdiction in an English court to allow service of process out of the jurisdiction except by statutory enactment, and it is conceded that the statutory enactment applicable to this case is to be found—if at all—in r. 8A of Ord. 11. That rule is in these terms: [His Lordship read the rule and continued:] There is nothing in the rule itself from which one would readily conclude that its operation was intended to extend to Scotland. It is limited in terms to service on a party or person in a foreign country, and it applies to that service the procedure of r. 8, which is strictly confined to foreign countries. Moreover, although r. 8 was the last rule in the order, when the new rule was added in 1909 it was not added as r. 9 but as 8A, a circumstance which tends to support the view that it was regarded as an addendum to r. 8 rather than as an independent rule affecting the whole order. However, on behalf of the respondent it has been argued that the intent with which the rule was introduced was to extend the ambit of the order to the service of summonses, orders, and notices, and that the expression "foreign country" means any country in which a different system of law prevails, in other words, any country of which the law might from our standpoint be spoken of as foreign law.

There is not wanting authority to support this contention to some extent. In *Re Akt. Robertsfors and Société Anonyme des Papeteries de L'AA.* (1), Lord Alverstone, C.J., says ([1910] 2 K.B. at p. 732):

> "As I understand the operation of r. 8A it is this. The previous operative part of Ord. 11, which applies to writs of summons, had caused a difficulty with regard to the service of other notices or summonses which the court or the parties desired should be served on persons abroad, and particularly with regard to the service of originating summonses, which, as Collins, M.R., pointed out in *Rasch & Co.* v. *Wulfert* (2), are the nearest approach to writs of summons and accordingly r. 8A was added. The effect of that appears to me to

be perfectly clear. The first portion of it extends the ambit of the rules other than r. 8 to other official proceedings beyond writs of summons—to a summons, to an order, or to a notice. But the state of circumstances which justifies the court in granting leave for service out of the jurisdiction under Ord. 11 of a document of that character must still be shown. The rule then proceeds to say that as to documents which come within the provisions of r. 8, which relates only to certain countries to which the Lord Chancellor has directed it to apply, the provisions of r. 8 shall apply. That construction makes r. 8A perfectly intelligible."

And much to the same effect is what PICKFORD, J., adds (ibid. at p. 735):

"It seems to me that the effect of that rule—r. 8A—is pretty clear. The intention is to place summonses, orders, and notices on the same footing as writs, and to give power to serve them out of the jurisdiction in the same way that writs are served."

These observations, however, must be read in the light of the case with which the court was there dealing—where the order sought to be set aside was an order giving leave to serve in France, and, although they do, no doubt, show that the court construed r. 8A as extending to foreign countries not within r. 8—they are not directed in any way to the point I have to consider, and when the expression "out of the jurisdiction" was used its application must, I think, be treated as limited to the class of case with which the court had there to deal—that is, to cases where there was no question as to the country in which service was sought to be effected being other than a foreign country.

To the question which I have to ask myself: Is Scotland a "foreign country" within the rule? I cannot return any but a negative answer. The expression "foreign country" is not to be found in the order until r. 8 is reached, and there, as I have already indicated, it is undoubtedly used in its ordinary and primary sense as referring to a State or country outside the King's Dominions. In rr. 1, 3, 4, and 7 the expression used is "out of the jurisdiction," and I think it is impossible to read these four rules and rr. 8 and 8A without appreciating that a clear distinction is drawn in the order between the two expressions. I think the words "foreign country" in r. 8A have precisely the same meaning as they have in r. 8, and that neither rule applies to Scotland or to any other part of the British Dominions. There was therefore, in my opinion, no jurisdiction to make the order giving leave to serve the summons in this matter on the applicant in Scotland, and I therefore discharge the order, and if they are asked for, with costs against the respondent.

Solicitors: *Stibbard, Gibson & Co.*; *Andrew, Wood, Purves & Sutton*, for *Hooper & Fletcher*, Biggleswade.

[*Reported by* W. P. PAIN, ESQ., *Barrister-at-Law.*]

RITTER AND WIFE *v.* GODFREY

[COURT OF APPEAL (Lord Sterndale, M.R., Atkin, L.J., and Eve, J.), November 11, 12, December 11, 1919]

[Reported [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396; 36 T.L.R. 144]

Costs—Deprivation of successful party—Discretion of court—Judicial exercise—Defendant—Conduct inducing plaintiff to bring action—Causing unnecessary litigation or expense—Defeating or delaying justice—Fraud, crime, or oppression.

In the absence of special circumstances a successful litigant should receive his costs. The discretion which is in the court to deprive such a litigant of his costs must be exercised judicially. The principle as to the exercise of the discretion is the same in the case of plaintiffs and defendants, but considerations sufficient to justify a refusal of costs to a plaintiff are not necessarily sufficient in the case of a defendant, for the former initiates the litigation while the latter is brought into it against his will.

To justify an order refusing a successful defendant his costs he must be shown to have been guilty of conduct, excluding the conduct which constituted the cause of action, which induced the plaintiff to bring the action by leading him reasonably to believe that he had a good cause of action against the defendant; or to have done something connected with the institution or conduct of the suit which was calculated to occasion unnecessary litigation or expense, including improper conduct in or connected with the litigation calculated to defeat or delay justice; or to have done some wrongful act in the course of the transaction of which the plaintiff complains which, though not constituting a cause of action, discloses a wrong to the public in the sense of some misconduct, e.g., fraud or crime, preparation for a fraud or crime, or possibly some act of serious oppression. If there is evidence of facts falling within these three classes, an appellate court will not interfere with the discretion of the trial judge to deprive a successful defendant of costs even though they might not have come to the same finding of fact or exercised their discretion in the same way. For the exercise of the discretion to be good there must be something more than an emphatic repudiation of liability, or a display of bad taste, or even bad temper, on the part of the defendant.

The plaintiff complained that the defendant, a medical practitioner, had negligently attended his (the plaintiff's) wife during her confinement with the result that the child was stillborn. He wrote to the defendant a letter giving particulars of the alleged mis-treatment, to which the defendant replied in a letter which the court described as "deplorable" and as likely to appear to the plaintiff as callous and couched in terms of levity. At the trial the judge found that the allegations of negligence were not made out, and he gave judgment for the defendant, but deprived him of costs.

Held: there was nothing in the letter calculated to create in the plaintiff's mind a reasonable belief that an action would succeed, or goading him into litigation on which otherwise he would not have embarked, and, therefore, there was no ground on which the defendant could be deprived of his costs.

Notes. Considered: *Donald Campbell & Co., Ltd.* v. *Pollak*, [1927] All E.R.Rep. 1. Referred to: *Brown* v. *New Empress Saloons, Ltd.*, [1937] 2 All E.R. 133; *Simmons & Son, Ltd.* v. *Wiltshire*, [1938] 3 All E.R. 403; *P. Rosen & Co., Ltd.* v. *Dowley and Selby*, [1943] 2 All E.R. 172; *London and National Property Co., Ltd.* v. *Inland Revenue Comrs.*, [1947] 2 All E.R. 799; *Barker* v. *Barker*, [1950] 1 All E.R. 812; *Findlay* v. *Railway Executive*, [1950] 2 All E.R. 969.

As to costs against a successful litigant, see 30 HALSBURY'S LAWS (3rd Edn.) 421, 422; and for cases see DIGEST (Practice) 851–860.

Cases referred to:

(1) *Bostock* v. *Ramsey U.D.C.*, [1900] 2 Q.B. 616, 622; 69 L.J.Q.B. 945; 83 L.T. 358; 64 J.P. 660; 16 T.L.R. 520; 44 Sol. Jo. 642, C.A.; Digest (Practice) 896, *4372*.

(2) *Harnett* v. *Vise* (1880), 5 Ex.D. 307; 43 L.T. 645; 29 W.R. 7, C.A.; Digest (Practice) 854, *3996*.

(3) *Dicks* v. *Yates* (1881), 18 Ch.D. 76; 50 L.J.Ch. 809; 44 L.T. 660, C.A.; Digest (Practice) 869, *4111*.

(4) *Sutcliffe* v. *Smith* (1886), 2 T.L.R. 881, C.A.; Digest (Practice) 872, *4138*.

(5) *Huxley* v. *West London Extension Rail. Co.* (1889), 14 App. Cas. 26; 58 L.J.Q.B. 305; 37 W.R. 625; 5 T.L.R. 355; sub nom. *Huxley* v. *West Indian Extension Rail. Co.*, 60 L.T. 642, H.L.; Digest (Practice) 896, *4371*.

(6) *F. King & Co., Ltd.* v. *Gillard & Co., Ltd.*, [1905] 2 Ch. 7; 74 L.J.Ch. 421; 92 L.T. 605; 53 W.R. 598; 21 T.L.R. 398; 49 Sol. Jo. 401, C.A.; Digest (Practice) 854, *3998*.

(7) *Edmunds* v. *Martell* (1907), 24 T.L.R. 25; 52 Sol. Jo. 10, C.A.; Digest (Practice) 852, *3979*.

(8) *Higgins* v. *L. Higgins & Co.*, [1916] 1 K.B. 640; 85 L.J.K.B. 1224; 114 L.T. 59; 9 B.W.C.C. 122, C.A.; Digest (Practice) 853, *3980*.

(9) *Brys and Gylson, Ltd.* v. *Imperial Steamship Co., Ltd., and Crosby, Ker & Co.* (1918), 34 T.L.R. 300; affirmed, p. 536, C.A.; Digest (Practice) 872, *4139*.

Also referred to in argument:

Lewin v. *Trimming*, *Trimming* v. *Lewin and Chadwick & Sons* (1888), 21 Q.B.D. 230; 59 L.T. 511; 37 W.R. 16, D.C.; Digest (Practice) 873, *4148*.

Granville & Co. v. *Firth* (1903), 72 L.J.K.B. 152; 88 L.T. 9; 19 T.L.R. 213, C.A.; Digest (Practice) 858, *4031*.

Civil Service Co-operative Society v. *General Steam Navigation Co.*, [1903] 2 K.B. 756, 765; 72 L.J.K.B. 933; 89 L.T. 429; 52 W.R. 181; 20 T.L.R. 10; 9 Asp.M.L.C. 477, C.A.; Digest (Practice) 852, *3978*.

Appeal by the defendant from an order of MCCARDIE, J.

The first plaintiff, F. Ritter, for a fee of £12 12s. retained the defendant, T. M. Godfrey, who was a qualified medical practitioner, to attend the second plaintiff, E. Ritter, the wife of the first plaintiff, in her confinement. The plaintiff E. Ritter was, accordingly, attended by the defendant on Mar. 28, 1918, and was delivered of a child which was born dead. The plaintiffs alleged that the defendant negligently attended the plaintiff E. Ritter that her child was stillborn, and she was put to unnecessary pain and shock, and was injured in her health, and that the plaintiff F. Ritter was put to expense in having her medically attended and nursed, and for the extra nourishment, and they brought this action against the defendant, claiming damages for negligence. By his defence the defendant denied that he had been guilty of the alleged or of any negligence, and he counterclaimed for the sum of £12 12s., the fee for which the plaintiff F. Ritter had retained him. The action came on for trial before MCCARDIE, J., sitting without a jury, and on May 27, 1919, he delivered judgment to the effect that the defendant had not been guilty of that which would constitute negligence on the part of a medical man, and that, accordingly, he was entitled to judgment, but he further held that the defendant be deprived of his costs. From the decision of the learned judge upon the question of costs, the defendant now appealed.

The defendant appeared in person.

J. B. Matthews, K.C., and *Herbert Jacobs* for the plaintiffs.

Cur. adv. vult.

Dec. 11, 1919. The following judgments were read.

LORD STERNDALE, M.R.—This appeal from a judgment of MCCARDIE, J., raises a difficult question, i.e., whether the learned judge was justified in refusing

to make an order that the plaintiffs should pay to the defendant the costs of an action by the plaintiffs against the defendant in which the latter was successful.

I do not intend to deal with the details of the action further than is necessary to an understanding of the question before us. It was an action brought by the plaintiffs, who are husband and wife, against the defendant for negligent conduct in his attendance upon the female plaintiff in her confinement, whereby her child was born dead, and much suffering, trouble, and expense caused. McCardie, J., gave judgment for the defendant negativing negligence, but refused to make an order for his costs. The defendant was called to attend the female plaintiff, by reason of her regular doctor not being able to attend her, and on first seeing his patient diagnosed that the impending delivery would be by what is called a head presentation. This was a mistake as afterwards appeared. He then waited for a time in order to allow the process of nature to continue, and after waiting an interval put the patient under chloroform, intending, as I think the evidence shows, to effect the delivery according to the diagnosis which he had formed. To continue this operation it was obviously necessary to make a more minute examination than had been made before, and on making this examination he very soon discovered the mistake in his diagnosis, and found that the presentation, instead of being a head, was a breech presentation of a peculiar and difficult kind. At the time when he discovered the true nature of the presentation he had in his hand a forceps which he contemplated using if the circumstances made it right to do so. After finding the true nature of the presentation he proceeded to deliver the child, but unfortunately when delivered it was dead, and according to the finding of the learned judge may have been dead before the defendant began his attendance at all. The defendant continued his attendance on the female plaintiff for a short time after the birth of the child, but was then told that his attendance was no longer required, and that his conduct had been negligent. It is necessary to mention one other matter, i.e., in the course of the delivery the perineum was torn, and the defendant put in two stitches of wire to repair the tear. After a time the stitches gave the patient pain or discomfort, and he removed one and did not remove the second. There was a controversy as to why the second stitch was not removed, but I do not think it necessary to examine it. Accusations of negligent conduct were made against the defendant in respect of the mistake in his diagnosis, of his putting the patient under chloroform, and his subsequent treatment, of his intention to use the forceps, and of his not having removed the second stitch. I shall not consider them in detail. It is enough to say that the learned judge in the court below found that he had not been negligent in these or any other respects and I have only stated these facts because they are referred to in the judgment of McCardie, J., as to costs. After the defendant had been dismissed from attendance some correspondence took place between the male plaintiff and the defendant, and it is upon this correspondence that, in my opinion, the whole question turns. [His Lordship read a letter from the male plaintiff to the defendant, and continued:] This letter was answered by the defendant on April 5 and 6 in two letters to which it is not necessary to refer, and then he wrote another letter on the 6th and which is the important letter in the case. It is very long but I must read a considerable part of it. It began thus:

> "Sir,—The letter I wrote to you this morning was written under the impression that on Tuesday last somebody expressed to you opinions which led to your adoption of the attitude with which you received me on Wednesday, when you accused me of 'unskilful and neglectful treatment' of your wife, and said that 'I have deprived you of your child,' refused to discuss the matter reasonably then as I requested, but merely reiterated that you had written me a letter which I could answer, and in response to my affirmation that you were loading the actions of fate on my shoulders, and that I could prove I had treated your wife with all possible skill and attention, your comment was: 'Then God help your other patients.' Knowing that whatever your charges

were they must be unjust, unfounded, and atrociously ungrateful, I was naturally annoyed and used rather strong language, saying that your last remark was the remark of a cad. When the heat of the moment had passed, and, remembering regretfully the loss of your child and its natural effect on a man of your temperament, my animus against you died down, and I regretted some phrases I had used. But I think I am like you in being a rather obstinate person, and I determined that before you had any detailed answer to the letter you told me you had written, your informant should be made to eat humble pie. Hence my letter of this morning. Not knowing Dr. Dutch at all, I jumped to the conclusion that he was your informant. This midday, thinking it only fair to him to know the situation, I telephoned to let him know what I had written to you, when I found that he is a sensible man and had said nothing on which you could build your false accusations. I conclude that probably you are going solely on what you have read in medical or medico-legal text-books, and that being so, and remembering the amusing flounderings in medical matters I have heard in the courts from quite eminent counsel, I can easily understand how you have befogged and misled yourself (when you bring that hypothetical case against me, would you not think me rather foolish if I conducted my own defence?), also my reasons for delaying a detailed reply to your letter vanish as there is no guilty 'informant' to drag from behind the screen and kick. Of course, I suspect the nurse has been indiscreet (what man would not?), and very likely she has unconsciously helped the books to mislead you, but she may keep her mind quite easy, I do not war on women's tongues, but let them wag as they will, some do me more good, others more harm, than I deserve, so I let the balance strike itself. With men it is different, they should know when to speak and when to be silent, and if they don't it is good for them to be taught by adversity. I am writing and shall write diffusely, and you for your sins must read it, because it is too wet to work in the garden as I intended, and because you and I know little of each other (and hitherto like that little less), and I want you to get not merely a series of bald statements, which you might misconstrue as easily as a text-book, but to get, as it were, my atmosphere of thought in my conduct of your wife's case. I have an innate conviction that just as I am not the incompetent fool you kindly deem me so you with your experience and reputation can scarcely have presented yourself to me in your true light on Wednesday, though I always have said that good lawyers can make the most damnable as well as the best of statesmen."

After some matters, not material to be mentioned, the defendant proceeds to give his explanation of what took place about which it is sufficient to say that it was substantially accepted by the learned judge as correct and that it dealt with the administration of chloroform, and the presence of the forceps, and then concludes in this way:

"Now, Mr. Ritter, I have given this full account, making even unnecessary admissions which, if both medically ignorant and vindictive, you might construe against me, and overlooking nothing in my favour. I have given it less to defend myself from the covert threat of some foolish 'action' you might take against me, for I know my position is sound throughout the case, than in the hope of lifting from your mind the dark cloud of horrid suspicion that you have lost your child through trusting the case to an incompetent and careless ass. No doctor gets through life without disagreements with some patients, unfair criticism by others, and over-adulation by a few. It is the peculiar irony of fate that the cases who get at cross-purposes with one are just those, who, if they only knew it, have special cause for gratitude. A certain type of mind so easily jumps to unsound conclusions, especially when deeply moved either by assuming that post hoc must be propter hoc, or by building on unsound premises because the structure runs with their wish. Their attitude

seems to be that of a man who having been beaten in a fight found relief to his chagrin by going home and kicking the dog. But I dislike being anybody's dog and have a rooted objection to being kicked. I was very tempted to leave you, to use a classic phrase, 'to stew in your own juice,' and bring your action in spite of the annoyance and waste of time it would have caused me these busy times; I am sure you would be riding for a fall, but I felt your trouble was too serious to leave you with that horrid suspicion if I could remove it. I have had my share, in thirty years of practice, of adverse criticism, but never quite in this way. It has been reserved to you to be the first to bring a charge of neglect and incompetence against me, and I hope you are now less proud of it than you were, you doubtless recognise that the only point on which you might build up a case against me and even conceivably so before a judge and jury as to get an unfair verdict adverse to me (not that I think you would get an unfair verdict willingly) is on the point of my calling a breech case a head case. Whether you now agree with me or not that this error was due to conditions and not to 'negligence or want of skill,' you will allow now, at all events, understand that, the case being what it was, this was quite a lucky mistake on my part—lucky, that is, in your interest—what some might term a special interposition of Providence. Had I at that first examination been able to diagnose a breech I could not then have diagnosed a double extended breech (at least such diagnosis can very rarely be made and practically never with certainty except under chloroform), I must have then assumed it to be a common breech, and then the natural thing would have been to delay giving chloroform as long as I could. As it was a double extended breech this delay could not have increased but must have diminished the chance of a living child, and must have entailed danger to your wife. The most skilful accoucheur is very unlikely ever to meet a case in which (unless he has reason to introduce his hand into the womb under chloroform) he is able with certainty to diagnose the extended arms until the body is partly born and the arms absolutely block the head from coming. Horrible things have had to be done in such cases and the mother's life is in danger. In fact, I have known consulting accoucheurs argue that if only one could diagnose this condition before the membranes rupture, cæsar section should be performed as the only likely way to save the life of both mother and child. This shows you their estimate of the danger to the child in a double extended breech, and this alone should convince you of the folly of your attitude towards me; but, as, for all I know, you may think me capable of lying, too, I append a few extracts from the first authority to hand, EDEN'S MIDWIFERY, which your love of text-books will doubtless appreciate and which you can verify. . . . Please give up, Mr. Ritter, the foolish idea that even the keenest intellect can form a sound judgment on medical matters by reading text-books. It is really rather funny that you should accuse me with the aid of a text-book. I say this simply and without a grain of vanity, but in the spirit of deep thankfulness for the ability with which, not through any merit of my own, I have been endowed, and partly, perhaps, because I want you to be as sick of reading this letter as I am of writing it. It is too long, isn't it, but it must be a bit longer. I hope you feel keenly the few digs I have had at you as I have written, and now for another. You undoubtedly have the reputation of being a clever barrister. Your accusation of me justifies me in asking you seriously to consider whether you deserve it. Can a man be a clever man unless he recognises his own limitations? I always say not, and I instance H. G. Wells and Bernard Shaw; so if you fail you are in what some people consider good company. Of course you may argue that it is not your own limitations that you failed to recognise but those of the text-books, and perhaps you could convince me. One more nasty thing—whether I have convicted you of stupidity or not, I must insist that you carefully tell all the people to whom you have aired your erroneous opinion of me that you, and not I, were in error. I will also ask you to

promptly send my fee. Why, this letter alone is worth it. How much would a lawyer charge for it? But I am forgetting that possibly your temperament does not enable you to discard rooted opinions, however erroneous, and if you are still unconvinced I will make a sporting offer. Each of us nominates a consulting accoucheur attached to one of the large London hospitals, and if you wish you nominate a barrister, too, and you submit to each a copy of your letter and mine (or better a short synopsis of this letter) and any other you care to write. If they agree with your view, I will forgo my fee, pay their fees, and give £20 to any charity you name. If they agree with my view, you shall do the paying, including £20 to any charity I name. I hope the experts will accept fees, because I feel you ought to pay for your folly. If not now, then later truth will prevail, and I know that then you will honourably fulfil the pledge of the last words of our interview on Wednesday, which doubtless you remember as clearly as I do; but please do it fully and freely in a large-souled way, Mr. Ritter. I shall not be satisfied with anything grudging or mean-spirited. Now I hope you are grateful, for I have presented you gratis with a medical treatise and, what ought to do you much more good, some valuable moral teaching; but you brought it on yourself, and so good-night. —Yours truly, TOM GODFREY."

[HIS LORDSHIP read a letter from the male plaintiff to the defendant, dated April 7, 1918, and one from the plaintiff in reply, and continued:] McCARDIE, J., did not lay much, if any, stress on these last two letters, but he describes the long letter of April 6 as a regrettable letter, and one that should not have been written by a doctor in the position of the defendant. I entirely agree with that opinion. I think that that letter and the letter of April 8, though that was provoked by a rather offensive letter of April 7 from the male plaintiff, were letters that the defendant ought not to have written, and I shall be much surprised if he does not now think so.

McCARDIE, J., in his first judgment, given on May 27, 1919, after finding that the defendant had not been negligent, said:

"Upon the whole matter, therefore, I am unable to find that the defendant had been guilty of that which would constitute negligence by a medical man. But I desire to add one or two words on the case. In the first place, I am satisfied—wholly satisfied—that this action was brought by Mr. Ritter with the deep belief that the defendant had been negligent, with the firm belief that the negligence of the defendant had caused the death of the first-born of Mrs. Ritter and Mr. Ritter after five years of marriage. I am satisfied that he brought this action because he felt, and felt strongly, that he ought to bring it in view of what he deemed to have taken place. I desire further to say that the letter which was written by the defendant on April 6 is a letter which I deplore. He wrote many pages to the plaintiff on that day—fifteen pages, I think, closely written pages—with regard to this matter. I think it is a regrettable letter. It was wholly lacking in real sympathy for that which was a deep sorrow to Mr. and Mrs. Ritter. I could well understand the statement by Mr. Ritter in the witness-box, that one of the reasons which led him to bring this action was the unhappy wager, as Mr. Ritter called it, which was proffered by the defendant in connection with this matter. This letter was written within ten days of the death of the little child. It was written to a man who was suffering deeply from the loss of the child that he and his wife had looked forward to. The defendant says this at p. 15. I will read just a passage: 'One more nasty thing—whether I have convicted you of stupidity or not, I must insist that you carefully tell all the people to whom you have aired your erroneous opinion of me that you, and not I, were in error. I will also ask you to promptly send my fee. Why, this letter alone is worth it. How much would a lawyer charge for it? But I am forgetting that possibly your temperament does not enable you to discard rooted opinions, however

erroneous, and if you are still unconvinced I will make a sporting offer.' The sporting offer is this, that 'Each of us nominates a consulting accoucheur attached to one of the large London hospitals, and if you wish you nominate a barrister, too, and you submit to each a copy of your letter and mine (or better a short synopsis of this letter) and any other you care to write. If they agree with your view, I will forgo my fee, pay their fees, and give £20 to any charity you name. If they agree with my view, you shall do the paying, including £20 to any charity I name. I hope the experts will accept fees, because I feel you ought to pay for your folly.' That is a letter that was written by a member of a great and beneficent profession to a man who was stricken by the agony of the death of his little child. I do not think it is necessary that I should refer to other phrases in this unfortunate letter, but there is a good deal in it that I deeply regret; it is a letter which, I think, is inconsistent with the high dignity which should ever be preserved by a member of a high profession. There are many other aspects of the case which I need not refer to, although it may be necessary to refer to them if the defendant invites me to consider in this case whether or not the costs should be given in his favour against Mr. Ritter. There will be no judgment for the defendant upon the claim."

As the defendant's counsel were at that time unfortunately not in court, the question of costs was discussed on a later date, and then this judgment was given on June 2, 1919:

"I have already said that this is a painful case. I appreciate fully the arguments of Mr. Rigby Swift. I regret that this application for costs compels me to state with more clearness than when I gave judgment the opinion I had formed with regard to several aspects of the matter. In my view, there is ground for serious criticism of Dr. Godfrey, even though the facts may not establish negligence with respect to chloroform, with respect to the forceps, with respect to the episode on Sunday, April 2, and with respect to the stitches. I have felt able, having regard to the totality of the evidence, to hold that the plaintiff has not established negligence against the defendant. But that finding, it must be clearly stated by me, in no way involves an approval by me of the totality of the matters which are relevant to the conduct of the defendant from first to last. It is unnecessary, and from the point of view of the defendant it can be of no benefit, that I should recite in further detail my opinion with regard to certain matters of fact. I feel, and feel clearly, moreover, that the whole of the correspondence from the pen of the defendant with regard to this matter is unsatisfactory. Portions of it are more than unsatisfactory. As I said before, and as I say now, in my view the letter of April 6 in particular, and certain passages of it with still more particularity, is not only unjustifiable, but deplorable from every point of view. I fully realise the duty which falls upon me of weighing all the circumstances of the case ere I come to a conclusion upon the costs. I am fully aware that the discretion should be one exercised upon grounds and with due regard to the interests of the parties. Applying myself, with a full conception of all that is involved in this matter, I have come to the clear conclusion that it is my duty to deprive the defendant of any costs in this case. Therefore, there will be judgment for the defendant on the claim and counterclaim without costs."

In my opinion, the real ground for refusing to make an order for costs in favour of the defendant was the attitude taken by him in the correspondence, and the other matters were mentioned as throwing light on that letter. It could be no ground for refusing a successful litigant his costs that his evidence, which was accepted as in substance correct, was unsatisfactory in some respects, and I have already pointed out that the learned judge had found the defendant not to blame in respect of the chloroform, the forceps, or the stitches.

In order to see whether the learned judge was justified in the course he took it is necessary to see the principles which govern a judge's discretion as to costs. This was a case tried without a jury before the judge alone, and, therefore, in the absence of an order by him, neither party is entitled to any costs. . . . But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised and, therefore, there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question whether they are sufficient is entirely for the judge at the trial, and this court cannot interfere with his decision. The principle as to the exercise of discretion is the same in the case of plaintiffs and defendants. But it is clear that considerations sufficient to justify a refusal of costs to a plaintiff are not necessarily sufficient in the case of a defendant, for the former initiates the litigation while the latter is brought into it against his will. Speaking generally, I think that it may be said that, in order to justify an order refusing a defendant his costs, he must be shown to have been guilty of conduct which induced the plaintiff to bring the action and without which it would probably not have been brought. This is also stated by Vaughan Williams, L.J., in *Bostock* v. *Ramsey U.D.C.* (1) ([1900] 2 Q.B. at p. 625), and it generally may be tested by the question stated in the judgment of the two other members of the court, A. L. Smith and Romer, L.JJ., in the same case, i.e., was the defendant's conduct such as to encourage the plaintiff to believe that he had a good cause of action. I do not say that this is the only test. But I think that it is the one properly applied to this case. From this point of view I think that the plaintiffs' counsel in the present case was right in laying stress upon what he called the levity with which the defendant in a part of his letter dealt with the plaintiffs' complaint more than upon offensive expressions which could only tend to excite anger, and the question finally turns upon this point: Were the tone and the language of the letter such as fairly to lead the plaintiffs to think that the defendant was likely to have been negligent and to think that they could not accept the explanations given in the earlier part of the letter of April 6? I have had great difficulty in the case, and great doubts whether the letter did not afford some ground for refusing an order for costs, the sufficiency of such grounds, if existent, being entirely for the decision of the judge and not of this court. I cannot say that those doubts are entirely removed, but as both the other members of the court are clearly of opinion that the letter affords no such grounds, I concur in the decision to which they have come. The result is that the appeal must be allowed, the order of the learned judge as to costs set aside, and judgment entered in the action for the defendant with costs. The defendant is also entitled to the costs of the appeal.

ATKIN, L.J.—In order to determine this appeal it seems to me necessary to pass in review some of the more recent authorities which have dealt with the provisions of Ord. 65, r. 1. Costs are to be in the discretion of the court or judge. If the discretion is absolute, the defendant must fail. If the discretion is limited, then he must show that the exercise of the discretion in the present case exceeded the proper limits. I think that it will appear from the authorities to be mentioned that the discretion of the court or a judge is not an absolute discretion, but must be exercised subject to certain governing principles which on this appeal it seems to me necessary to ascertain.

The first group of cases to which I refer are cases dealing with the second proviso to the rule, viz., the conditions under which after trial by jury the judge may find that there is good cause for depriving the successful litigant of his costs [annulled 1929]. The subject-matter is not in terms identical with that before us. Nevertheless, where the courts have held that there is good cause for deprivation of costs after trial by jury, I think it is clear that under similar circumstances after

trial without a jury the exercise of the discretion in the same way must be justifiable. If, on the other hand, there is held to be no "good cause," I suppose it possible that the exercise of the discretion in like circumstances can yet logically be supported, though, as will appear from the cases, it will be found in practice that the distinction tends to disappear. I will review the authorities in the following order: (i) In *Harnett* v. *Vise* (2) an action was brought for the indirect purpose of meeting rumours which were not the defendant's. JAMES, C.J. (5 Ex.D. at p. 311), held that it is the duty of the judge who tried the case to consider the whole circumstances of the action, everything which led to the action, everything which led to the litigation, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel complained of. (ii) In *Dicks* v. *Yates* (3) (18 Ch.D. at p. 85) JAMES, C.J., referred to the difference between a plaintiff and a defendant who is dragged into court. (iii) In *Sutcliffe* v. *Smith* (4) (2 T.L.R. at p. 883) FRY, L.J., said that whenever a defendant had by his mis-statements, made under circumstances which imposed an obligation upon him to be truthful and careful in what he said, brought litigation on himself and rendered the action reasonable, there would be "good cause" to deprive him of costs. (iv) In *Huxley* v. *West London Extension Rail. Co.* (5) (14 App. Cas. at p. 33) it was laid down that the requirements at all events embrace everything for which the party is responsible connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation and expenses. (v) In *Bostock* v. *Ramsey U.D.C.* (1) A. L. SMITH, L.J., said ([1900] 2 Q.B. at p. 622) that the judge is not confined to the consideration of the defendants' conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation. There there was evidence of conduct on the part of the defendants such as to lead the plaintiff reasonably to think that he had a good cause of action against them. VAUGHAN WILLIAMS, L.J. (ibid. at p. 625), asked whether there was conduct on the part of the defendants which could be considered as having led to the action being brought and but for which it probably never would have been brought. ROMER, L.J. (ibid. at p. 627), said that the matter was not confined to causes founded upon the conduct of the successful party in the course of the litigation. Conduct must be shown such as led the plaintiff reasonably to suppose that he had a good cause of action, and this induced him to bring the action. But not if it had no reference to the action and did not induce the plaintiff reasonably to believe that he had a right of action. Misconduct in nowise connected with the action would not be good. Nor conduct outside the action not such as to induce the plaintiff reasonably to suppose that he had a good cause of action and so conduced to the action. (vi) In *F. King & Co., Ltd.* v. *Gillard & Co., Ltd.* (6) there was an alleged fraudulent representation by the defendants. VAUGHAN WILLIAMS, L.J., said ([1905] 2 Ch. at p. 11) that where a plaintiff comes to this court for relief, if, in the course of establishing the title on which he relies, he has been guilty of a fraud upon the public, it would be right to say to him: "You cannot be allowed to come to the court for relief, because your own conduct in establishing your own title has involved a fraud upon the public." The court has no right to deprive a successful defendant of his costs because he has done some act which is a wrong to the public. In order that he should be deprived of his costs he must have done some wrongful act in the course of that transaction of which the plaintiff complains. (vii) In *Edmunds* v. *Martell* (7) the owner of a lease with seventy-four years unexpired altered the premises without consulting the reversioners. BUCKLEY, L.J., said (24 T.L.R. at p. 26) that the facts must be facts relevant to the question to be adjudicated upon as between the plaintiff and the defendant. The judge had no power to deprive the successful litigant of costs because in some matters not material he might think that that party should have behaved, say, with more courtesy or consideration. These were not matters upon which the court could act. (viii) In *Higgins* v. *L. Higgins & Co.* (8), which was a workman's compen-

sation case, a declaration of liability only was made. There BANKES, L.J., said ([1916] 1 K.B. at p. 643):

> "I can find no evidence that the employers were on any point unsuccessful or that they had by their conduct in any way brought about the litigation or done any wrongful act in relation to the plaintiff or his claim for compensation. According to the well-established practice, therefore, the defendants could not have been deprived of costs."

(ix) *Brys and Gylson, Ltd.* v. *Imperial Steamship Co. and Crosby, Ker & Co.* (9) was another case on the point.

It is not easy to deduce from those authorities what the precise principles are that are to guide a judge in exercising his discretion over costs. And yet, as the discretion is only to be exercised where there are "materials" upon which to exercise it, it seems important to ascertain the principles on which a judge is to discover whether the necessary materials exist. In the first place, in the case of a wholly successful defendant, in my opinion, the judge must give the defendant his costs unless there is evidence that the defendant brought about the litigation; or, secondly, has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense; or, thirdly, has done some wrongful act in the course of the transaction of which the plaintiff complains. These require further expansion. By the first is meant has shown such conduct as to have led the plaintiff to believe that he had a good cause of action against the defendant, and so induced him to bring the action. The authority for that proposition is *Bostock* v. *Ramsey U.D.C.* (1). It is wide, for in terms it is not limited to unreasonable or improper conduct, or to conduct other than that which constitutes the alleged cause of action. Inasmuch as the bringing of many actions of contract and most actions of tort is due to the effect upon the plaintiff's mind of the defendant's conduct, and the effect is at any rate to produce a belief that the plaintiff has a good cause of action, it would appear to follow that, provided the belief was reasonable, the judge in all such cases has grounds for depriving a successful defendant of his costs. I presume that there would be grounds for dealing with a successful plaintiff's costs where his conduct has induced the defendant reasonably to believe that he has a good defence. I am inclined to think, therefore, that the propositions in *Bostock* v. *Ramsey U.D.C.* (1) should be read subject to the first, if not also the second, of the limitations suggested above, i.e., subject to the conduct being unreasonable or improper, and being conduct other than that which constituted the alleged cause of action. For the purposes of the present case, however, I shall assume that they are to be read without the qualification suggested. The second and third propositions may possibly overlap. The second I think would include improper conduct in or connected with the litigation calculated to defeat or delay justice. Such conduct would also be included in the third, which I think further extends to cases where the facts complained of, though they do not give the plaintiff a cause of action, disclose a wrong to the public: *F. King & Co., Ltd.* v. *Gillard & Co., Ltd.* (6), by which I understand some misconduct, e.g., fraud or crime, or preparation for a fraud or crime, or possibly some act of serious oppression. Such conduct must, however, be "in the course of the transaction complained of." If there is evidence of facts falling within the three classes above mentioned, an appellate court will not interfere with the discretion of the trial judge even though they might not have come to the same finding of fact or exercised their discretion in the same way. I am aware of the inconvenience of fettering by rules the exercise of what in terms appears to be an unfettered discretion. But it is too late to contend for an arbitrary discretion over costs. Some rules undoubtedly there are that control the discretion; and it seems hard to require a judge to exercise his discretion according to rule and yet not be able to state what the rule is. Nor, if the rules are to be formulated, does it appear helpful to cast it in the negative form of a string of prohibitions, leaving the guiding principle to be deduced from them.

Applying, therefore, the principles stated, was there here evidence of facts which the learned judge in the court below could find to fall within one of the classes mentioned? I do not propose to detail the facts relied on. I agree with the statement of them by the Master of the Rolls. The charge was almost as serious a charge as could be made against a medical man who practised as an obstetrician that by his negligence he had procured the child of a patient to be stillborn and caused unnecessary pain and suffering to the patient. The charge was formulated by the plaintiff at the first interview and in his first letter. It was met by the defendant in the letters complained of with detailed explanations, and the explanations so given the judge at the trial found to be accurate in fact, and to negative the negligence complained of. It is to be noted that the original mistake of the doctor in diagnosis was common ground, alleged by the plaintiff and admitted by the defendant in the earlier letters. The material question between the parties was whether that original mistake was persisted in on and after the second examination of the patient, and whether, therefore, the subsequent conduct of the defendant was consistent with reasonable care and skill. If, as I think was found by the learned judge in the court below, the explanations in the letter of April 6 were true statements of fact, and as such indicated that there had been no lack of reasonable care and skill, I cannot think that they afford evidence that they led the plaintiff reasonably to believe that he had a good cause of action. Apart from the explanations that they give on the matters relative to the cause of action, there are expressions in them which I think the judge was justified in describing as deplorable, and I desire to associate myself with the condemnation pronounced on them by the Master of the Rolls. They have caused me considerable anxiety on the point whether it fell within the ambit of the judicial discretion to deprive the author of them of his costs of successfully defending himself against a charge of professional negligence. I have come to the conclusion that they do not afford evidence of facts falling within the classes I have mentioned. Discourtesy between neighbours in dispute or even insulting language and behaviour are unfortunately not so uncommon as they might be. In many cases the bitter letters or the verbal taunt has in a very real sense brought about the litigation. But I cannot think that the plaintiff, so provoked to bring unfounded litigation, is entitled to have his feelings salved by escaping costs. I think it probable that the tone of levity, and what the plaintiff no doubt considered callousness, of the letter of April 6 would be calculated to lead the plaintiff to attach less weight than otherwise he would to the defendant's explanation and contradictions of the reverse. But the explanations were there. The course was wrong, and the plaintiff's complaints were in fact unfounded. In the present case I think that the expressions complained of could not lead the plaintiff reasonably to believe that he had a good cause of action against the defendant; nor could they amount to misconduct within the third rule.

EVE, J.—This action came on to be tried before McCardie, J., in May last, and on the 27th of that month the learned judge, after hearing the evidence, came to the conclusion that the defendant had not been guilty of negligence and dismissed the action. At the conclusion of his judgment he referred in terms of strong condemnation to a letter written by the defendant on April 6, 1918—some few days after the occasion on which the negligence was alleged to have occurred—and, after a short discussion which followed the delivery of his judgment, adjourned for consideration on a latter date the application for the costs of the action made by the defendant's counsel. In the course of his comments on the letter I have referred to, the learned judge said:

> "I could well understand the statement by Mr. Ritter in the witness-box that one of the reasons which led him to bring this action was the unhappy wager, as Mr. Ritter called it, which was proffered by the defendant in connection with this matter."

The concluding paragraph of his judgment is in these terms:

"There are other aspects of the case which I need not refer to, although it may be necessary to refer to them if the defendant invites me to consider in this case whether or not the costs should be given in his favour against Mr. Ritter."

The application for costs was persisted in and was disposed of on June 2, 1919, when the learned judge gave his decision in the words which have already been read, and which it is not necessary for me to read again. But it is not, I think, immaterial to observe that he prefaces this decision with a criticism of the defendant's conduct with respect to five, if not six, of the nine heads under which negligence had been charged, and from this, as from the concluding words of the earlier judgment which I have already quoted, it would almost appear that the learned judge, although he had decided in the defendant's favour on each of these heads upon the only issue raised in the action, was inclined to approach the determination of the question of costs from an attitude of doubt whether the defendant had really rebutted all the charges of negligence brought against him. In this court the case was argued on behalf of the plaintiffs on the footing that the judgment as to costs was founded on the view taken by the judge of the correspondence. But I cannot help thinking that the observations I have referred to lend some support to the defendant's contention that the learned judge's ultimate decision as to costs was to some extent based on a re-consideration of matters upon which he had already adjudicated in the defendant's favour, and it was this view which, no doubt, led to his importing into the argument in support of this appeal topics which eventually turned out to be irrelevant.

For, in substance the question which ultimately emerges for our decision is this: Does the correspondence which preceded the issue of the writ, and in particular the letter of April 6, disclose any ground for the exercise of the judicial discretion to refuse to award costs to a successful defendant? It is contended that it does because it is said it amounted to conduct which led to the action being brought, and but for which it probably never would have been brought, and in support of this contention Mr. Ritter's statement in evidence is strongly relied upon. The contention involves the consideration of what is meant by "conduct leading to the action being brought and but for which it probably never would have been brought." It cannot, of course, refer to the act or conduct of the defendant constituting the cause of action. Yet this would be the most obvious conduct leading to the action and but for which the action would never have been brought. Nor can it, I think, properly be extended to include the manner, tone, language, or attitude adopted by the defendant in repelling or repudiating allegations which he believes and, as the result shows, rightly believes, to be wholly unfounded. To hold a defendant disentitled to his costs because he repels, and it may be with some warmth, an unjust accusation would be the negation of justice. The more unwarranted the accusation the greater in many cases the force with which it is repudiated, and it is within the experience of us all that the heat generated in certain disputes is not infrequently in inverse proportion to the importance of the issues involved. In one sense all these matters—the nature of the accusations made, the relationship of the disputants, and the attitude and manner in which the accusation is met—may be said to involve conduct conducing to the action and, it may be, finally depressing the scale in favour of litigation. But they cannot, in my opinion, except in special circumstances such as I am about to refer to, be said to be conduct but for which the action would probably never have been brought.

I venture to suggest that, in determining whether a good ground exists for the exercise of the judicial discretion, the judge must eliminate from consideration the conduct constituting the alleged cause of action, and must then inquire, first, whether the defendant has so conducted himself ante litem motum as to induce in the plaintiff's mind the reasonable belief that there is no valid defence to the claim, or, secondly, has so misconducted himself as to have goaded the plaintiff into a litigation on which he never would have embarked but for such misconduct. A persistent refusal on the part of an agent or trustee to answer inquiries, to give

reasonable explanations, to impart information, or to render adequate accounts, might well amount to conduct sufficient to induce a reasonable belief that a claim to recover moneys from him was maintainable, and provocative conduct or even truculent language might readily be shown to have compelled proceedings by a plaintiff who otherwise would never have gone to the extreme limit of instituting an action. In such circumstances there would exist ground for the exercise of the discretion. But, in my opinion, there must be something more than a repudiation of liability, something more than a display of bad taste or even bad temper, some actual misconduct on the defendant's part, before a foundation is laid for the exercise of the discretion. The judge, however, much he may disapprove of the defendant's behaviour, is not entitled to refuse him his costs unless he has materials upon which he is prepared to hold judicially that the defendant has thereby created a mistaken belief in the plaintiff's mind or that his conduct was the real cause of the action being brought.

Were there those materials in the present case? It is impossible, in my opinion, to hold that there is anything in the letter of April 6 calculated to create in the plaintiff's mind a reasonable belief that an action would succeed. The defendant dealt therein with the serious charges made against him seriatim and in great detail, and, as the result of the trial demonstrates, in a manner which ought to have satisfied the plaintiff, assisted, as he says he was, by competent medical advice, that the charges were not likely to be substantiated. Had the defendant shirked or even had he manifestly dealt with the charges the letter might perhaps have afforded ground for saying that he thereby induced the plaintiff to believe there was no real defence to the charges or some of them. But in all these respects the letter is, in my opinion, an emphatic repudiation of liability and of any negligence and a full and honest attempt to convince the plaintiff that there was no foundation for his aspersions. There is, therefore, in my opinion, nothing in the letter which affords material for suggesting that the letter misled the plaintiff and thereby led to the action being brought. On the contrary, a competent appreciation of this part of the letter ought to have prevented the action.

The next and only remaining question is: Is there material in the letter upon which it can judicially be held that there was misconduct on the defendant's part of the nature I have indicated—that is to say, misconduct goading the plaintiff into a litigation on which he would not have embarked but for its existence? There is no evidence outside the letter itself to support this view. Mr. Ritter's statement, the truth of which I do not doubt, that the offer to have the matter in dispute settled by arbitration (an offer which he seems, as I venture to think, mistakenly to have regarded in the nature of a wager) was one of the reasons which led him to bring the action, only goes to prove that there were other reasons—a proposition confirmed, I think, by the plaintiff's own letter and the whole course of the proceedings—and so that, even if this offer were misconduct on the defendant's part, and I do not think it was, it was not misconduct without which the action would not have been brought. I do not feel called upon to express any opinion as to the taste or want of good taste exhibited in the letter. It was written under difficulties by an overworked man smarting under a series of unjust accusations. What I am concerned with is to find any materials in it for holding the defendant guilty of misconduct of the nature necessary to be found before any foundation could be laid for exercising against him a discretion which, in depriving him of his costs, has imposed upon him a grievous penalty in vindicating his professional reputation. I have read and re-read the letter carefully, and I can find no such material. I think that there was no evidence on which the learned judge's decision as to costs could properly be founded; and in my opinion this appeal ought to be allowed, the defendant ought to be awarded his costs of the action, and he will also be entitled to his costs of this appeal.

Appeal allowed.

Solicitors: *Young, Jackson, Beard & King*; *H. Dade & Co.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

A

WHITEFIELD BILLIARD HALL CO., LTD. *v.* PICKERING

[King's Bench Division (A. T. Lawrence, Avory and Sankey, JJ.), December 16, 1919]

B

[Reported [1920] 1 K.B. 604; 89 L.J.K.B. 287; 122 L.T. 429; 84 J.P. 30; 18 L.G.R. 185]

Licensing—Billiard licence—Statutory fee—Non-payment—Validity of licence—Right of justices' clerk to sue for fee.

The payment of the statutory fee for a billiard licence is not a condition C precedent to the granting of the licence. Where such a licence has been granted or renewed it remains valid despite the fact that the grantee has not obtained possession of the licence by reason of his failure to pay the fee. Where a licence is granted and the grantee does not pay for it the clerk to the justices is entitled to sue the grantee, and the justices can treat the non-payment as a ground for refusing to renew the licence.

D **Notes.** As to licensed billiard halls, see 32 Halsbury's Laws (2nd Edn.) 107 et seq.; and for cases see 42 Digest 924, 925. As to the Gaming Act, 1845, see 10 Halsbury's Statutes (2nd Edn.) 746. Section 11 of that Act is amended by the Betting and Gaming Act, 1960, Sched. 4, para. 9 (40 Halsbury's Statutes (2nd Edn.) 380), but without affecting the point of this case.

E **Case Stated** by justices for the petty sessional division of Bury in the county of Lancaster.

On July 17, 1919, the appellants, the Whitefield Billiard Hall Co., Ltd., were charged on two informations that they, on July 2 and 4, 1919, at Whitefield, in the county of Lancaster, did unlawfully keep on certain premises belonging to them in Sefton Street, Whitefield, a public billiard table for public use without being F duly licensed, and not then holding a licensed victualler's licence for the premises where the billiard table was kept, contrary to the provisions of s. 11 of the Gaming Act, 1845.

At the hearing of the informations the following facts were proved or admitted. (a) On July 2 and 4, 1919, the appellants in fact kept and used at Sefton Street, Whitefield, a public billiard table for public use, without holding a licensed G victualler's licence in respect of the premises. (b) At the adjourned general annual meeting of the licensing justices for the sessional division of Bury on Mar. 13, 1919, upon an application by the appellants' solicitor, the justices renewed the appellants' licence authorising them to keep and use on their premises at Sefton Street, Whitefield, a public billiard table for public playing, subject to the conditions endorsed on the licence. (c) It was not proved or alleged that the H appellants had broken any of the said conditions. (d) The licence so granted and renewed was prepared and signed by the clerk to the licensing justices and was duly sealed by them and the usual notice was sent to the appellants by the clerk that it would be given out to them upon application, but no application was made for the same and the licence was never taken up or paid for by the appellants and it remained in the office of the clerk to the justices. (e) On April 6, 1919, in conse- I quence of the licence not having been taken up and paid for by the appellants the said clerk treated it as lapsed and so marked it in his minute book. (f) On the hearing of the said charges the appellants adduced no evidence to account for their not having taken up and paid for the licence, and the only explanation given to the justices was a statement by the appellants' solicitor that it was due to an oversight. (g) On the occasion of the grant of the licence in the previous year the appellants had been twice reminded by the clerk before they took up the licence and the justices were of opinion that they had no intention of taking up and paying for it.

It was contended on behalf of the appellants that the licence, having admittedly been renewed, could not be treated by the clerk as having lapsed merely because it was not taken up and paid for by the appellants after notice from the clerk, and that in the circumstances the appellants did not in fact or in law keep or use a billiard table without a licence and therefore could not be convicted of the offences charged against them. The justices were of opinion that the licence had lapsed, that it was not in force on the dates on which the offences were alleged to have been committed, and that the appellants were in the position of having no licence on the dates charged. They, therefore, convicted the appellants and fined them £2 12s. 6d. in each case. The appellants appealed.

By the Gaming Act, 1845:

"Section 10: . . . the justices . . . shall have authority at such general annual licensing meeting, or at any adjournment thereof, to grant billiard licences to such persons as the said justices shall in their discretion deem fit and proper to keep public billiard tables and bagatelle boards, or instruments used in any game of the like kind, . . . and the clerk of the justices shall be entitled to demand and receive from every person licensed under this Act, for the petty constable or other peace officer for serving notices and other services required of him, the sum of one shilling, and for the clerk of the justices, for the licence, the sum of five shillings . . .

Section 11: . . . every house, room, or place kept for public billiard playing, or where a public billiard table or bagatelle board, or instrument used in any game of the like kind is kept, at which persons are admitted to play, except in houses or premises specified in any licence granted under the Alehouse Act, 1828, hereinafter called a victualler's licence, shall be licensed under this Act; and . . . every person keeping any such billiard table or bagatelle board, or instrument used in any game of the like kind for public use, without being duly licensed so to do, and not holding a victualler's licence for the house or premises where such billiard table, bagatelle board, or other instrument as aforesaid, is kept or used, . . . shall be liable [on summary conviction to a fine not exceeding ten pounds] . . ."

Henn Collins for the appellants.
Jeeves for the respondent.

A. T. LAWRENCE, J.—We are of opinion that the appeal in this case must be allowed. The best argument that can be advanced against the appellants is that they were not duly licensed because they never got the licence into their possession by payment of the fee which was payable on such grant. That argument is not, in my opinion, satisfactory, because it involves that the appellants were compelled to pay a certain sum before they were licensed, whereas the statute says that they are liable to pay the sum when they are licensed. The clerk to the justices, without any statutory authority to act in this manner, treated the licence as having lapsed, because he had not received the proper fee. No doubt there were other remedies open to him in case of non-payment, but we have not had our attention drawn to any provision which enables him under the circumstances to cancel the licence. The action of the clerk to the justices had no effect, and, therefore, the justices were wrong in coming to the conclusion that the licence had lapsed. The real position is that the licence is a condition precedent to the right of the justices' clerk to receive the fee which is payable to him. This appeal must therefore be allowed, and the convictions must be quashed.

AVORY, J.—I am of the same opinion. The question may be advanced as to what is the practical remedy where a billiard licence is granted and the grantee does not pay for it. I think that there are two answers to this question. In the first place the clerk of the justices is entitled to sue the grantee; and in the second place, the justices may, on an application for the renewal of the licence, bear the

matter in mind and deal with such application accordingly. I am of opinion, therefore, that this appeal should be allowed and that the convictions should be quashed.

SANKEY, J.—I agree.

Convictions quashed.

Solicitors: *Thompson, Quarrell & Jones*, for *C. H. Pickstone*, Radcliffe; *Snow, Fox & Higginson*, for *Sir Harcourt Clare*, Preston.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

Re THELLUSSON. Ex parte ABDY *v.* OFFICIAL RECEIVER

[COURT OF APPEAL (Warrington, Duke and Atkin, L.JJ.), June 27, 30, July 31, 1919]

[Reported [1919] 2 K.B. 735; 88 L.J.K.B. 1210; 35 T.L.R. 732; 63 Sol. Jo. 788; 122 L.T. 35; [1918–19] B. & C.R. 249]

Court—Control of officers—Direction to act according to morality and justice, though not legally compellable—Trustee in bankruptcy—Money lent to bankrupt in ignorance of pending bankruptcy—Repayment to lender by trustee.

The court has a discretionary jurisdiction to direct its officer to pursue a line of conduct which a high-minded, honest man, actuated by motives of morality and justice, would pursue, though not compellable thereto by legal process. As an example, the court will not allow its officer to take advantage of a mistake of law. The discretion is not only to be exercised where the officer has been pursuing what the court thinks is a dishonest course of conduct and appears to be minded to continue it. It is enough if it appears that the thing which the officer is about to do or omit is such that it would be grievously unfair and contrary to natural justice for him to do or omit to do it.

Accordingly, where the official receiver, as trustee in a bankruptcy, in course of administration came into possession of money of the bankrupt which had been lent to the bankrupt by a friend in ignorance of the fact that on the day before the loan a receiving order had been made against the bankrupt, and the money would not have been lent if that fact had been known to the lender,

Held: in such circumstances an honest man, on ascertaining the facts, would at once repay the money, and the official referee must be ordered to pay the sum in question to the lender.

Notes. Considered: *Re Wigzell, Ex parte Hart*, [1921] 2 K.B. 835; *Scranton's Trustee* v. *Pearse*, [1922] All E.R.Rep. 764. Distinguished: *Re Wilson, Ex parte Salaman, The Trustee* v. *Keith, Prowse & Co., Ltd.* (1925), 133 L.T. 814. Applied: *Re Regent Finance and Guarantee Corpn.* (1930), 69 L.Jo. 283. Considered: *Re Sandiford (No. 2), Italo-Canadian Corpn., Ltd.* v. *Sandiford*, [1935] All E.R.Rep. 364; *Re Gozzett, Ex parte Messenger & Co.* v. *Trustee*, [1936] 1 All E.R. 79.

As to powers and duties of trustees in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 382–390; and for cases see 4 DIGEST (Repl.) 226–229, 236 et seq.

Cases referred to:

(1) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; 43 L.J.Bcy. 107; 30 L.T. 773; 22 W.R. 937, L.JJ.; 4 Digest (Repl.) 226, *2031.*

(2) *Re Tyler, Ex parte Official Receiver*, [1907] 1 K.B. 865; 76 L.J.K.B. 541; 97 L.T. 30; 23 T.L.R. 328; 51 Sol. Jo. 291; 14 Mans. 73, C.A.; 4 Digest (Repl.) 228, *2041.*

(3) *Re Carnac, Ex parte Simmonds* (1885), 16 Q.B.D. 308; 54 L.T. 439; 34 W.R. 421; 55 L.J.Q.B. 74; 2 T.L.R. 18, C.A.; 4 Digest (Repl.) 227, *2032*.

(4) *Re Hall, Ex parte Official Receiver*, [1907] 1 K.B. 875; 76 L.J.K.B. 546; 97 L.T. 33; 23 T.L.R. 327; 51 Sol. Jo. 292; 14 Mans. 82, C.A.; 4 Digest (Repl.) 413, *3692*.

(5) *Tapster* v. *Ward* (1909), 101 L.T. 25, 503; 53 Sol. Jo. 503, C.A.; 5 Digest (Repl.) 727, *6289*.

(6) *Re Stokes, Ex parte Mellish*, [1919] 2 K.B. 256; 88 L.J.K.B. 794; 121 L.T. 391; 35 T.L.R. 345; [1918–19] B. & C.R. 208; 5 Digest (Repl.) 790, *6703*.

(7) *Robinson* v. *Dickinson* (1828), 3 Russ. 399; 7 L.J.O.S.Ch. 70; 38 E.R. 625, L.C.; 35 Digest 102, *91*.

(8) *Cochrane* v. *Willis* (1865), 1 Ch. App. 58; 35 L.J.Ch. 36; 13 L.T. 339; 11 Jur.N.S. 870; 14 W.R. 19, L.JJ.; 35 Digest 103, *97*.

(9) *Re Phillips*, [1914] 2 K.B. 689; 83 L.J.K.B. 1364; 21 Mans. 144; sub nom. *Re Phillips, Ex parte Official Receiver*, 110 L.T. 939; 58 Sol. Jo. 304; 5 Digest (Repl.) 680, *5981*.

(10) *Re Rogers, Ex parte Villars* (1874), 9 Ch. App. 432; 43 L.J.Bcy. 76; 30 L.T. 348; 38 J.P. 533; 22 W.R. 603, L.C. & L.JJ.; 5 Digest (Repl.) 887, *7384*.

(11) *Re Rhoades, Ex parte Rhoades*, [1899] 2 Q.B. 347; 68 L.J.Q.B. 804; 80 L.T. 742; 15 T.L.R. 407; 6 Mans. 277; sub nom. *Re Rhoades, Ex parte Official Receiver*, 47 W.R. 561; 43 Sol. Jo. 571, C.A.; 4 Digest (Repl.) 546, *4774*.

Also referred to in argument:

Re Reed, Ex parte Barnett (1876), 3 Ch.D. 123; 45 L.J.Bcy. 120; 34 L.T. 664; 24 W.R. 904; 5 Digest (Repl.) 795, *6729*.

Re Angerstein, Ex parte Angerstein (1874), 9 Ch. App. 479; 43 L.J.Bcy. 131; 30 L.T. 446; 22 W.R. 581, L.JJ.; 5 Digest (Repl.) 975, *7860*.

Appeal by the creditor of a bankrupt from an order of HORRIDGE, J.

The facts of the case and the arguments of counsel appear from the judgments.

Kerly, K.C. (with him *Pitman*) for the appellant.

E. W. Hansell (*the Attorney-General, Sir Gordon Hewart, K.C.*, with him) for the official receiver, the trustee in bankruptcy.

Cur. adv. vult.

July 31, 1919. The following judgments were read.

WARRINGTON, L.J.—The question in this appeal is whether the circumstances of this case justify the exercise by the court of the jurisdiction it has often asserted of directing its officer—in this case a trustee in bankruptcy—to pursue a line of conduct which an honest man actuated by motives of morality and justice would pursue, though not compellable thereto by legal process.

The appellant, one R. H. E. Abdy, an officer in the army, became acquainted with the debtor, a retired naval captain, in October, 1918. In the middle of November the debtor asked the appellant if he would lend him £1,000 to enable him to discharge a pressing debt. The appellant consulted his solicitor and found that he could only raise the money by insuring his life and mortgaging the policy. He thereupon stipulated that the debtor must agree to repay not only the £1,000, but the expenses of effecting the policy including the premium. Pending the effecting of the insurance, the appellant paid £100 to the debtor on account by means of a promissory note guaranteed by his solicitor, and the transaction was completed on Jan. 3, 1919, by the advance of the further sum of £900 to the debtor on his signing an agreement of that day, by which he bound himself to pay to the appellant the sum of £1,272 on July 3, 1919, with interest at 6½ per cent. The £272 was the amount of the premium and expenses above referred to. The £900 was paid to the debtor's bankers. Out of it they paid themselves the amount of an overdraft due to them leaving a balance of £764 0s. 5d. in their hands. It subsequently appeared that, unknown to the appellant and his solicitor, and (as was said by the debtor) to him also, a receiving order had been made against him on Jan. 2, 1919. The appellant and his solicitor were also ignorant of the facts that

A the debtor had committed an act of bankruptcy and that a petition had been presented, though these latter facts must, of course, have been known to the debtor. The appellant states that, had he known that a receiving order had been made, he would not have paid the £900 to the debtor and there is every reason to accept this statement. The official receiver, as trustee in bankruptcy, having required the bank to pay him the £764 0s. 5d. and having received it from them, the appellant B applied by motion to the Court of Bankruptcy that the loan transaction be declared void and/or rescinded, and that the official receiver do repay to him the £764 0s. 5d. above mentioned. This money was, in fact, at the time of the application still in the hands of the official receiver. On May 12, 1919, HORRIDGE, J., sitting in bankruptcy, dismissed the motion with costs. Hence this appeal. Before HORRIDGE, J., it was contended that the loan transaction ought to be set aside on the C ground of common mistake or mistake of fact as to something affecting the subject-matter of the contract. But it was further contended that, even if there was no legal right in the appellant to rescind the transaction, and so recover the money, it would not, under the circumstances, be in accordance with strict notions of honesty and justice for the official receiver to retain it, and the court ought, in exercising control over its officer, to order him to do that which a strictly honest D man would do—viz., to repay the £764 0s. 5d. to the applicant. HORRIDGE, J., arrived at a conclusion adverse to the appellant on his legal claim, and, on his appeal to the court's discretionary jurisdiction, was of opinion, for reasons which do not clearly appear from his judgment, that the case was not one in which the court ought to interfere with the legal title. Before this court the legal claim was hardly pressed, and without going so far as to say it could not succeed, I will E assume that it ought not to do so.

The question then arises whether the court ought to exercise the discretionary jurisdiction over its officer to which I have referred. The first matter to be determined is what are the limits of the jurisdiction? The first case in which the jurisdiction in question appears to have been exercised in the case of a trustee in bankruptcy is *Re Condon, Ex parte James* (1). In that case an execution creditor, F acting under what proved to be a mistaken view of the law, voluntarily paid the proceeds of his execution to the trustee in bankruptcy of the debtor. On an application by the execution creditor for repayment by the trustee the court ordered the trustee to repay, notwithstanding that he could not by law be compelled so to do. The ground of the decision is thus stated by JAMES, L.J. (9 Ch. App. at p. 614):

> "A trustee in bankruptcy is an officer of the court. The court, finding that G he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

In saying that the trustee had money in his hands which "in equity" belonged to someone else, the learned lord justice did not mean that a court of equity would as between litigants hold that the money belonged to the supposed claimant, but H was using the word "equity" in a wider and more popular sense: see per VAUGHAN WILLIAMS and BUCKLEY, L.JJ., in *Re Tyler, Ex parte Official Receiver* (2) ([1907] 1 K.B. at pp. 869 and 873).

The principle laid down in *Re Condon, Ex parte James* (1) was again applied by this court in *Re Carnac, Ex parte Simmonds* (3). In that case the trustees of a settlement had for many years, under a mistake as to their legal obligations, paid I certain surplus income to the trustee in liquidation of a debtor. The money so paid had been expended in payment of dividends. The court on the application of the surviving trustee who had then discovered his mistake, ordered the trustee in liquidation to repay the money out of other moneys coming to his hands and applicable for payment of dividends. The principle was laid down by LORD ESHER, M.R., in the following terms (16 Q.B.D. at p. 312):

> "A rule has been adopted by courts of law for the purpose of putting an end to litigation, that if one litigant party has obtained money from the other

erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. The court has never intimated that it is a high-minded thing to keep money obtained in this way; the court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil—in order, that is, to put an end to litigation. But JAMES, L.J., laid it down in *Ex parte James* (1) that although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of a court of common law, the court would order him to repay it so soon as the mistake was discovered. Of course as between litigant parties even a court of equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that, if money had come into the hands of a receiver appointed by a court of equity through a mistake of law, the court would, when the mistake was discovered, order him to repay it. A trustee in bankruptcy has always been treated as an officer of the court of bankruptcy, and the court will order him to act in an honourable and high-minded way, and so it was laid down by JAMES and MELLISH, L.JJ., in *Ex parte James* (1)."

In both those cases, it will be observed, there was nothing dishonest on the part of the trustee in demanding and receiving the money in question; in each case he reasonably believed that he was entitled to it. What the court thought would be dishonest was that he should retain the money when the mistake had been pointed out.

The principle has been followed and applied in many other cases. But I propose to refer to one only, for a reason which will appear hereafter, that of *Re Tyler, Ex parte Official Receiver* (2). In that case the bankrupt's wife, in pursuance of a request made by the bankrupt, before his bankruptcy, had paid the premiums on a policy of assurance on the life of the bankrupt. After his death the trustee in his bankruptcy received the policy moneys, and the wife applied for the payment to her thereout of the amount of the premiums paid by her. The fact that the premiums were being paid by the wife had been disclosed by the bankrupt to the deputy of a former official receiver in the course of an examination. All the judges seem to have thought that the wife might establish a legal right to the premiums. But, being asked by the Solicitor-General to determine what is the true principle of *Re Condon, Ex parte James* (1) and *Re Carnac, Ex parte Simmonds* (3), they all three delivered judgment on this point, on the assumption that the wife had no legal right. It is unnecessary to read the judgments of all the lords justices on this point; they all agree in substance though they use different language. I will read a passage from the judgment of BUCKLEY, L.J., as putting the matter in the clearest possible way ([1907] 1 K.B. at p. 873):

"In *Ex parte James* (1) JAMES, L.J., speaks of money which in equity belongs to someone else. In my judgment, he there meant money which, in point of moral justice and honest dealing, belongs to someone else. He was using the words in a popular sense, and not in the sense of money which in a court of equity would belong to someone else. I think the context of his judgment plainly shows that that was his meaning. In *Ex parte Simmonds* (3) LORD ESHER, referring to *Ex parte James* (1), says that the court will direct its officer to act as any high-minded man would act—namely, not to take advantage of a mistake of law. That is to say, assuming that he has a right enforceable in a court of justice, the Court of Bankruptcy, or the court for the administration of estates in Chancery, will not take advantage of that right if, to do so, would be inconsistent with natural justice and that which an honest man would do. In *Ex parte Simmonds* (3) the court was extending the doctrine of *Ex parte James* (1) in this sense, that they were holding not merely that if the trustee had the money still in his hands he ought to hand it to the person

who, in point of justice, was entitled to it, but that if he had parted with the money but there was other money coming in from the bankruptcy, he ought out of such money to make good the fund which he had by error misappropriated."

In that case as in the previous cases there had been nothing which would be inconsistent with the strictest honesty in the conduct of the trustee except in insisting on retaining the policy money without payment of the amount of the premiums paid by the wife when he had ascertained the facts. The knowledge imputed to the former trustee, and through him to the trustees, at the date of the death of the debtor was relied upon only as one of the facts rendering it, in the opinion of the court, dishonest on the part of the latter to retain the benefit of the wife's payment without making it good to her. This is put with admirable clearness by BUCKLEY, L.J., in the following passage in his judgment (ibid. at p. 874):

"Under these circumstances, looking beyond rights enforceable in a court of law or equity, the real fact is that the policy moneys payable in 1906 originated from and owed their existence to the premiums which the wife, to the knowledge of the trustee, had paid, and it would be grievously unfair, and contrary to natural justice between man and man, that whereas she kept up the policy yet, when the life dropped, somebody else should take the money. She may not have an enforceable claim, but as a matter of justice it cannot be right, when the time comes for the payment of the moneys due on the policy, to allow the trustee to turn round and say: 'I knew you were keeping down the premiums, but I shall take the policy moneys, and you shall go without the money you have paid.' "

But it is said that in *Re Hall, Ex parte Official Receiver* (4), decided after, but on the same day as *Re Tyler, Ex parte Official Receiver* (2), there are expressions which show that the principle expounded in *Re Tyler, Ex parte Official Receiver* (2) is not to be taken to be as wide as the judgment in that case would appear to make it. It is said that it is only applied where the trustee has been pursuing what the court thinks is a dishonest course of conduct and appears to be minded to continue it. If the judges really intended so to limit the principle it would be an extraordinary thing that they did not do so in *Re Tyler, Ex parte Official Receiver* (2), when they were deliberately expounding the principle, but reserved the limitation for the judgment delivered immediately afterwards in a case in which the principle in its wider scope was plainly inapplicable. The judgment mainly relied upon is that of FARWELL, L.J., as follows (ibid. at p. 879):

"The distinction between this and the last case (*Re Tyler, Ex parte Official Receiver* (2)) is to my mind apparent. In this case the officer of the court has neither done nor omitted anything which could give rise to the suggestion that he has committed the court to a course of conduct which is in any way unworthy of its dignity. The mortgagees chose to make these payments of 4s. in the pound on their own initiative without a suggestion from the trustee, in the hope of avoiding the bankruptcy by carrying through the composition. I have already explained that the principle is that the officer of the court must not embark upon a course of conduct, either of omission or commission, which is unworthy of the court so as to commit the court to acts which it would feel bound to repudiate. In the last case, for example, my judgment proceeded on the knowledge of the trustee in the bankruptcy of the existence of the policies and the necessity for paying the premiums, and the fact that the wife was paying them. Different considerations would have arisen altogether if the trustee had been ignorant of the existence of any policy at all, and then, after the life had dropped, the wife had come to the trustee and said that she had been paying the premiums. That would have been a mistake of law, which I will deal with when it arises, but certainly I should require to consider a good deal more closely before I decided that case in favour of the wife, because, to my mind, the principle rests on the act or omission of the trustee in

bankruptcy acting as the officer of the court, and not on any mere mistake made by a third person with whom the officer had nothing to do."

This is, I think, consistent with the view that it is enough, in order to apply the principle, to find as to the thing which the trustee is about to do or omit to do, that it would be dishonest to do it or omit to do it. The previous course of conduct in both parties may be material on the question whether it would be dishonest to do or omit the action in question, but that is all. I am quite sure that is all that FARWELL, L.J., meant in the expression he has used. *Tapster* v. *Ward* (5) and *Re Stokes, Ex parte Mellish* (6) were cited in support of the trustees' case. In each of these cases the debtor himself had kept up a policy which he had not disclosed to the trustee, and on his death his executor claimed to be repaid the premiums out of the policy moneys. Here the dishonesty, if any, was on the part of the debtor himself. It would have been a perversion of the principle expounded in *Re Tyler* (2) to have applied it in those cases.

We have here a trustee in bankruptcy in possession of money of the bankrupt, which he knows was lent to him by Mr. Abdy in ignorance of the fact that on the day before the payment a receiving order had been made, and which would not have been so lent if the facts had been known to the lender. I think, under such circumstances, an honest man would, on ascertaining the facts, at once repay the money, and, in my opinion, the trustee must be ordered to pay the £764 0s. 5d. accordingly. The debtor is not before us except so far as the trustee represents him. If there are any rights or obligations arising out of the mere transaction which, notwithstanding the bankruptcy, remain vested in or binding on the debtor, these will not be affected by our order save, of course, so far as they may be affected by the repayment of the £764 0s. 5d. I think the appellant is entitled to the costs of this appeal, but, inasmuch as the trustee was entitled to have the direction of the court in the matter, there should be no costs in the court below.

DUKE, L.J.—The sum in question, £764 odd, was claimed by the appellant on three grounds—namely, that the appellant is entitled to it at law as a sum paid under a mistake of fact; that he is entitled to it in equity under a trust by which the trustee in bankruptcy is bound; that, if he is not entitled either at law or in equity upon principles binding in courts of justice as between ordinary litigants, nevertheless the trustee ought, upon grounds of common honesty and fair dealing, to pay the sum to him; and that the court in its discretion should direct him to do so. These questions have necessitated a careful examination of the transaction which led to the payment being made to the bankers by the appellant. The appellant's account of the transaction is that in November, 1918, he had consented to raise money and make a loan to the bankrupt upon the terms that the bankrupt should indemnify him against the expense of the transaction; that £100 was provided and advanced in pursuance of the promise in December; and that on Jan. 3, after the execution of an agreement for repayment, the balance of £900 was paid to the bankrupt's bankers. The appellant and his solicitor did not know, and the bankrupt did not know at the time of the payment of £900, but it was the fact, that on Jan. 2, a receiving order was made against the bankrupt. Nor did the appellant know, though the bankrupt did, of the proceedings in bankruptcy which led to the making of the receiving order. The bankrupt states that when the petitioning creditor began to press him he told the appellant that he was being pressed by a creditor; that the appellant thereupon offered to lend him £1,000; that £100 of this sum was paid in December, that the agreement in respect of the transaction was executed on Jan. 22, and the balance of £900 paid to the bankrupt's banking account on Jan. 4. The bankrupt knew that a petition in bankruptcy against him stood for hearing on Jan. 22, but not that a receiving order was made. The £100 paid to him in December was spent by him on his personal expenses, and about £80 due to his bankers in respect of an overdraft was with his knowledge retained by the bankers out of the £900. There was no express stipulation as to the mode of appropriating the borrowed money or for its return by the bank-

A rupt to the appellant in case the bankrupt found himself unable to satisfy the creditor who was pressing him. Nor do I see any evidence of an agreement between the parties that the loan was only to be carried out if the debtor found he could make the desired settlement. On proof of these facts, or either of them, the appellant would, I think, have been entitled to recover any part of the £1,000 which remained under the bankrupt's control at the time of his being adjudicated B bankrupt. The bankrupt spent £100 of the £1,000 upon his personal expenses, and he appears to have intended that his bankers should appropriate £136 or thereabout to make good his overdraft and other liabilities.

It could not, in my opinion, be actually said that there was a trust created by the agreement of the bankrupt and the appellant, in respect of the £1,000 or any specified part of that amount. As to this I agree in the opinion of HORRIDGE, J. C It is not so clear to me as it was to the learned judge that there was no mistake on the appellant's part as to the facts material to the transaction in respect of which he made his arrangement with the bankrupt. The appellant believed on Jan. 4, 1919, that the bankrupt could then receive £900 for the purpose of paying that sum or part of it to a creditor whose claim against him dated from October or November, 1918, so as to discharge that claim. He believed the bankrupt to be D subject to no disability which would prevent him from making binding arrangements with his creditors or from disposing of assets to which he had become or might become entitled. In this he was mistaken. Whether this was a mistake in the transaction itself, or only a mistake in a collateral matter, seems to me to be the material question on this part of the case. Mistake as to the rights possessed by parties to contracts, or their competency to make contracts, which they purport or E intend to make, is a ground on which contracts may under some circumstances be avoided. *Robinson* v. *Dickinson* (7) and *Cochrane* v. *Willis* (8) are instances of such mistakes. But in the present case the bankrupt is not personally party to the litigation, and the trustee in his bankruptcy is not concerned with the contract of loan, except to the extent to which its admitted existence furnished primâ facie proof that the money in question was part of the bankrupt's estate divisible among F his creditors. It is, moreover, unnecessary to decide whether, at the time when the payment in question was made to the bankers, the bankrupt could, upon the construction of the facts, have maintained any action against the appellant if the appellant instead of paying the money, had repudiated the transaction. For reasons which I am about to state, I am of opinion that, whatever be the true answer to that question, the trustee in bankruptcy ought not to retain the sum G in question. The appellant is, as I think, entitled to relief under the rule as to administration of estates in bankruptcy laid down in *Re Condon, Ex parte James* (1), *Re Carnac, Ex parte Simmonds* (3), and *Re Tyler, Ex parte Official Receiver* (2).

The principle on which, as it appears to me, the court is now bound to proceed in such a case as the present is that which is enunciated very distinctly in the H judgment of JAMES, L.J., in *Re Condon, Ex parte James* (1), LORD ESHER, M.R., in *Re Carnac, Ex parte Simmonds* (3), and BUCKLEY, L.J., in *Re Tyler, Ex parte Official Receiver* (2)—namely, that the trustee in bankruptcy is an officer of the court and in deciding what is his duty with regard to a contested claim in which he is concerned as trustee, this court must consider not merely whether he has a cause of action or right, or a defence or answer which would prevail at law or in I equity as between ordinary litigants, but also what in point of honesty the trustee ought to do in respect of the facts of the case. The position of the trustee in bankruptcy as an officer of the court is the material matter. "The court ought to set an example," JAMES, L.J., said in *Re Condon, Ex parte James* (1). It "ought to be as honest as other people"—that is to say, it ought to be honest. LORD ESHER, M.R., in *Re Carnac, Ex parte Simmonds* (3) said with regard to the control of the court over a trustee in bankruptcy, "The court will order him to act in an honourable and high-minded way." And so it was laid down by JAMES and MELLISH, L.JJ., in *Re Condon, Ex parte James* (1). VAUGHAN WILLIAMS, L.J., in *Re Tyler,*

Ex parte Official Receiver (2) agrees in the view expressed in both the previous cases. When JAMES, L.J., says in *Re Condon, Ex parte James* (1) that the trustee has in his hands money which in equity belongs to somebody else, he is not referring to an equity which is capable of forensic enforcement in a suit or action, but he is referring to a moral principle which he describes when he says that the Court of Bankruptcy ought to be as honest as other people. BUCKLEY, L.J., in his judgment in *Re Tyler, Ex parte Official Receiver* (2), explaining still more fully the principle of the decision in *Re Condon, Ex parte James* (1), said ([1907] 1 K.B. at p. 873):

> "In *Ex parte James* (1) JAMES, L.J., speaks of money which in equity belongs to someone else. In my judgment he there meant money which in point of moral justice and honest dealing belongs to someone else. He was using the words in a popular sense, and not in the sense of money which in a court of equity would belong to someone else. I think the context of the judgment plainly shows that that was his meaning. In *Ex parte Simmonds* (3) LORD ESHER, M.R., referring to *Ex parte James* (1), says that this court will direct its officer to act as any high-minded man would act—namely, not to take advantage of a mistake of law. That is to say, assuming that he has a right enforceable in a court of justice, the Court of Bankruptcy, or the court for the administration of estates in Chancery, will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do."

Emphasis was laid by counsel for the trustee in bankruptcy in his argument upon passages in the judgments in the three cases to which I have referred, and in the judgments in *Re Hall, Ex parte Official Receiver* (4) and in *Tapster* v. *Ward* (5), which were said to confine the principle of *Re Condon, Ex parte James* (1) within narrower limits than those which I have endeavoured to define. In particular, reliance was placed upon some observations contained in the judgment of FARWELL, L.J., in *Re Hall, Ex parte Official Receiver* (4) and the concurrence therein of LORD COZENS-HARDY, M.R., in his judgment in *Tapster* v. *Ward* (5). What had been said by FARWELL, L.J., was that ([1907] 1 K.B. at p. 879):

> "the principle is that the officer of the court must not embark upon a course of conduct, either of omission or commission, which is unworthy of the court, so as to commit the court to acts which it would feel bound to repudiate."

Again (ibid.):

> "the principle rests on the act or omission of the trustees in bankruptcy acting as the officer of the court."

Counsel referred also in support of his contention in the present case to the judgment of HORRIDGE, J., in *Re Phillips, Ex parte Official Receiver* (9) and *Re Stokes, Ex parte Mellish* (6), both of them decisions on the exercise of the jurisdiction of the Court of Bankruptcy. In none of the group of cases now under consideration did the question arise which has to be determined upon the present appeal. In *Re Hall, Ex parte Official Receiver* (4) a mortgagee claimed as against a trustee in bankruptcy to be entitled to add to his security money which was due from his debtor to third parties, which he had paid for purposes of his own, and in each of the cases in bankruptcy the bankrupt had concealed part of his assets, and a claim thereto was made as against the trustee in bankruptcy by a third party who had had no dealings with the trustee. The discussion of the principle of *Re Condon, Ex parte James* (1) arose only with regard to a state of facts which rendered its application impossible. A broad principle of general application was laid down in the three leading cases; its generality cannot be diminished by reason that other cases upon their facts were held not to fall within the principle. The principle to be applied is that the Court of Bankruptcy ought not to allow its officer to insist upon a rule of law or of equity in the administration of an estate in bankruptcy under the control of the court where such insistence would produce an unjust and

dishonest result. The trustee in the present case claims to be entitled as of legal right to retain a sum of money which would not have been paid by the appellant to the bankrupt's account if he had known of the receiving order. In my opinion, the bankrupt could not honestly have received this sum, and the trustee ought to be directed to refund it. The appeal should be allowed.

ATKIN, L.J.—This is an appeal from an order of HORRIDGE, J., sitting as bankruptcy judge, dismissing a motion by the appellant, Mr. Abdy, which asked for an order that a loan transaction between himself and the debtor be declared void or rescinded, and that the official receiver repay to him the sum of £764 0s. 5d., part of a sum of £900 paid by him to the debtor. The claim is based upon the principle said to be established by *Re Condon, Ex parte James* (1) and subsequent cases, that in administering estates in bankruptcy the court can look beyond the legal rights of the parties, and will direct its officers to act as an honourable and high-minded man would act in dealing with his own affairs. It is said that the facts here are such as to require the official receiver, acting in accordance with the foregoing principle, to return the money.

[HIS LORDSHIP stated the facts and continued:] The debtor was adjudicated bankrupt on Feb. 7. The result of the receiving order was undoubtedly to defeat the object of the loan transaction—viz., to relieve the debtor from pressure by a creditor. Its existence placed the £900 in the custody of the official receiver as receiver of the debtor's property. As soon as adjudication followed, the money vested in the official receiver as trustee, and, in the absence of a composition or scheme of arrangement, the possibility of which was not suggested in this case, adjudication under the Bankruptcy Act, 1914, necessarily followed. Moreover, if, as was contended by the Board of Trade before us, the loan transaction created an obligation upon the debtor for the first time on Jan. 3, the appellant had no right of proof against the assets of the debtor. For the right of proof by s. 30 is limited to debts and liabilities to which the debtor is subject at the date of the receiving order. His remedy, as the learned judge in the court below, no doubt ironically, observed, is to present another petition. The result would be a second adjudication, in which the trustee would be entitled to distribute all the assets of the debtor to which the trustee in the first bankruptcy was not entitled. In truth, the loan transaction became nugatory. The £900, instead of a loan to the debtor, was a gift to the creditors. The covenant to pay in six months' time might have been written in water. It was not disputed that if the debtor had known of the receiving order on Jan. 3 it would have been dishonourable of him to have received the money. Under these circumstances the appellant claims to have the money returned to him on the footing that it would be dishonourable of the debtor to hold it as soon as he knew the circumstances, and that it would be equally dishonourable of the Court of Bankruptcy through its officer, the official receiver, to hold it. He relies on cases such as *Re Condon, Ex parte James* (1) and *Re Tyler, Ex parte Official Receiver* (2) to show that the court will look beyond the bare legal rights of the parties and direct its officer to act as an honourable and high-minded man should. The contention of the Board of Trade, as I understand it, is that, however true that proposition may be where the officer of the court has himself done or omitted to do something which commits the court to a dishonourable course, the rule has no application where all the officer has done is to find the debtor in legal ownership of property, and to assert his right to it as part of the debtor's property. In that case the dishonourable person is the debtor, and, however soiled his possession may be, the court receives the property with clean hands.

It becomes necessary to consider the relevant cases. In *Re Condon, Ex parte James* (1) the sheriff had seized under fi. fa. goods of the debtor, and, after holding for fourteen days, had paid the proceeds to the execution creditor. The sheriff had notice of a petition by the debtor for liquidation by arrangement which had become abortive. After payment by the sheriff, the creditor filed a petition in bankruptcy, relying, as he was entitled to do, on the abortive petition for liquida-

tion. The debtor was adjudicated bankrupt, and the trustee claimed the proceeds of the execution from the execution creditor, relying upon the notice to the execution creditor of the petition for liquidation, being the act of bankruptcy upon which the order of adjudication was made. It happened that on Feb. 20, 1874, MELLISH, L.J., sitting on appeal in bankruptcy in *Re Rogers, Ex parte Villars* (10), in very similar circumstances had decided in favour of the trustee; and on Feb. 23, 1874, the execution creditor being advised that he had no defence, paid over the money to the trustee. Later on—namely, on May 8—the full Court of Appeal re-heard *Re Rogers, Ex parte Villars* (10) and reversed the decision, MELLISH, L.J., being a member of the court. The execution creditor thereupon claimed to have the money repaid to him. One of the defences set up by the trustee was that the money had been paid to him voluntarily and under a mistake of law, and that it was irrecoverable. The court (JAMES and MELLISH, L.JJ.) ordered the money to be repaid. JAMES, L.J., there said (9 Ch. App. at p. 614):

> "A trustee in bankruptcy is an officer of the court. The court then finding that he has in his hands money which in equity belongs to someone else ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

It is to be noted that the only act or omission of the trustee, other than the omission to repay the money when finally demanded, was to claim the money in the first instance from the execution creditor. In making that claim he was asserting a view of the law which had at first commended itself to MELLISH, L.J., himself. And the payment was made to him by the creditor and received by him after the judgment of MELLISH, L.J., and after the creditor had received legal advice. It would be perverse to suppose that in acting as he did in claiming and receiving the money under such circumstances the trustee was in any way tainted with any kind of dishonour. If it is said that he must by a fiction be supposed to have known the law as subsequently laid down by the full court, the answer is by the same fiction, so must the creditor. In truth, the only act or omission by the trustee capable of complaint was holding the money after the rights of the parties were ascertained.

In *Re Carnac, Ex parte Simmonds* (3) the trustees of a settlement for a period from 1875 to 1883 under a mistake of law paid to the trustee in the liquidation of the tenant for life certain income to which the trustee was not entitled. They did so in consequence of a notice served on them by the trustee in the liquidation. The trustee in the liquidation as the income was received distributed it in dividends among the creditors. On discovering their mistake, the trustees of the settlement applied to the Court of Bankruptcy for an order that the trustee in the liquidation should pay to them out of assets in his hands the sums as paid to him within the past six years. It is to be noted that the actual funds so paid had been distributed. This made no difference, and the court made the order. I need not repeat the passage from LORD ESHER'S judgment read by my Lord. There is no suggestion in the judgments that the decision turned on something done or omitted to be done by the trustee in the liquidation—some trick or unfair dealing or sharp practice. The reference to the mistake of the officer of the court by LINDLEY, L.J., is the mistake, not in asking for the money, but in distributing it when received. Later he uses the phrase "injustice which has been inadvertently done."

It appears to me that the principle as stated in these two decisions is not limited in its application to cases of money paid under a mistake of law. The two cases, however, were both of this description. One may notice that the next case in order of date was also of money paid under a mistake of law—namely, *Re Rhoades, Ex parte Rhoades* (11). There the executor, who was also a creditor of the testator, in ignorance of his right of retainer, had paid over all the assets he had got in to the official receiver, in whom the amounts vested under an order made for the administration of the estate of the testator, who was insolvent. In that case it is not suggested that the official receiver did anything at all except receive the money.

It does not appear that he asked for it, or that he knew that the executor had any claim. Nevertheless, the Court of Appeal, affirming WRIGHT, J., ordered the official receiver to repay the amount of the debt to the executor. LINDLEY, M.R., said ([1899] 2 Q.B. at p. 355):

> "*Ex parte James* (1) and *Ex parte Simmonds* (3) are distinct authorities to show that mistakes of this kind, although attributable to ignorance of law, can and will be set right by the court so long as the officer of the court still has the money in his hands."

In *Re Tyler, Ex parte Official Receiver* (2) an attempt was made by counsel for the Board of Trade, the Solicitor-General, to have this doctrine limited to cases of money paid under a mistake of law. It failed, and the court—intentionally, as I think—put the principle on a broad basis. The facts are instructive. In 1893 the debtor was possessed of two life assurance policies, and mortgaged them to his bank. In 1895, being embarrassed, he asked his wife to pay the premiums, which she did until the debtor's death in 1906. In August, 1896, the debtor was adjudicated bankrupt. One Davis was appointed trustee in bankruptcy. Subsequently, he was succeeded as trustee by the official receiver. On the debtor's death the bank, the mortgagees, collected the policy moneys, and, after deducting the amount due to them, paid the balance, £514, after notice by him, to the official receiver. The wife claimed to be repaid £481, the amount paid by her for premiums and interest on the loan. Neither the official receiver nor his predecessor as trustee knew that the wife had been paying the premium and interest, but the debtor had disclosed the fact for the first time in 1901 to a clerk of the official receiver in the course of a preliminary examination as to his affairs. In that case the balance was rightly claimed by the official receiver from the bank. It plainly formed part of the debtor's estate, and as to the portion in excess of the wife's claim there was no dispute as to the official receiver's title. The only fact that brought the principle into play was the knowledge of the trustee for the time being—six years after the wife had begun to pay the premiums—that she was paying them. Under these circumstances it was held to be unjust that the officer of the court should hold the money without recouping the wife the premiums which she had paid both before and after the date when knowledge was acquired. The judgments have been read, and I do not propose to repeat them. I only desire to remark that, if FARWELL, L.J., meant in his judgment to characterise as "a dirty trick" the conduct of the trustee in *Re Condon, Ex parte James* (1) in asking for the money, for the reasons I have already given there seems no foundation for the criticism. I do not understand a constructive dirty trick. In applying this principle we have to deal with real and substantial dishonesty or unfairness or injustice. And we have not to rely on any fiction of law. The true principle seems to me to be summed up in the words of BUCKLEY, L.J. That is to say, assuming that the applicant has a right enforceable in a court of justice, the Court of Bankruptcy, or the court for the administration of estates in Chancery, will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do.

On the same day the Court of Appeal gave judgment in *Re Hall, Ex parte Official Receiver* (4). There the mortgagees of a debtor proceeded to pay a composition to creditors with notice of an act of bankruptcy, believing, as it was said, that they could add the sums so paid to the mortgage debt. They realised the mortgage security and claimed to defray the sums so paid out of the sums realised. It was held that they could not. I am quite at a loss to see how it could be suggested that there was any sort of a moral obligation upon the official receiver to allow such a claim, and the court so held. In FARWELL, L.J.'s judgment he said ([1907] 1 K.B. at p. 879):

> "I have already explained that the principle is that the officer of the court must not embark upon a course of conduct, either of admission or commission,

which is unworthy of the court so as to lower the acts which it would feel bound to repudiate."

If to hold money for distribution among a debtor's creditors which in honesty and fairness ought to be paid to a third party is embarking upon a course of conduct, the above sentence, which is obiter, is consistent with the facts of the decision in *Re Condon, Ex parte James* (1), *Re Carnac, Ex parte Simmonds* (3), *Re Rhoades, Ex parte Rhoades* (11), and *Re Tyler, Ex parte Official Receiver* (2). If not, I cannot think that the sentence correctly records the effect of the previous decisions which were binding upon the Court of Appeal.

In *Tapster* v. *Ward* (5) a debtor in 1879 effected a policy of assurance on his own life and then presented a petition for liquidation. The policy vested in the trustee in the liquidation, but its existence was not disclosed by the debtor. In 1880 the liquidation was closed and the debtor continued to pay premiums until his death in 1907. On his death the trustee in the liquidation, who was then represented by the official receiver, and who never had received any notice of the existence of the policy or the payment of premiums by the debtor, claimed the policy money. The personal representatives of the debtor claimed not merely the premiums paid, but the policy moneys. How the claim of the official receiver under those circumstances—in effect to have the moneys of the debtor applied in payment of the debtor's creditors—should be stigmatised as dishonourable or unjust, or may seem other than the claim of a high-minded man, it is difficult to conceive. The court had no difficulty in allowing the official receiver's claim. In giving judgment, the then Master of the Rolls referred to the passage of FARWELL, L.J., in *Re Hall, Ex parte Official Receiver* (4), above cited, and adopts it, and he proceeds to point out, as the fact is, that in *Re Tyler, Ex parte Official Receiver* (2), a case of a claim to the refunded premiums, the deciding fact was the knowledge of the trustee that premiums were being paid. I do not think that the Master of the Rolls took the passage of FARWELL, L.J., which he cited, to be varying the principles laid down clearly in *Re Tyler, Ex parte Official Receiver* (2) and the previous cases, or meant himself to vary them. If he did, it is apparent that, in view of the fact of the particular case, his expression of opinion was unnecessary to the decision of the case, and, therefore, though entitled to the greatest weight, is not binding upon us.

Re Phillips, Ex parte Official Receiver (9), decided by HORRIDGE, J., turned on facts similar to those in *Tapster* v. *Ward* (5). A life policy was taken out by a debtor who was then made bankrupt. He did not disclose the policy, paid the premiums himself, became bankrupt a second time, and then died. It was held, as I think quite rightly, that there was no kind of moral obligation on the part of the trustee in the first bankruptcy to forgo his claim to the whole of the policy moneys. *Re Stokes, Ex parte Mellish* (6) is a similar case.

The conclusion that I draw from the cases is that the contention of the Board of Trade in this case is inconsistent with the decisions in *Re Condon, Ex parte James* (1) and *Re Carnac, Ex parte Simmonds* (3), as explained in *Re Tyler, Ex parte Official Receiver* (2), and that the principle laid down in those cases has not been qualified by the later cases. It can make no difference whether the trustee himself has acquired the property by unworthy means or whether there is vested in him by operation of law property which has been acquired by the debtor by unworthy means. If it would be dishonourable of the debtor to use the money to pay his creditors, it is equally dishonourable for the officer of the court, knowing the full facts, to use the money to pay the creditors. We were pressed in argument with the contention put before the court in *Re Tyler, Ex parte Official Receiver* (2) that great difficulties will arise in the administration of bankruptcy if the court is to decide according to what it considers high-minded without regard to law or equity. I think that these difficulties are exaggerated. But while one may agree that opinions as to rules of honesty differ, the difficulty of recognising honesty when it appears affords an inadequate reason for discarding it altogether. The advantages of maintaining a high standard of commercial morality, in my judgment, far

outweigh the suggested inconveniences of administration. If I may repeat the words of LORD ESHER, "the proposition strikes me as a good, a righteous, and a wholesome one, and I eagerly desire to adopt it." The application of that proposition to the facts of the present case is relatively of small importance, and does not appear to me to present much difficulty. If the debtor knew the facts when he recovered the money, can it be suggested that a high-minded man would have completed the transaction and secured the money? He would know that the object of the transaction was defeated; that the money would go straight into the possession of the official receiver; and that the sweeping away of his assets in bankruptcy would make it impossible for him to comply with his covenant to repay. Can it be said that any different rule of conduct should have guided him when a day or two later he discovered the true facts? If he ought as a just man then to have restored the money, then so ought the officer of the court who recovered the money from him. It is said that the same position will always arise when money or goods are handed over in a mistaken belief as to the recipient's financial position. I do not agree. The important fact here is that the whole of the recipient's assets had been taken from his control by operation of law. The mere uncertainty that arises while a man is left with full disposing power of his available assets such as they are presents a different problem which can be considered when it arises.

It becomes unnecessary to consider the other points raised by counsel for the applicant. If the transaction on Jan. 3, 1919, was really based on an agreement to lend money made in November and December, 1918, as I think might well be contended, it might be said that the whole transaction was frustrated by the making of the receiving order. The case was not argued on this footing, and I express no opinion about it. It only remains to add that the principle of *Re Condon, Ex parte James* (1) has not been applied before in quite similar circumstances. Here we are directing the return of money paid in execution of the consideration moving from the promise in a contract of loan. And we are doing so in the absence of the debtor, the other party to the contract. It is an extended application of the principle, but the principle is the same. If it was unfair or unjust for the debtor to receive the consideration for a promise to be executed by him, I think that the obligation upon the officer of the court to return such consideration when it comes into his hands must exist. I think that this appeal should be allowed, and that the official receiver should be directed to repay to the applicant the sum of £764 0s. 5d. with costs here.

Appeal allowed.

Solicitors: *Smith, Rundell, Dods & Bockett*; *Solicitor to the Board of Trade.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

T. A. RUF & CO., LTD. *v.* PAUWELS

[Court of Appeal (Bankes, Warrington and Duke, L.JJ.), March 4, 5, 14, 1919]

[Reported [1919] 1 K.B. 660; 88 L.J.K.B. 674; 121 L.T. 36; 83 J.P. 150; 35 T.L.R. 322; 33 Sol. Jo. 372]

Court of Appeal—Divisional Court—Appeal from—Need for leave—Order of Divisional Court setting aside award of arbitrator—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict.*, *c.* 16), *s.* 1 (1) (*b*).

Section 1 (1) (b) of the Supreme Court of Judicature (Procedure) Act, 1894 [now Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (i)], provides that, with certain exceptions: "No appeal shall lie . . . without the leave of the judge or the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge. . . ." An award of an arbitrator was set aside by the Divisional Court on the ground of error of law appearing on its face.

Held: leave to appeal from the order of the Divisional Court was not necessary as the word "judge" in the above subsection meant a judge sitting alone, and so did not include a Divisional Court.

Arbitration—Setting aside award—Error of law on its face—Contract possibly not in writing described as "contract in writing."

Sellers sold goods to buyers on terms set out in a sold note which the sellers sent to the buyers and asked them to confirm. The buyers sent no written confirmation, but they accepted the terms of the note, which included an arbitration clause. A dispute arising under the contract was referred to arbitration, and the arbitrators' award recited that "by a contract in writing" the sellers contracted to sell, and concluded by awarding that the buyers should pay costs because "their conduct in not confirming in writing the contract was probably the cause of the dispute."

Held: whether or not the contract was properly described as "a contract in writing," there was no error in law on the face of the award which would justify the court in setting it aside.

Notes. The Judicature (Procedure) Act, 1894, has been repealed, but the provision thereof considered in this case is now contained in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (i). The Arbitration Act, 1889, has been repealed, but the power to set aside an award formerly given by s. 11 thereof is now contained in s. 23 (2) of the Arbitration Act, 1950.

As to power of the Court to remit or set aside an arbitrators' award, see 2 Halsbury's Laws (3rd Edn.) 55–62; and for cases see 2 Digest (Repl.) 676–699. For the Arbitration Act, 1950, see 29 Halsbury's Statutes (2nd Edn.) 89. As to appeals to the Court of Appeal, see 30 Halsbury's Laws (3rd Edn.) 453–480; and for cases see 16 Digest 177–180. For the Supreme Court of Judicature (Consolidation) Act, 1925, see 5 Halsbury's Statutes (2nd Edn.) 337.

Cases referred to:

(1) *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475; 72 L.J.Ch. 723; 89 L.T. 123; 52 W.R. 24; 19 T.L.R. 631, C.A.; Digest (Practice) 825, *3821*.

(2) *Re New Eberhardt Co., Ex parte Menzies* (1889), 43 Ch.D. 118; 59 L.J.Ch. 73; 62 L.T. 301; 38 W.R. 97; 6 T.L.R. 56; 1 Meg. 441, C.A.; 9 Digest (Repl.) 318, *1990*.

(3) *Bake* v. *French* (*No. 2*), [1907] 2 Ch. 215; 76 L.J.Ch. 605; 97 L.T. 750; 51 Sol. Jo. 554; 42 Digest 127, *1219*.

(4) *Re Jones*, [1895] 2 Ch. 719; 64 L.J.Ch. 832; 73 L.T. 543; 60 J.P. 7; 44 W.R. 10; 13 R. 707; on appeal, [1896] 1 Ch. 222, C.A.; 42 Digest 132, *1260*.

(5) *Re Croasdell and Cammell, Laird & Co., Ltd.*, [1906] 2 K.B. 569; 75 L.J.K.B. 769; 95 L.T. 441; 54 W.R. 620; 22 T.L.R. 759; 50 Sol. Jo. 682, C.A.; 2 Digest (Repl.) 587, *1172*.

Appeal from an order of a Divisional Court setting aside an award of arbitrators.

By a contract of Feb. 29, 1918, A. Pauwels (the respondent) sold to T. A. Ruf & Co., Ltd. (the appellants) certain soap. At the foot of the sold note, which was signed by the respondent, were these words: "P.S.—Please confirm the above." The note also provided that "any dispute on the contract or any question arising thereout to be settled by arbitration herein, in the usual manner. . . ." A dispute which arose under the contract as to non-delivery of part of the soap was referred to arbitrators who made an award in favour of the appellants, the buyers. The award recited that

> "by a contract in writing made by Alphonse Pauwels with T. A. Ruf & Co., Ltd., dated Feb. 28, 1918, Alphonse Pauwels contracted to sell and deliver"

a certain quantity of soap to the appellants at a certain price, and that a dispute had arisen which was referred to arbitration: it contained an adjudication of that dispute in favour of the appellants; and it concluded as follows:

> "We award and determine that T. A. Ruf & Co., Ltd., are to pay the costs of the reference, arbitration, and award, including £36 15s. our fees and expenses in regard to the said arbitration, as we consider that their conduct in not confirming in writing the contract was probably the cause of the dispute."

The respondent moved in the Divisional Court to set aside the award on the ground that it "is bad in law and shows error on its face and shows further that there was no legal contract binding on the parties." The Divisional Court set the award aside on the ground that on its face the arbitrators had treated that which was signed by one of the parties only as a contract in writing binding upon both parties and that therefore there was not a contract in writing. The buyers appealed. No leave to appeal was applied for or obtained. The preliminary objection was taken on behalf of the respondent that no appeal lay without leave.

Hastings for the appellants.

Casswell (*Jowitt* with him) for the respondent.

Cur. adv. vult.

Mar. 14, 1919. The following judgments were read.

BANKES, L.J.—This is an appeal from a Divisional Court setting aside an award on the ground that it was bad in law and for error apparent on its face. A preliminary objection was taken that no appeal lay from the decision without leave, and that no leave had been either applied for or obtained. The point is one of some practical importance, and as the various books of practice deal with the question as one upon which there may be some doubt we took time to consider our judgment.

The application to set the award aside was made under s. 11 of the Arbitration Act, 1889, which provides that in certain circumstances the court may set aside an award. "Court" is defined in that statute as meaning "Her Majesty's High Court of Justice." The practice is well established that an application under the section must in the King's Bench Division be made to a Divisional Court and in the Chancery Division to the judge in court. The policy of the Judicature Acts has undoubtedly been to curtail the right of appeal from a decision of a Divisional Court without leave. Section 45 of the Judicature Act, 1873, provides that no appeal shall lie without special leave from the decision of a Divisional Court on an appeal from petty or quarter sessions or from any other inferior court. Section 8 of the Judicature Act, 1884, extended the provisions of s. 45 of the Act of 1873 to all appeals from any award or certificate of an arbitrator where there had been a compulsory reference to arbitration in any cause or matter in the Queen's Bench Division of the High Court. Subsection (5) of s. 1 of the Judicature (Procedure) Act, 1894, made further provision restricting the right of appeal without leave from a Divisional Court. The language of this subsection is very wide, but it has received judicial interpretation by the full Court of Appeal in *Wynne-Finch* v.

Chaytor (1). In that case an action in the Chancery Division had been referred to an official referee for trial, and judgment had been entered in pursuance of his direction. The first question which the court had to decide was whether an appeal from that judgment lay to the Court of Appeal, or whether an application to set aside the judgment should be made to the judge of the Chancery Division to whom the action was assigned. The court decided that the latter course was the proper one to follow. The other question in the case was whether sub-s. (5) of s. 1 of the Act of 1894 applied. The court decided that it did not, upon the ground, expressed, [1903] 2 Ch. at p. 485 of the judgment, that

> "this clause of the Judicature Act, 1894, has reference to appeals from inferior courts and does not apply to an appeal from a judgment or order of the High Court itself."

The editors of the various books of practice point out that this decision apparently covers a case like the present where the decision is a decision of the High Court itself, although the application to the Divisional Court is in the nature of an appeal to the High Court from a decision of an arbitrator. In my opinion the decision in *Wynne-Finch* v. *Chaytor* (1) covers the present case. Indeed, I think that the respondent's counsel did not really contest this point.

It was, however, contended that the decision of the Divisional Court was an interlocutory order or judgment within sub-s. (1) (b) of s. 1 of that statute [now Judicature Act, 1925, s. 31 (1) (i)], and that as a consequence no appeal lay to this court without leave. To this it was replied that the subsection only applies to orders or judgments made or given by a judge: and that this expression does not include a Divisional Court. The Interpretation Act, 1889, was appealed to in answer to this objection, and it was pointed out that to accept the contention would not only be to decide against the general policy of the Judicature Acts in reference to appeals without leave, but that it would result in leave being necessary where an award had been set aside by a Chancery judge, but unnecessary where it had been set aside by a Divisional Court. I quite accept the force of this argument, but it is not, in my opinion, possible to deal with what may very possibly be a casus omissus by giving to the expression "a judge" a more extended meaning than that which has been the accepted meaning of the expression when used in the Judicature Acts where not otherwise provided, or a different meaning than that which it obviously bears in sub-s. (3) of the same section. As matters stand at present no leave to appeal is, in my opinion, necessary from a decision of a Divisional Court setting aside an award. The preliminary point taken by the respondent therefore fails.

On the merits the appeal in my opinion succeeds. The point taken before the Divisional Court was a short one, and a curious one. The award commenced with a recital that by a "contract in writing" between the parties the one had agreed to sell and the other to buy a quantity of soap. The award then proceeded to adjudicate upon the dispute between the parties in reference to the non-delivery of the agreed quantity of soap, and it concluded as follows:

> "We award and determine that T. A. Ruf & Co., Ltd., are to pay the costs of the reference, arbitration, and award . . . as we consider that their conduct in not confirming in writing the contract was probably the cause of the dispute."

The case made in the Divisional Court was that the award was bad on its face in that it recited the existence of a contract in writing and at the same time indicated that it was signed by one only of the parties, and that to constitute a contract in writing it was necessary in law that it should be signed by both parties. Reference was made to a number of cases, such as *Re New Eberhardt Co.* (2), where the court had to decide whether an agreement signed by one party only constituted a "contract duly made in writing" within the meaning of s. 25 of the Companies Act, 1867. In my opinion these decisions are of no real assistance in the present case, as there are just as many decisions to be found where the courts have decided

that the signature of one party only is sufficient to satisfy the requirements of some particular statute as there are decisions that the signatures of both parties are necessary to satisfy the requirements of some other statute. As instances of the former class of case I may mention *Bake* v. *French* (*No. 2*) (3) and *Re Jones* (4), decisions upon s. 4 of the Solicitors Act, 1870, which requires "an agreement in writing" between the solicitor and the client. In my opinion it is not possible to B discover upon the face of this award any error in law which would justify the court in setting it aside. Counsel for the respondent felt himself obliged to admit that if all he could rely upon was mere inaccuracy of expression he could not hope to succeed; but he suggested that he could by affidavit evidence establish that his client was right in his contention that the appellants had never accepted his written offer, and consequently that what might otherwise be a mere inaccuracy of expres- C sion became a fundamental mistake in law. In my opinion, it was not open to the Divisional Court to go into a question which was one entirely for the arbitrators. The court, however, on the materials before it as contained in the affidavits filed on behalf of the respondent, appears to have taken a strong view in his favour on the merits. Those affidavits have now been answered, and had the Divisional Court had the materials before them which were before this court, they would D probably not have come to the conclusion at which they did arrive on the merits.

In my opinion, however, the merits of the dispute between the parties cannot be taken into consideration for the purpose of coming to a decision on the language of the award. I think that it is making almost too generous a concession in the respondent's favour to admit that the arbitrators have used inaccurate language when they describe the sold note signed by the respondent and which apparently E they came to the conclusion was accepted verbally or by conduct on the part of the appellants, as a contract in writing between the parties, but assuming an inaccuracy of expression it is in my opinion not possible to set an award aside merely because of such an inaccuracy of expression as is here complained of. In my opinion the appeal succeeds and must be allowed with costs.

F **WARRINGTON, L.J.**—This is an appeal from an order of a Divisional Court of the King's Bench Division setting aside an award as being bad on the face of it. It was assumed that such an order is interlocutory: *Re Croasdell and Cammell, Laird & Co., Ltd.* (5). A preliminary objection was taken that leave to appeal was necessary and was not obtained. To this it was replied that the order having been made by a Divisional Court and not by a judge sitting alone, leave to appeal G was not necessary.

The question turns on the true construction of s. 1 (1) (b) of the Judicature (Procedure) Act, 1894 [now s. 31 (1) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925]:

> "No appeal shall lie without the leave of the judge or the Court of Appeal H from any interlocutory order or interlocutory judgment made or given by a judge,"

except in certain cases, amongst which such a case as the present is not included. I think the language of the subsection indicates that what is contemplated is an order of a judge sitting alone and exercising the jurisdiction of the High Court pursuant to s. 39 of the Judicature Act, 1873. The expression "the court or a I judge" is a familiar expression to those who have to consider rules of practice and procedure, and I think effect must be given to the use in the section in question of the less comprehensive expression "a judge." Moreover, the leave required is that of "the judge," rather strongly indicating that the provision is confined to orders made by a single judge. It is quite true that this construction gives rise to the curious anomaly that in the case of orders made in the Chancery Division by a single judge, leave would be required, whereas precisely similar orders made by a Divisional Court in the King's Bench Division would be appealable without leave, a greater degree of finality being thus conferred upon the former class of

orders than upon the latter. But in my judgment the words are strong enough to require the natural meaning to be given to them, although the anomaly I have referred to is thereby revealed. The order therefore was appealable without leave.

On the merits I am of opinion that the appeal ought to succeed. The ground on which the Divisional Court has set aside the award is that the arbitrators have treated as a contract in writing that which the award on the face of it shows was not a contract in writing. The transaction in question was an alleged sale by the respondent to the appellants of 100 tons of soap of a certain quality and at a certain price. The terms of the sale were expressed in a sold note signed by the respondent with a postscript "Please confirm the above." Written confirmation was not sent, but the arbitrators state that they heard evidence, and it may well be that they came to the conclusion that there was a parol acceptance by the appellants of the terms of the sold note. In fact, I should myself draw this inference from the correspondence. Then the arbitrators begin their award by reciting that by a contract in writing the respondent contracted to sell the goods, and it was provided that disputes should be settled by arbitration. They then mention their appointment and the proceedings at the arbitration, and make an award in favour of the appellants, but they conclude by awarding that they pay the costs, "as we consider that their conduct in not confirming in writing the contract was probably the cause of the dispute." In my opinion, these last words are not really contradictory of the recital. Taken in conjunction with the rest of the award they seem to me to indicate that the arbitrators found that the appellants had confirmed the contract, though not in writing, and if so they may quite properly refer to the contract as a "contract in writing," although the memorandum of it was signed by one party only. I think the appeal succeeds and the award ought to stand.

DUKE, L.J.—The appellants have, in my opinion, a right of appeal to this court from the decision of the Divisional Court, which is the subject of their appeal. It is not disputed that there is such a right of appeal if the case is outside the operation of the Judicature (Procedure) Act, 1894, s. 1 (1) (b) [now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (i)]. That statute enacts that except in certain specified cases no appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by "a judge"; and the respondent contends that the order in question is such an order. In my opinion an order of a Divisional Court is not an order given by a judge within the meaning of the section. The Act in question is by s. 7 thereof directed to be read with the Judicature Acts, 1873 to 1891, in which orders of a court and orders of a judge are systematically treated as distinct classes of orders. It is not necessary to consider whether the order in question is final or interlocutory.

The award which the Divisional Court has ordered to be set aside is said by the respondent and has been held by the Divisional Court to be bad in law on the face of it. The award recites and so by implication declares the existence of a contract between the respondent and the appellants, that is to say, a contract in writing made Feb. 28, 1918, whereby the respondent contracted to sell soap to the appellants, finds a breach by the respondent, and awards damages to the appellants, but directs payment of costs by the appellants on the ground that "their conduct in not confirming in writing the contract was probably the cause of the dispute." In the view of the Divisional Court this reference to the conduct of the appellants with regard to their obligations toward the respondent amounts to a declaration that there was not in fact any concluded contract, or at any rate that there was not a contract in writing. A contract in writing, it is said, does not need to be confirmed. Holding this opinion with regard to the meaning of the award, the Divisional Court has proceeded, on affidavit evidence filed by the respondent, to consider whether the arbitrators were right in holding that there was a contract between the parties for breach of which damages might be awarded. In my opinion, there is no inevitable discrepancy between the recital in the award of a

contract in writing and the ground which the arbitrators state for the order they made as to costs. It may well be that they thought the appellants had behaved unreasonably as business men in refusing some demand or request with which they were not bound in law to comply. As to the suggestion which was made that the words "contract in writing" import a contract made by means of a writing or writings signed by both parties, I do not think the words necessarily have that meaning. A document purporting to be an agreement may be an agreement in writing sufficient to satisfy the requirements of an Act of Parliament though it is only verified by the signature of one of the parties: *Re Jones* (4). Here the question is one of a bargain for the sale of goods. I doubt whether the objection which is here set up to avoid a business transaction would have been sufficient to support a special demurrer before the passing of the Common Law Procedure Acts. I think the appeal should be allowed.

Appeal allowed.

Solicitors: *Cosmo Cran & Harper*; *Bischoff, Coxe, Bischoff & Thompson.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

SMITH *v.* BUSKELL. BUSKELL *v.* SMITH AND GREAT WESTERN RAIL. CO.

[COURT OF APPEAL (Warrington and Duke, L.JJ.), May 26, 1919]

[Reported [1919] 2 K.B. 362; 88 L.J.K.B. 985; 121 L.T. 301; 35 T.L.R. 523; 63 Sol. Jo. 589]

Practice—Counterclaim—Joinder—Connection with "original subject of the cause"—Counterclaim against person other than plaintiff—Claim by seller for price of goods sold free on rail—Counterclaims by buyer against seller for bad packing and railway company for negligent carriage—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict.*, *c.* 66), *s.* 24 (3)—*Order* 21, *r.* 11.

A defendant in an action may raise a counterclaim against the plaintiff and another person jointly or in the alternative separately, but may not raise as a counterclaim against the other person a claim which is merely alternative; viz., which can succeed only if the defendant's counterclaim against the plaintiff fails.

Times Cold Storage Co. v. *Lowther and Blankley* (1), [1911] 2 K.B. 100, approved and explained.

A buyer of perishable goods alleged that in breach of his contract the seller had failed to pack the goods well or securely or in such a condition as to enable them to withstand the ordinary risks attaching to a journey on rail, that as a consequence the buyer had suffered considerable loss and damage, and that he thus had a counterclaim against the seller in excess of the amount claimed by the seller in an action against the buyer to recover the price of the goods sold and delivered. The buyer further alleged that he had likewise a counterclaim for damages against the railway company because they in breach of their duty as carriers of the goods failed to take any proper steps to prevent them from being exposed to the weather, but dispatched the same in open trucks, and allowed the same to stand in water during the course of their transit. On an application to strike out the buyer's counterclaim against the railway company,

Held: there was sufficient connection shown between the relief claimed against the railway company and the "original subject of the cause or matter" within the meaning of s. 24 (3) of the Supreme Court of Judicature Act, 1873 [now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (b)], to enable the counterclaim against the railway company to be joined with that against the seller.

Times Cold Storage Co. v. *Lowther and Blankley* (1), [1911] 2 K.B. 100, distinguished.

Notes. The Judicature Act, 1873, has been repealed, but the provision formerly contained in s. 24 (3) thereof is now made by s. 39 (b) of the Supreme Court of Judicature (Consolidation) Act, 1925.

As to counterclaims against the plaintiff and another, see 34 HALSBURY'S LAWS (3rd Edn.) 414; and for cases see 40 DIGEST (Repl.) 446–449, *338–350*. For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39, see 18 HALSBURY'S STATUTES (2nd Edn.) 476.

Cases referred to:

(1) *Times Cold Storage Co.* v. *Lowther and Blankley*, *Lowther and Blankley* v. *Times Cold Storage Co. and New Zealand Shipping Co.*, [1911] 2 K.B. 100; 80 L.J.K.B. 901; 104 L.T. 637; 55 Sol. Jo. 442, D.C.; 40 Digest (Repl.) 448, *348*.

(2) *Child* v. *Stenning* (1877), 5 Ch.D. 695; 46 L.J.Ch. 523; 36 L.T. 426, C.A.; 40 Digest (Repl.) 448, *346*.

(3) *Honduras Inter-Oceanic Rail. Co.* v. *Lefevre and Tucker* (1877), 2 Ex.D. 301; 46 L.J.Q.B. 391; 36 L.T. 46; 25 W.R. 310, C.A.; Digest (Practice), 409, *1092*.

Also referred to in argument:

Central African Trading Co. v. *Grove*, *Grove* v. *Central African Trading Co. and Taubman* (1879), 48 L.J.Q.B. 510; 40 L.T. 540; 27 W.R. 933, C.A.; 40 Digest (Repl.) 448, *347*.

Evans v. *Buck*, *Buck* v. *Evans* (1876), 4 Ch.D. 432; 46 L.J.Ch. 157; 25 W.R. 392; 40 Digest (Repl.) 448, *345*.

Bullock v. *London General Omnibus Co.*, [1907] 1 K.B. 264; 76 L.J.K.B. 127; 95 L.T. 905; 23 T.L.R. 62; 51 Sol. Jo. 66, C.A.; Digest (Practice) 407, *1077*.

Sanderson v. *Blyth Theatre Co.*, [1903] 2 K.B. 533; 72 L.J.K.B. 761; 89 L.T. 159; 52 W.R. 33; 19 T.L.R. 660, C.A.; Digest (Practice) 409, *1093*.

Smurthwaite v. *Hannay*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp.M.L.C. 485; 6 R. 299, H.L.; Digest (Practice) 399, *1013*.

Sadler v. *Great Western Rail. Co.*, [1896] A.C. 450; 65 L.J.Q.B. 462; 74 L.T. 561; 45 W.R. 51; 12 T.L.R. 394, H.L.; Digest (Practice) 403, *1038*.

Interlocutory Appeal against an order of ROCHE, J., refusing to strike out a counterclaim by the defendant in an action against a person other than the plaintiff.

In January, 1919, Frederick William Buskell (hereinafter called "the buyer") bought from Thomas Reuben Smith (hereinafter called "the seller") under a contract contained in correspondence between the parties 1 ton of jelly cuttings at 2s. 1d. per pound f.o.r. The goods were to be in all respects in accordance with a sample sent by the seller to buyer on Jan. 14, 1919, and were to be dispatched by the former to the latter's premises at Exeter. The buyer alleged that: (a) it was an implied term of the contract that the seller should pack the goods well and securely, and in such a manner as to enable them to withstand the ordinary risks attaching to a journey on rail to Exeter on the Great Western Rail. Co.'s system, and that the same when put on rail should be in such a condition and so packed as to enable them to arrive at Exeter in good condition; (b) on or about Jan. 20, 1919, the seller put on rail a quantity of jelly cuttings amounting to

1,979 lb. as the buyer alleged, and no further quantity of goods had even been put on rail or delivered to the buyer; (c) in breach of the contract the seller failed to pack the 1,979 lb. of jelly cuttings well and securely or in such a condition as to enable them to withstand the ordinary risks attaching to a journey on rail to Exeter, and the same when put on rail were in bad condition and/or were in such a condition that they would become bad in the ordinary course before delivery to the buyer; (d) the tins in which the jelly cuttings were contained were not water-tight, and were not packed in cases as they should have been but were dispatched loose without any precautions being taken to prevent water getting to the same or to guard against the consequences of exposure; (e) on arrival at Exeter on or about Jan. 24, 1919, it was discovered as the fact was that the contents of the tins had become mildewed and mouldy owing to wet and exposure. The tins contained water, and the jelly cuttings were loose in the tins; (f) by reason of the premisses 900 lb. of the jelly were unfit for sale and unmerchantable. The balance of 1,079 lb. had to be unpacked and re-packed after being cleaned, dusted, and sugared; and after being so treated was worth only 1s. 8d. per pound, being 5d. per pound less than the contract price. Particulars based on the buyer's estimate showed that from the value of the 1,979 lb. at 2s. 1d. per pound amounting to £206 2s. 11d. there were to be deducted 900 lb. at 2s. 1d. amounting to £93 5s. plus 1,079 lb. at 5d. amounting to £29 2s. 7d., to which had to be added the expenses of cleaning, &c., amounting to £90 and totalling £205 14s. 7d., leaving a surplus amounting to 8s. 4d.

In an action by the seller against the buyer to recover the sum of £233 6s. 8d., being the price of the goods alleged by the seller to be sold and delivered, the buyer claimed to set off the sum of £205 14s. 7d. against the sum of £206 2s. 11d. which would otherwise be due to the seller, and admitted his liability to the seller in the sum of 8s. 4d., subject to and by way of a counterclaim against the seller and the Great Western Rail. Co.

By the latter counterclaim the buyer alleged that the railway company in breach of their duty as carriers of the goods which, upon delivery, became and were the property of the buyer, failed to take any proper steps to prevent the jelly cuttings from being exposed to the weather but dispatched the same in open trucks and allowed same to stand in water during the course of their transit to Exeter between Jan. 20 and 24, 1919. If it was found that the goods at the date of their delivery to the railway company were in good condition, as the buyer alleged, he counter-claimed to recover from the railway company by way of damages the sum of £205 14s. 7d. and a further sum of £100 being the estimated profit which the buyer would have made if the goods had not been damaged in transit. Further or alternatively, in that event the buyer claimed subject to the set-off hereinbefore appearing the sums of £205 14s. 7d. and £100 as damages against the seller by reason of the breach of his implied contract to pack the goods well and securely and in such a manner as to enable them to withstand ordinary transit risks. In the event of its being found that the said goods at the date of their delivery to the railway company were in a bad condition, as the buyer alternatively alleged, he claimed to recover from the seller, subject to the set-off, the sums of £205 14s. 7d. and £100 as damages for breach of contract. The buyer claimed damages from both the seller and the railway company. On May 8, 1919, an order was made by Master Bonner on the application of the seller that the buyer's counterclaim be struck out in so far as it joined the railway company as defendants to the counter-claim. On appeal from that order by the buyer it was ordered by Roche, J., sitting in chambers that the order be rescinded and that the costs of the appeal and the application to Master Bonner be costs of the buyer in the counterclaim.

From that decision the seller, by leave, now appealed.

C. H. Pitman for the seller, the plaintiff.

Bartley for the railway company, defendant to the counterclaim.

W. A. Jowitt for the buyer, the defendant.

WARRINGTON, L.J.—This is an appeal from an order of ROCHE, J., refusing to strike out the defendant's counterclaim in so far as it is a claim against the Great Western Rail. Co.

The plaintiff's action is for the price of goods sold and delivered, the contract being one to deliver the goods f.o.r. at Paddington. The defence is, first, that the plaintiff failed to deliver the goods in good condition and, therefore, did not fulfil his contract; and, secondly, that if he did deliver them in good condition he committed a breach of an implied term of his contract so to pack the goods that they should be reasonably fit to withstand the ordinary risks of transit by rail. That is the defence, and the defendant also raises that point against the plaintiff by way of counterclaim, making a claim for damages. To that counterclaim he has added the Great Western Rail. Co. as defendants, the allegation against the railway company being that the goods having been delivered to them at Paddington Station in good condition, they, in breach of their duty as carriers, so treated the goods that when the same arrived at their destination they were in bad condition. There is a further claim in the counterclaim which really covers both grounds, because if the plaintiff had not failed properly to pack the goods the damage would not have arisen; for if either the goods had been packed in watertight packages, or the packages in which they were packed, whether watertight or not, had been placed by the railway company in a watertight conveyance, the goods would have escaped injury.

In those circumstances ought this counterclaim against the railway company to be allowed? The Act of Parliament—the Judicature Act, 1873—from which the right to deliver a counterclaim is derived, merely provides by s. 24 (3) [now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (b)], that the courts shall have power to grant to any defendant

> "all such relief relating to or connected with the original subject of the cause or matter, and claimed against any other person, whether already a party to the same cause or matter or not . . . as might properly be granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose."

In other words, the subsection allows a counterclaim for relief connected with the original subject of the cause or matter, the object being that all questions, as far as may be, arising out of a particular transaction shall be determined in the same cause or matter. Then Ord. 21, r. 11, contains this proviso:

> "Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons"

he shall take certain steps. That rule confers no fresh or greater power upon the defendant to counterclaim. It merely assumes that that which the defendant is proposing to do is in pursuance of the authority already conferred by the Act of Parliament. It gives him no fresh authority at all.

The only question that we have to determine is whether the relief here claimed against the railway company is so connected with the original subject of the cause or matter that it may properly be raised by counterclaim. It was admitted by counsel for the defendant that if the two claims were really and strictly alternative —that is to say, if the defendant could only succeed against the railway company if he failed to prove his case against the plaintiff, or, on the other hand, could only succeed against the plaintiff by proving that which would exonerate the railway company—then the counter-claim against the railway company would be one which could not properly be raised; and with that I agree. Such a case would come exactly within the decision in *Times Cold Storage Co.* v. *Lowther and Blankley* (1).

However, he urged that that is not so here, because there is one aspect of the case in which the two subjects—namely, the relief against the railway company and the relief against the plaintiff—overlapped, and that was with regard to the packing. It may be that the packing was so defective that the damage may have been caused thereby. It may also appear that although the packing was defective

yet if the railway company had taken ordinary precautions the damage would not have been occasioned.

It seems to me, however, that it is impossible for us to say that there may not arise circumstances, when the evidence comes to be gone into at the trial, which may show that the defendant is entitled to some relief arising out of the same state of facts against both these defendants to the counterclaim—the original plaintiff and the railway company. I will even go so far as to say that circumstances may arise which will render it necessary for the court in some way to apportion the damages as between these two defendants. If that is so then there is a sufficient connection shown between the relief claimed against the railway company and the original subject of the cause or matter to enable the claim against the railway company to be joined with that against the original plaintiff.

It seems to me, therefore, that the order made by ROCHE, J., was correct, and that this appeal ought to be dismissed with costs.

DUKE, L.J.—I am of the same opinion. The decision of this appeal no doubt depends on the true construction of s. 24 (3) of the Judicature Act, 1873 [now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (b)], which confers on the defendant to an action the right to counterclaim. The direction in that subsection is this:

> "All such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person,"

may be made the subject of counterclaim.

The means of putting that section into operation are provided by Ord. 19, r. 3, of the Rules of the Supreme Court and Ord. 21, rr. 11 and 15. Order 19, r. 3, declares the right of the defendant or the mode of execution of the right of the defendant to set up a counterclaim. The defendant to an action may set up by way of counterclaim any right or claim, whether such counterclaim sound in damages or not, and such counterclaim shall have the same effect as a cross-action so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross-claim. Rule 15 of Ord. 21, to which I shall presently have to refer, is supplementary and deals with the specific case where a defendant sets up a counterclaim in which the plaintiff and another person or persons are defendant or defendants by way of counterclaim. Rule 11 provides as follows:

> "Where a defendant by his defence sets up any counterclaim which raises the question between himself and the plaintiff along with any other persons he shall add to the title of his defence a further title. . . ."

Rule 15 provides that either the plaintiff or any person who is named as party to any action by such counterclaim may at any time before reply apply to the court for an order that such counterclaim may be excluded. The provision of the Judicature Act, 1873, which gives the general right to a defendant to set up a counterclaim, is that contained in s. 24 (3). Order 19 deals with the exercise of the right under circumstances where the plaintiff and the defendant are alone concerned, and the two rules in Ord. 21, rr. 11 and 15, which regulate the application of the right where the defendant to the counterclaim, the original plaintiff, is joined with other parties.

It seems to me that the defendant to the present action is within the terms both of the Judicature Act, 1873, and of Ord. 19, r. 3. He is raising a claim which relates to and is connected with the original subject of the cause or matter in this way. The plaintiff in the original action will not be entitled to succeed if the defendant establishes that on the railway journey, by reason of negligence or breach of contract by the plaintiff, these goods suffered damage and their value was destroyed or materially reduced. The plaintiff might then suffer a reduction of his claim, if not the total destruction of it.

It is said that to the extent to which the defendant succeeds against the plaintiff he will defeat his own claim against the railway company. This is not the first

time that that kind of contention has been raised to prevent the application of the section in the Judicature Act, 1873, which provides for the inclusion as far as possible of matters which are in litigation in one action to be tried between the parties. In *Child* v. *Stenning* (2), to which reference was made in the course of the argument, MELLISH, L.J., said this (5 Ch.D. at p. 702):

> "If we were to say that two persons could not be joined as defendants unless the causes of action against them were exactly the same, the object of the legislature would be entirely defeated. In most cases where alternative remedies are sought against two persons the causes of action are different, as in the case where an action is brought against an agent and his principal, because the plaintiff is uncertain whether he shall be able to prove the authority given to the agent, as in *Honduras Inter-Oceanic Rail. Co.* v. *Lefevre and Tucker* (3). There the plaintiff seeks compensation for one wrongful act, but he cannot tell which of the two parties is really liable."

That seems to me, together with the consideration of the main provision with regard to this matter in s. 24 (3) of the Judicature Act, 1873, to entitle the present defendant as a plaintiff to maintain his alternative cause of action against the original plaintiff and against the railway company. The question of its also being a matter in dispute between them is not fully ascertained with regard to either of them. If that be the true conclusion with regard to the defendant as a plaintiff—that is, the defendant is a party entitled to maintain an action against the two persons who will be his opponents on the counterclaim—I think that there is nothing in the terms of Ord. 21, r. 11, which prevents the exercise by the defendant of the right conferred on him by the Act in the present case.

It is said that in a case before the Divisional Court, *Times Cold Storage Co.* v. *Lowther and Blankley* (1), it was held that where there is a claim in the alternative the rule does not apply, and reliance was placed on the following passage in the ANNUAL PRACTICE for 1911, p. 372, in the notes to Ord. 21, r. 11:

> "But the rule does not apply where the defendant's claim against the third person is alternative to his claim against the plaintiff, and not 'along with' it."

I think that the meaning of that rule and of that passage and of the decision in the case on which reliance is placed has been misunderstood. In *Times Cold Storage Co.* v. *Lowther and Blankley* (1) there were mutually exclusive claims which could not exist together, which arose out of different sets of facts either of which would give a right to a remedy but the existence of either of which had not at the time been established.

In the present case, as counsel for the defendant pointed out, the defendant's main ground of complaint is that his goods were delivered to him in a condition in which they were of very little commercial value; that the damage apparently occurred during the transit; that it may have been entirely due to bad packing and to the condition in which the goods were delivered; or that it may have been entirely due to exposure to the weather and standing in the rain; that it may on the other hand have been due to a combination of these causes; and that if that were so they would not be alternative claims but they would be claims for injury and for negligence which had jointly contributed to the state in which the defendant's goods were delivered.

I think that upon that ground the case is just outside of the authority of *Times Cold Storage Co.* v. *Lowther and Blankley* (1), and well within the authority of the subsection of the Act of Parliament and the relevant rules and that this appeal fails.

Appeal dismissed.

Solicitors: *Oldman, Cornwall & Wood Roberts*; *L. B. Page*; *Arnold Carter*, for *Dunn & Baker*, Exeter.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re ASHLEY AND SMITH, LTD. ASHLEY *v.* THE CO.

[CHANCERY DIVISION (Sargant, J.), July 17, 1918]

[Reported [1918] 2 Ch. 378; 88 L.J.Ch. 7; 119 L.T. 674; 34 T.L.R. 585]

Company—Winding-up—Preferential creditor—"Clerk or servant"—Contributor to newspaper—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 107, *s.* 209.

Where a person who is an outside contributor to a newspaper company is (i) working entirely away from the company and not in the company's office, (ii) not exclusively employed in the service of the company, (iii) not bound to render any services generally, but only a particular class of service, and (iv) not working under the control of the company or subject to the command of the employer under whom he works, he is not a "clerk or servant" of the company and so is not entitled to preferential payment in the winding-up of the company or in a debenture-holders' action to realise debentures under s. 107 and s. 209 of the Companies (Consolidation) Act, 1908.

Notes. The Companies (Consolidation) Act, 1908, s. 107, s. 209, have been replaced by the Companies Act, 1948, s. 94 and s. 319.

Considered: *Re Benalpha Products, Ltd.* (1946), 115 L.J.Ch. 193.

As to priority of debts in the winding-up of a company by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 661 et seq.; and for cases see 10 DIGEST (Repl.) 991 et seq. For the Companies Act, 1948, s. 94 and s. 319, see 3 HALSBURY'S STATUTES (2nd Edn.) 532, 698.

Cases referred to in argument:

Re Beeton & Co., Ltd., [1913] 2 Ch. 279; 82 L.J.Ch. 464; 108 L.T. 918; 57 Sol. Jo. 626; 30 Mans. 222; 10 Digest (Repl.) 995, *6845*.

Re Winter German Opera, Ltd. (1907), 23 T.L.R. 662; 10 Digest (Repl.) 995, *6843*.

Re G. H. Morison & Co., Ltd. (1912), 106 L.T. 731; 10 Digest (Repl.) 995, *6844*.

Simmons v. *Heath Laundry Co.*, [1910] 1 K.B. 543; 79 L.J.K.B. 395; 102 L.T. 210; 26 T.L.R. 326; 54 Sol. Jo. 392; 3 B.W.C.C. 200, C.A.; 34 Digest 427, *3469*.

Walker v. *Crystal Palace Football Club, Ltd.*, [1910] 1 K.B. 87; 79 L.J.K.B. 229; 101 L.T. 645; 26 T.L.R. 71; 54 Sol. Jo. 65; 3 B.W.C.C. 53, C.A.; 34 Digest 239, *2045*.

Scottish Insurance Comrs. v. *Edinburgh Royal Infirmary*, 1913 S.C. 751; 34 Digest 20, *5 iii*.

Debenture Holders' Action to enforce security.

Debenture-holders of the newspaper called the "Sportsman" brought this action to enforce their security, and an inquiry was directed as to what creditors were entitled to payment in priority over the claims of the debenture-holders under s. 107 and s. 209 of the Companies (Consolidation) Act, 1908, which give a right to preferential payment in the case of clerks, servants, workmen, and labourers either when the company is in winding-up or when a receiver has been appointed on behalf of the debenture-holders. The categories under which claims were alleged to be due were: "A, amounts due to contributors in respect of articles and/or items of news supplied to the 'Sportsman,' to be paid for at a recognised rate or fee for each article or item," and "B, amounts due to contributors (being regularly employed) in respect of a continuous supply of articles and/or items of news to the 'Sportsman,' for which a fixed rate of remuneration was payable, either annually, quarterly, monthly, or weekly, in respect of the matter contributed, whether used or not." One claimant, H. Huggins, who was a justice of the peace and an alderman of the Borough of Gravesend, was employed for about twenty years before March, 1916, by the company to report sporting events, particularly coursing meet-

ings, at the rate of 15s. a day for every meeting, and 7s. 6d. a "draw." His accounts were sent in monthly, and were regularly paid up to December, 1915, leaving something over £12 in arrears. He had only a verbal contract with a former manager of the company, but he had always been recognised as the "representative" of the "Sportsman" in the Gravesend district, and all official communications were sent to him as such for transmission to the paper. His contention was that he was not a mere occasional contributor, but was under an obligation to the company to report the coursing meetings and draws in his district, and "the prospects of the various competing greyhounds"; and that, although there had been no agreement as to this, his employment could not have been determined without reasonable notice from himself or the company. The managing director of the company, however, said, with reference to the term "employment," used by Huggins, that he was never in any sense a member of the staff of the "Sportsman," but was only an outside contributor, paid according to the work done by him; that he was under no obligation to report; and that no notice to terminate the connection was required on either side. The other claimant, Lowingham Hall, an author, had been continuously engaged as coursing correspondent to the "Sportsman" for about forty years before the appointment of the receiver and manager. His work was to report coursing meetings and write weekly articles from about September in each year until the following March; to report the Waterloo Cup Meeting, and to deal with any events and questions connected with coursing which arose in the summer months. It had been the practice to pay him one-half of what he called his "salary" in December or January, and the other half in March. The salary had been reduced at different times, and early in September, 1915, the late managing director and Hall arranged that the work should be confined to contributing twenty-one weekly articles, to "analysing" the runners for the Waterloo Cup, and to reporting that event, and to the usual work in the summer months, and that Hall was to be paid £150, that sum being calculated on the basis of £5 an article and £50 for the report and review of the Waterloo Cup and the summer work. The Waterloo Cup was run on three days in February, 1916, and Hall's contributions were all in by Mar. 4, 1916. Hall had been paid £60 by the late managing director, and he claimed that a balance of £90 was owing to him at the date of appointment of the receiver, and made a preferential claim for £50.

Mark L. Romer, K.C., and *R. H. Hodge* for the plaintiffs.
Dighton Pollock for Huggins.
J. R. Northcote for Hall.

SARGANT, J.—I have to decide here whether two persons who rendered services to the company are or were in the position of being servants of the company. The claim is made under s. 107 of the Companies (Consolidation) Act, 1908, which applies to a debenture-holders' action to enforce a floating charge the provisions of s. 209 of the same Act with reference to preferential payments in a winding-up. That section provides that there shall be a preferential payment of certain debts including "all wages or salary of any clerk or servant"; and then later, "all wages of any workman or labourer." I read that later portion of the section because the collocation of words shows that the term "servant" is not being used in any exceptionally large sense in the earlier part of the section. A large number of persons had claims against the company somewhat similar to the claims of Mr. Huggins and Mr. Hall, and, with a view to preventing multiplicity of proceedings, YOUNGER, J., gave directions under which notices were sent out to these persons, and it was attempted to class them into certain categories, and Mr. Huggins has been selected as representing A category and Mr. Hall as representing B. As a matter of fact, I do not think that there is very much distinction between category A and category B, or that Mr. Huggins and Mr. Hall do correctly represent different categories of the kind in question. They were in positions somewhat similar to, but not quite coincident with, the position of persons such as are mentioned in categories A and B. I must not attend to categories A and B at all, but

decide the case of Mr. Huggins and the case of Mr. Hall, and those decisions, while not being binding on any other persons, may throw light on the position of persons who are in a somewhat similar position.

[HIS LORDSHIP stated the facts with regard to Mr. Huggins and Mr. Hall, and continued:] The question is whether those two persons were servants of the company within the meaning of s. 209. A large number of cases have been cited to me, and it is impossible for me to go through them, or to differentiate the present case from those cases; and, in fact, I think that would be a wrong way of working altogether, and would only lead to confusion. I have to consider what are the main indications of whether a person is in the service or not. I have come to the conclusion that neither of these persons was a servant of the company; and I note four circumstances. In the first place, they were working entirely away from the company, and not in the office of the company at all. Secondly, they were not exclusively employed in the service of the company, but they might have taken up any amount of other work for other persons, and I think it is highly probable that they did so. Thirdly, they were not bound to render any services generally, but only a particular class of service. Fourthly, and most important of all, they might perform the service in question practically as they pleased. They were not working under the control of the company or subject to the command of the master under whom they worked. I do not say that any one of those four circumstances which I have mentioned, except possibly the last, would be exactly conclusive; but I do think that, when all those four circumstances are taken together, it is impossible to say that either of those persons was a servant of the company; and I think that, prior to this appointment of a receiver, either of them—certainly Mr. Huggins at least, and I think also Mr. Hall—would have been very much surprised and distressed if he had been spoken of as a servant of the company.

In my judgment, therefore, neither of these persons is entitled to the amount claimed as a preferential claim; but, as they have been brought here for the purposes of facilitating the administration of the affairs of the company and were added as representative persons, they are entitled to their costs, their costs as between solicitor and client, to be paid out of the assets, and the plaintiffs' costs will be their costs in the action.

Solicitors: *Speechly, Mumford & Craig*; *Soames & Vigo*; *Gush, Phillips, Walters & Williams.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re FRASER AND CHALMERS, LTD.

[CHANCERY DIVISION (Astbury, J.), April 15, 29, May 9, 1919]

[Reported [1919] 2 Ch. 114; 88 L.J.Ch. 343; 121 L.T. 232; 35 T.L.R. 484; 63 Sol. Jo. 590; [1918–19] B. & C.R. 186]

Company—Winding-up—Voluntary winding-up—Distribution of assets—Surplus assets after payment of debts and repayment of preference capital—Rights of preference and ordinary shareholders—Construction of articles of association.

The capital of a company was divided into preference and ordinary shares. The holders of preference shares were entitled, according to the company's articles, to a fixed cumulative preferential dividend of 7½ per cent. on the amount paid up on their shares, and whenever the profits of the company in respect of any calendar year were sufficient to pay a dividend of 7½ per cent. to the holders of ordinary shares in addition to the dividend on the preference shares, the preference shareholders were entitled to participate pari passu with the ordinary shareholders in any further dividend that might be paid for such year. The articles further provided that in the event of the winding-up of the company the preference shareholders should have a preferential right as regards repayment of capital, and "accordingly shall be entitled to have the surplus assets applied, first, in paying off the capital paid up on the preference shares . . . and, secondly, in paying off arrears . . . of the preferential dividends . . . before any return or payment of capital is made to the holders of the other shares." The company went into voluntary liquidation and after payment of arrears of dividend on the preference shares and repayment of the capital paid up on preference and ordinary shares, there was a substantial surplus of assets. On the question how the surplus ought to be distributed as between preference and ordinary shareholders,

Held: the mere fact that express provision was made by the articles for the payment of debts due to shareholders in a particular order was no reason for excluding some shareholders from participation in the surplus assets; the rights expressly given to preferential shareholders were not exhaustive of their rights; and the surplus assets must be rateably distributed between the ordinary and the preference shareholders.

Re Espuela Land and Cattle Co. (1), [1909] 2 Ch. 187, followed.
Re National Telephone Co. (2), [1914] 1 Ch. 755, not followed.

Notes. Considered: *Anglo-French Music Co.* v. *Nicoll* (1920), 90 L.J.Ch. 183; *Collaroy Co.* v. *Giffard*, [1927] All E.R.Rep. 346. Followed: *Re John Dry Steam Tugs, Ltd.*, [1932] All E.R.Rep. 586. Considered: *Re William Metcalfe & Sons, Ltd.*, [1933] Ch. 142; *Re Isle of Thanet Electric Supply Co.*, [1949] 2 All E.R. 1060. Referred to: *Re Wood, Skinner & Co.*, [1944] Ch. 323; *Scottish Insurance Corpn., Ltd.* v. *Wilsons and Clyde Coal Co.*, [1949] 1 All E.R. 1068.

As to surplus after refunding paid-up capital, see 6 HALSBURY'S LAWS (3rd Edn.) 680 et seq.; and for cases see 10 DIGEST (Repl.) 1065 et seq.

Cases referred to:

(1) *Re Espuela Land and Cattle Co.*, [1909] 2 Ch. 187; 78 L.J.Ch. 729; 101 L.T. 13; 16 Mans. 251; 10 Digest (Repl.) 1069, *7410*.
(2) *Re National Telephone Co.*, [1914] 1 Ch. 755; 83 L.J.Ch. 552; 109 L.T. 389; 29 T.L.R. 682; 58 Sol. Jo. 12; 21 Mans. 217; 10 Digest (Repl.) 1069, *7413*.
(3) *Webb* v. *Earle* (1875), L.R. 20 Eq. 556; 44 L.J.Ch. 608; 24 W.R. 46; 9 Digest (Repl.) 639, *4250*.
(4) *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, *7391*.

(5) *Will* v. *United Lankat Plantations Co., Ltd.*, [1912] 2 Ch. 571; 81 L.J.Ch. 718; 107 L.T. 360; affirmed [1914] A.C. 11; 83 L.J.Ch. 195; 109 L.T. 754; 30 T.L.R. 37; 58 Sol. Jo. 29; 21 Mans. 24, H.L.; 9 Digest (Repl.) 639, *4258*.

Adjourned Summons taken out by the liquidator of Fraser & Chalmers, Ltd., to have it determined on what principle the surplus assets of the company which would remain in the hands of the liquidator after payment of the liabilities of the company, the costs of the liquidation, the capital paid up on the preference shares in the company, the arrears of the preferential dividend on such shares to the commencement of the winding-up of the company, and the capital paid up on the ordinary shares in the company ought to be distributed.

The company was incorporated on Jan. 7, 1890, under the Companies Acts, 1862–1886, as a company limited by shares. The Scottish Northern Investment Trust, Ltd., and Arthur Wilby Hall were the respondents to the summons, the former being the holder of 2,050 preference shares of £1 each by purchase at a substantial premium as follows: 350 shares then in the denomination of £3 each were bought in July, 1916, and in the following year sub-divided into 1,050 shares of £1 each, while in August, 1918, 1,000 further shares of £1 each were purchased and this respondent was appointed by the registrar on Apr. 2, 1919, to represent on the hearing of this summons all the holders of the preference shares. The respondent, Arthur Wilby Hall, the holder of 4,092 ordinary shares, was by the same order appointed to represent all the holders of the ordinary shares.

Clause 5 of the company's memorandum provided:

"The capital of the company is £525,000, divided into 105,000 shares of £5 each, with power to divide the shares in the capital for the time being, original or increased, into different classes of shares, with any preferential, deferred, qualified, or special rights and privileges and conditions attached thereto."

The relevant provisions of the company's articles were the following:

"43. The company in general meeting may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient. 44. The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed thereto as the general meeting, resolving upon the creation thereof, shall direct, and if no direction shall be given as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends, and in the distribution of assets of the company, and with a special or without any right of voting. 47. Except so far as otherwise provided by the conditions of issue, or by these presents, any capital raised by the creation of new shares shall be considered part of the original capital, and shall be subject to the provisions herein contained with reference to the payment of calls and instalments, transfer and transmission, forfeiture, lien, surrender and otherwise. 48. The company may from time to time by special resolution reduce its capital by paying off capital or cancelling capital which has been lost or is unrepresented by available assets or reducing the liability on the shares or otherwise as may seem expedient, and capital may be paid off on the footing that it may be called up again or otherwise, and the company may also by special resolution sub-divide or consolidate its shares or any of them. 110. Without prejudice to the general powers conferred by the last preceding clause, and so as not in any way to limit or restrict those powers, and without prejudice to the other powers conferred by these presents, it is hereby expressly declared that the directors shall have the following powers, that is to say, power—(a) Before recommending any dividend, to set aside out of the profits of the company such sums as they think proper as a reserve fund to meet contingencies, or for equalising, dividends, or for repairing, improving, and maintaining any of the property of the company, and for other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and (subject to cl. 4 hereof) to invest the several sums so set aside upon such investments as

they may think fit, and from time to time to deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and to divide the reserve fund into such special funds as they think fit, and to employ the reserve fund, or any part thereof, in the business of the company, and that without being bound to keep the same separate from the other assets. 148. If the company shall be wound-up, the liquidators (whether voluntary or official) may, with the sanction of an extraordinary resolution, divide among the contributories in specie any part of the assets of the company, and may, with the like sanction, vest any part of the assets of the company in trustees, upon such trusts for the benefit of the contributories as the liquidators, with the like sanction, shall think fit."

By special resolutions passed and confirmed on June 8 and 25, 1894, it was resolved:

"1. That the present capital of the company be reduced from £525,000, divided into 105,000 shares of £5 each, to £315,000, divided into 105,000 shares of £3 each, and that such reduction be effected by cancelling to the extent of £2 per share the amount paid up in respect of each of the said 105,000 shares which have been issued, as being capital which has been lost or is unrepresented by available assets. 2. That the capital of the company be increased by the creation of 21,000 new shares of £3 each, to be called 'preference shares,' to which there shall be attached the special rights and privileges following, that is to say: (i) The holders of such shares shall be entitled to a fixed cumulative preferential dividend at the rate of £7 10s. per cent. per annum on the capital for the time being paid up on such shares respectively. (ii) Whenever the profits of the company in respect of any calendar year shall be more than sufficient to pay the preferential dividend aforesaid to the close of such year, and also a dividend for such year at the rate of £7 10s. per cent. per annum on the capital paid up on the ordinary shares, the holders of the preference shares aforesaid shall be entitled to participate in any further dividend that may be paid for such year pari passu with the holders of the other shares in proportion to the capital paid up thereon. (iii) The capital paid up on the preference shares aforesaid shall not be liable to cancellation or reduction in respect of loss or depreciation. (iv) In the event of the winding-up of the company the holders of the said preference shares shall have a preferential right as regards repayment of capital and otherwise as hereinafter mentioned, and accordingly shall be entitled to have the surplus assets applied, first, in paying off the capital paid up on the preference shares held by them respectively, and, secondly, in paying off the arrears (if any) of the preferential dividends aforesaid to the commencement of the winding-up before any return or payment of capital is made to the holders of the other shares."

The reduction of capital proposed to be effected by the said special resolution in that behalf was confirmed by the court by order dated July 28, 1894.

By a resolution dated Dec. 11, 1900, the nominal capital of the company was increased by the addition thereto of the sum of £72,000, divided into 24,000 ordinary shares of £3 each, beyond the registered capital of £378,000. By special resolution of the company duly passed and confirmed in accordance with s. 69 of the Companies (Consolidation) Act, 1908, at extraordinary general meetings of the company held respectively on Jan. 4 and 25, 1917, it was resolved:

"That each of the existing 21,000 preference shares of the company of £3 each and each of the existing 129,000 ordinary shares of the company of £3 each be divided into three shares of £1 each."

By another special resolution duly passed and confirmed on Jan. 2 and 29, 1919, it was resolved that the company be wound-up voluntarily, and Walter McDermott, who for twenty-two years preceding the passing of that resolution for winding-up was managing director of the company, was appointed liquidator. All the pre-

ference shares had been issued and paid up in full. Three hundred and seventy-eight thousand of the ordinary shares had been issued, and all such shares had been paid up in full. All dividends on the preference shares had been paid up to Jan. 23, 1919, the date of the commencement of the winding-up. The greater part of the undertaking of the company was realised. Pursuant to art. 110 (a) appropriations were made from time to time to reserve account, with the result that at the date of the passing of the resolution for the liquidation of the company there was a sum so held of £100,000. After payment of the liabilities of the company, the costs of the liquidation, the capital paid up on the preference shares, the arrears of the dividend on the preference shares from July 1, 1918, to the commencement of the winding-up, and the capital paid up on the ordinary shares, there remained surplus assets to the amount, as estimated at the time of this summons, of £150,000.

C. E. E. Jenkins, K.C., and *J. W. M. Holmes* for the liquidator.

A. C. Clauson, K.C., and *Tyldesley Jones* for the respondent, representing the preference shareholders.

W. H. Upjohn, K.C., and *H. E. Wright* for the respondent representing the ordinary shareholders.

ASTBURY, J.—There are two classes of shareholders in this company, ordinary and preference. After payment of the liabilities of the company, the costs of liquidation, arrears of preferential dividend, and the amount of capital paid up on the preference and ordinary shares, it is estimated that there will be an ultimate surplus of £150,000, or thereabouts, in the hands of the liquidator, and it is to determine how this surplus ought to be distributed that this summons has been taken out.

The question in issue is whether the preference shareholders are entitled to participate. The company was incorporated in 1890 with a capital of £525,000, divided into 105,000 ordinary shares of £5 each. [HIS LORDSHIP read cl. 5 of the memorandum of association and arts. 43, 44, 47, 110 (a), 148.] In 1894, the company having lost capital, the following special resolutions were passed: [HIS LORDSHIP referred to the rest of the facts, and continued:] The only provision in the Companies Acts directly affecting the question which I have to decide is that contained in s. 186 of the Companies (Consolidation) Act, 1908, which directs that, on a voluntary winding-up, the property of the company shall be applied in satisfaction of its liabilities pari passu, and subject thereto shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company. All shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares. This contract, so far as the preference shares are concerned in the present case, is contained in the resolutions passed in 1894, which were in accordance with the rights and powers of the company as contained in its memorandum and articles.

There are only two authorities directly bearing on the question in issue, and as the learned judges who decided them are not in accord, I propose to discuss in the first place what, in my humble opinion, is the true construction and effect of the contract under which the preference shareholders hold their shares—independent of authority. Under the second resolution, which I have read, these shares have attached to them certain defined special rights and privileges—i.e., (i) a fixed dividend of 7½ per cent. which is preferential and cumulative, and (ii) the additional rights conferred in resolution 2 (2). The meaning and effect of the first of these provisions is that with regard to the fund distributable as dividend in each calendar year of the company's existence as a going concern, the dividend payable to the preference shareholders is fixed by contract and not by the amount of dividends distributed; in other words, their dividend is one of 7½ per cent. and not a rateable proportion of the total sum distributed. This is, and, subject to one overruled decision, always has been, the accepted meaning of a fixed preferential dividend, but there being nothing in law to prevent a company from contracting.

in an event, to pay a further and additional sum, the preference shareholders in this company obtained by contract the additional rights, qua dividend, provided for in resolution 2 (2). The remaining sub-clauses of the resolution refer to capital. In the first place, the preference capital is not to be subject to cancellation or reduction in respect of loss or depreciation. The provisions of resolution 2 (4) give a preferential right in the order of repayment of the company's debt to capital account in the event of a winding-up, and provide for the discharge of any arrears of preferential dividend before any return or payment of capital is made to the ordinary shareholders. This provision differs entirely from that relating to dividend. The latter provides for the exhaustion of an annual distributable sum, whereas the former merely provides for the order in which certain of the company's obligations are to be met in a winding-up, and is really only directly concerned with a deficiency of assets to satisfy the capital liability, because if there is more than sufficient to do so it is wholly irrelevant in what particular order the capital debts are in fact met; the provision does not, in form or in substance, deal with the whole corporate assets except in a case of deficiency, and then only by implication. No reference is made to any remaining assets after the capital is repaid to all the shareholders, and no provision is made depriving the preference shareholders of their rights as corporators with regard thereto. It seems to me impossible to say that, because it is provided that certain debts of the company shall be paid in a winding-up in a particular order, a fund remaining after doing so and which is not expressly, nor, in my judgment, by implication, referred to at all, and which forms part of the general assets of the company, shall be divided between some to the exclusion of other shareholders. It is contended for the ordinary shareholders that the express rights given to the preference shareholders by these resolutions contain the whole of their rights as such. It is clear, however, that they do not. They have voting and other rights as corporators, and I see no reason for construing this contract as depriving them of a right to share in an ultimate surplus that is not referred to any more than as depriving them of voting and other rights of shareholders which are in the same position.

So much for my own view of the construction of this contract. With regard to the authorities, the first is *Re Espuela Land and Cattle Co.* (1). In that case the memorandum stated that the capital was divided into ordinary and preference shares, and that the latter carried a cumulative preferential dividend of 10 per cent. on the amount for the time being paid up thereon, and also a preferential right to be repaid the amount paid up thereon and interest out of the assets of the company if the company was wound-up. The articles of association stated the same preference and provided that in case the company should at any time be wound-up the preference shareholders should be entitled to be paid out of the property and assets of the company the full amount of capital paid up thereon in preference and in priority to and before any payment should be made thereout in respect of the ordinary shares. This contract was, qua the issue which I have to decide, substantially identical with that in the present case, and Swinfen Eady, J., decided that a similar surplus was divisible between the preference and ordinary shareholders in proportion to the nominal value of their shares. The learned judge said ([1909] 2 Ch. at p. 193):

> "Mr. Younger, who claimed the whole surplus on behalf of the ordinary shareholders, contended that where priority of repayment on a winding-up is secured to the preference capital, the preference shareholder is entitled to that repayment, but not to any further interest in the capital of the company, in the same manner as where a right to a fixed preferential dividend is secured to preferential shareholders they take that fixed amount and nothing more, however large the revenue of the company may be. This, however, is merely a question of the construction of the memorandum and articles. There is not any rule of law that shareholders having a fixed preferential dividend take that only. It is quite open to a company to distribute its revenue first in paying a

fixed preferential dividend, then in paying a dividend of like amount to the ordinary shareholders, and then dividing any surplus revenue of any year rateably between the preference and ordinary shareholders. An instance of this is found in *Webb* v. *Earle* (3) . . . In the absence, however, of any provision to the contrary, the rights of the shareholders are equal."

When the learned judge said that there is no rule of law that shareholders having a fixed preferential dividend take that only, I think it is plain that he meant that it is open to the company and the shareholders by contract to provide otherwise, and his citation of *Webb* v. *Earle* (3), where this was the case, seems to me to make this apparent.

In *Re Espuela Land and Cattle Co.* (1) the learned judge determined that the surplus was distributable between the preference and ordinary shareholders. This decision, if I may respectfully say so, accords with my own views of the contract in question, and I should have followed it without more if it had not been for certain observations in the judgment of SARGANT, J., in *Re National Telephone Co.* (2), which I will deal with in a moment. In *Birch* v. *Cropper, Re Bridgwater Navigation Co., Ltd.* (4), a case where no priority in a winding-up was given to preference shareholders, LORD MACNAGHTEN said (14 A.C. at p. 546):

"The ordinary shareholders say that the preference shareholders are entitled to a return of their capital, with 5 per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture holders, liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of 5 per cent. upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures. But they are not debenture-holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company."

This, subject to the fact that in the present case, as in *Re Espuela Land and Cattle Co.* (1), a preferential right as to the repayment of the company's debt to capital in a winding-up is given, seems to me to sum up the position.

In *Will* v. *United Lankat Plantations Co., Ltd.* (5) preference shareholders entitled to a 10 per cent. cumulative preferential dividend, who had no contractual right to more in any event, were held to be entitled to a 10 per cent. dividend, and that only, as far as dividend was concerned, but both COZENS-HARDY, M.R., and FARWELL, L.J., pointed out the difference between a provision as to dividend and a priority given in a winding-up as to repayment of capital. COZENS-HARDY, M.R., after referring to the contract in that case, said ([1912] 2 Ch. at p. 578):

"In other words, I think that although on any matter as to which the resolution is silent the articles do prevail, such, for instance, as the right of voting or the right to surplus on a winding-up, in such cases, no doubt, the articles will prevail."

And FARWELL, L.J., said (ibid. at p. 580):

"To my mind the considerations affecting capital and dividend are entirely different. The preferences given to capital is in the winding-up, and the preference claimed to be given to dividend here is in a going concern; and I do not think that you can reason from what will happen to capital in a winding-up to what ought to happen to dividend while the company is a going concern."

In the same case in the House of Lords LORD HALDANE, referring to the resolution as to dividend, said ([1914] A.C. at p. 16):

"Your Lordships will observe that the second resolution gave the authority to make the bargain and defined the terms which the bargain was to contain. A shareholder comes to the company and says, 'I wish to contract with you for a share in your capital and so to become a shareholder.' He advances his money and the terms are contained in the bargain that is made between him and the company on the issue of the share to him, and that bargain is that he is to receive a cumulative preferential dividend at the rate of 10 per cent. on the amount paid up on his share, and that his preference share is to rank both as regards capital and dividend in priority to other shares. My Lords, I should have thought that if we were dealing with an ordinary case of two individuals coming together, and if a document were produced saying, 'You are to have a cumulative preferential dividend of 10 per cent.,' or whatever might be the equivalent in the circumstances, of the bargain, it would be naturally concluded that that was the whole of the bargain between the parties on that point."

That means the whole of the bargain between the parties on the question of the quantum of dividend that the shareholder was entitled to receive. None of the opinions of the law lords suggest that a preferential right to be repaid capital in a winding-up is exhaustive like the dividend provision and operates to deprive the shareholders having such preference of the right to more than a sum fixed by the face value of their shares, if there is in fact a surplus, after repayment of capital.

In *Re National Telephone Co.* (2) there was a surplus to be dealt with and a large number of different classes of shareholders. The contractual rights of the various classes were of a complicated character, and the contract, as a whole, which the learned judge who tried the case had to construe, was very different from the simple contract in the case now before me. The decision itself has little bearing on the view I take in the present case, but SARGANT, J., made certain observations bearing generally on the matters that I have discussed, and in particular on the effect of the decision in *Re Espuela Land and Cattle Co.* (1), which make it necessary for me to explain why I feel bound to arrive at the decision that I have come to. The learned judge said ([1914] 1 Ch. at p. 771):

"But apart from those indications, and apart from the authorities to which I am going to refer, I should have thought that, as a matter of ordinary construction, not only from the business point of view, the express mention of the rights which the preference shareholders were to be entitled to in a winding-up would have operated as an exclusion of any further or other rights."

This, I imagine, depends on the language used, and does not, I think, apply in the present case. Lower down the learned judge said (ibid.):

"Similarly here I should have thought, in a matter which is specially dealt with by the terms of the issue of the shares, that those terms of issue would have fully defined the terms of issue, and would not have been a mere modification of certain anterior or antecedent rights which might be supposed to appertain to the shares as shares."

I think the same observation applies to this. The learned judge further said (ibid. at p. 772):

"There is undoubtedly the case of *Re Espuela Land and Cattle Co.* (1) before SWINFEN EADY, J. In that case the articles of association provided that in the case of the winding-up of the company 'the said preference shareholders shall be entitled to be paid out of the property and assets of the company the full amount of capital paid up thereon in preference and priority to and before any payment shall be made thereout in respect of the ordinary shares'; and the learned judge decided, amongst a great number of other points, that the insertion of that express right did not deprive the holders of the preference shares of the ordinary right, which they would have had but for those words, to share in what may be called excess assets—that is, assets beyond the amount

required fully to replace the capital—but I do not think that the learned judge intended to lay down any absolute canon of construction."

Speaking for myself, I think SWINFEN EADY, J., intended, and rightly, to lay down that, in the absence of provision to the contrary, the shareholders' rights are equal. Then SARGANT, J., says (ibid.), referring to the judgment in *Re Espuela Land and Cattle Co.* (1):

"As far as I read his judgment, he deals with preferential dividend and preferential return of capital in the winding-up on the same principles, and all that he says is that, in the absence of any provision to the contrary, the rights of the shareholders are clear. I take that remark as applying to the rights of the shareholders in respect of the dividend as well as in respect of capital; certainly it is founded on a ground common to both sets of rights. That being so, JOYCE, J., decided (following out logically that canon of construction, on the assumption that it was a right one) in *Will* v. *Lankat Plantations Co., Ltd.* (5) that the holder of a share entitled to preferential dividend was entitled, in default of express provision to the contrary, to share with the holders of the ordinary shares in excess dividend beyond the amount of the preferential dividend."

I respectfully disagree that SWINFEN EADY, J., dealt with preferential dividend and preferential return of capital on the same principles or that he laid down any such canon of construction as that suggested. The two sets of provisions do not seem to me, for the reasons I have already given, to be in para materia, and I respectfully suggest that the only safe canon of construction in these cases is to construe each set of provisions strictly in accordance with their respective language and subject-matter. SARGANT, J., said (ibid. at p. 773), referring to the decision in the Court of Appeal, and especially to a passage in FARWELL, L.J.'s judgment:

"But although that may be so, I think he has applied to the rights of preference shareholders with regard to dividend a canon of construction which is necessarily applicable in the same way to the rights of preference shareholders in the winding-up, if those rights are expressly provided for. Looking at the way in which SWINFEN EADY, J., dealt with the question of the rights of winding-up, as being analogous to the similar rights to dividend while the company is a going concern, and looking to the canon of construction which was applied by the Court of Appeal in *Will* v. *United Lankat Plantations Co., Ltd.* (5), it appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding-up, the express gift or attachment of preferential rights to preference shares, on their creation, is, primâ facie, a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights, they would have been entitled."

For the reasons which I have already attempted to give, I am unable to adopt the view here again expressed and I am unable to find any previous authority in its support; the decision in *Re Espuela Land and Cattle Co.* (1) seems to me to negative it, and I find it difficult to reconcile it with the views expressed by LORD MACNAGHTEN in *Birch* v. *Cropper, Re Bridgwater Navigation Co., Ltd.* (4) and by the Court of Appeal in *Will* v. *Lankat Plantations Co., Ltd.* (5). The decision in *Re Espuela Land and Cattle Co.* (1) is a direct authority on the issue I have to decide, and I follow it for the reasons which I have attempted to give, and I hold that the surplus assets in the present case must be rateably distributed between the ordinary and preference shareholders, and that the costs of this summons must be costs in the winding-up.

Order accordingly.

Solicitors: *Holmes, Son & Pott*; *Field, Roscoe & Co.*; *Nisbet, Drew & Loughborough.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

LEWIS *v.* DODD

[King's Bench Division (Darling, Avory and Salter, JJ.), October 17, 1918]

[Reported [1919] 1 K.B. 1; 88 L.J.K.B. 117; 119 L.T. 740; 83 J.P. 25; 35 T.L.R. 9; 17 L.G.R. 299; 26 Cox, C.C. 331]

Licensing—Offence—Found drunk on licensed premises—Wife of licensee—Non-permitted hours—Premises open to the public for sale of food and non-intoxicating liquor—Licensing Act, 1872 (35 & 36 *Vict.*, *c.* 94), *s.* 12—*Licensing Act*, 1902 (2 *Edw.* 7, *c.* 28), *s.* 8.

By s. 12 of the Licensing Act, 1872: "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty. . . ." By s. 8 of the Licensing Act, 1902: "For the purposes of s. 12 of the Licensing Act, 1872 . . . the expression 'public place' shall include any place to which the public have access, whether on payment or otherwise." The respondent, the wife of the licensee of a fully-licensed hotel, was found drunk on the licensed premises during the non-permitted hours, the front door being open at the time, and she was charged with being drunk on licensed premises under s. 12 of the Act of 1872.

Held: since at the time in question the premises were open and there was nothing to prevent the sale of food and non-intoxicating liquor to the public the respondent was guilty of the offence charged.

Notes. The Licensing Act, 1872, s. 12, has been applied to the place where the intoxicating liquor is sold under an occasional licence by the Licensing Act, 1953, s. 148 (5), replacing the Licensing (Consolidation) Act, 1910, s. 64 (3).

Applied: *Evans* v. *Fletcher*, [1926] All E.R.Rep. 173.

As to drunkenness in public places, see 22 Halsbury's Laws (3rd Edn.) 691; and for cases see 30 Digest (Repl.) 111 et seq. For the Licensing Act, 1872, and the Licensing Act, 1902, see 13 Halsbury's Statutes (2nd Edn.) 157 and 191 respectively.

Cases referred to:

(1) *Lester* v. *Torrens* (1877), 2 Q.B.D. 403; 46 L.J.M.C. 280; 41 J.P. 821; 25 W.R. 691, D.C.; 30 Digest (Repl.) 111, *808*.

(2) *Young* v. *Gentle*, [1915] 2 K.B. 661; 84 L.J.K.B. 1570; 113 L.T. 322; 79 J.P. 347; 31 T.L.R. 409; 25 Cox, C.C. 23, D.C.; 30 Digest (Repl.) 112, *816*.

(3) *R.* v. *Pelly*, [1897] 2 Q.B. 33; 66 L.J.Q.B. 519; 76 L.T. 467; 61 J.P. 373; 45 W.R. 504; 13 T.L.R. 319; 41 Sol. Jo. 455; 18 Cox, C.C. 556, D.C.; 30 Digest (Repl.) 111, *809*.

Case Stated by justices for Monmouthshire sitting at Llanhilleth.

An information was preferred by the appellant, Henry Lewis, superintendent of police, against the respondent, Celia Dodd, wife of Augustus Dodd, a licensed victualler, of the Navigation Hotel, Crumlin, under s. 12 of the Licensing Act, 1872, for that she on Dec. 13, 1917, was found drunk on the licensed premises known as the Navigation Hotel. The following facts were admitted or proved: The Navigation Hotel was a fully-licensed house and was in the occupation of the respondent's husband. At 10 p.m. on Dec. 13, 1917 (a weekday), Police Constable Cullen and a man named Bernard, hearing a noise in the hotel, went in, the front door being open, and they found the passage and rooms in disorder. The respondent's husband was holding her against the railings at the top of the stairs and she was screaming. The constable separated them, and he found that the respondent was drunk. Half-an-hour later the constable again heard screaming in the hotel, and, in company with a man named Hall, he again entered, and in the passage near the front door he saw the respondent and told her that she was mad drunk and that she had better go to bed. The respondent lived at the Navigation Hotel with her husband. The said hotel was situate at Crumlin, in the county

of Monmouth, within the district of the Central Control Board (Liquor Traffic) for the Welsh area. An order of the Board provided as follows:

"Hours during which intoxicating liquor may be sold:—For consumption on the premises: The days and hours when intoxicating liquor may be sold or supplied in any licensed premises or club for consumption on the premises shall be restricted and be as follows:—On weekdays the hours between 12 noon and 2.30 p.m. and 6 p.m. and 9 p.m. Except on the days and between the hours aforesaid no person shall (a) Either by himself or any servant or agent sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed on the premises, or, (b) Consume in any such premises or club any intoxicating liquor or permit any person to consume in any such premises or club any intoxicating liquor."

It was contended by the respondent that she was living with her husband and was a resident at the hotel, and that even if she was drunk after the hours during which intoxicating liquors could be sold or supplied she could not be guilty of the offence, and that her husband had refused to supply her with any intoxicating liquor after 9 p.m. and turned off the beer taps. It was contended by the appellant that, although the order of the Central Control Board (Liquor Traffic) prohibited the sale or supply of intoxicating liquor after 9 p.m., the licensed premises could be kept open until 11 p.m. for purposes other than the sale and consumption of intoxicating liquor.

The justices were of opinion that the respondent was drunk on the licensed premises; that at the time of the alleged offence the premises were not licensed premises open to the public for the purpose of the licence; and that as the premises were the house and residence of the respondent it was not an offence under the section for her to be drunk on the premises at that time, and they dismissed the information.

By the Licensing Act, 1872, s. 12:

"Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty. . . ."

St. John G. Micklethwait for the appellant.
R. O. B. Lane for the respondent.

DARLING, J.—The magistrates were wrong in their decision, and the Case must be remitted to them with directions to convict. It appears to me that the meaning of the decision in *Lester* v. *Torrens* (1) was explained by LORD READING, C.J., in *Young* v. *Gentle* (2), where he said:

"It seems to me that the decision in *Lester* v. *Torrens* (1) is to be supported upon the ground that persons of the class I have mentioned [i.e., lodgers and other inmates] are on the licensed premises in their capacity of residents in a private house, not that the premises cease to be licensed premises."

That is in accord with the view of LUSH, J., in *Lester* v. *Torrens* (1), and was assented to by AVORY, J., in *Young* v. *Gentle* (2), where he said ([1915] 2 K.B. at pp. 672, 673):

"In *Lester* v. *Torrens* (1) LUSH, J., said:

'I think, looking at the collocation of words, that "licensed premises," for the purposes of the section, must mean premises open to the public during licensed hours, or during the time when the premises are a quasi-public place. It seems to me that the innkeeper, if drunk on his own premises while they are open, is as much amenable to the penalty as if he was found drunk on the highway. It is clear, however, that the section does not apply to a person, not being an innkeeper, found drunk in his own private house. If the innkeeper lived next door to the licensed premises he might be drunk in his own house without being liable. Why should he be liable if he lives

on the licensed premises and gets drunk at a time when they are not open because during certain hours of the day they are open to the public? When they are closed they are as much his private house as a house in which he lives next door.'

It is clear that these observations would apply equally to the case of a lodger."

That comes to this, that the occupier or his wife or a lodger would be a resident in a private house and no more amenable to the law for getting drunk there than any other person if the time at which he or she got drunk was when the licensed house was no longer a public place. Sometimes it is a private house and at other times a public-house, but all the time it is a licensed house.

We have to say whether at the time when the respondent was found drunk the house was a public-house in the sense of being open to the public. The house was a fully-licensed house, and it would naturally have been open for the sale of intoxicating liquor and all other purposes at that time. But it was not then open for the sale of intoxicating liquor, because such sale had to cease at 9 p.m., and the respondent was found drunk at 10 and 10.30 p.m. The house was, however, still being used as a public-house, and was only closed for the sale of intoxicating liquor. The order of the Central Control Board provided that the premises could be kept open until 11 p.m. for purposes other than the sale and consumption of intoxicating liquor. It is plain that the house was physically open. It was, therefore, still a licensed public-house, being used as a public-house for certain purposes though not all. Therefore, at the time in question it was not a private house. All the judgments in *Young* v. *Gentle* (2) drew a distinction between the appellant in that case being found drunk on the premises during the time when the house was open as a public-house and his being found drunk on the premises during the time when neither intoxicating drink nor anything else was being supplied. The magistrates ought to have convicted.

AVORY, J.—I agree. The respondent was summoned under s. 12 of the Licensing Act, 1872, which imposes a penalty on

"every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises."

I need not repeat what I said in *Young* v. *Gentle* (2) as to the obvious literal meaning of those words. The respondent was in fact found drunk on licensed premises. There can be no doubt that at the time the premises were licensed, and but for the restriction put on the meaning of the section by *Lester* v. *Torrens* (1) this case would not have been open to argument. The effect of *Lester* v. *Torrens* (1) and *R.* v. *Pelly* (3) must be taken to be that which this court in *Young* v. *Gentle* (2) stated to be their true meaning. In *Young* v. *Gentle* (2) Lord Reading, C.J., said that the decision in *Lester* v. *Torrens* (1) was to be supported on the ground that persons of the class mentioned were on the licensed premises in their capacity of residents in a private house, not that the premises ceased to be licensed premises. In other words, the question is whether at the time when the person is found drunk the premises on which he is so found are a private house or a public-house. This view is confirmed by reference to the Licensing Act, 1902, which provided in s. 1 that:

"If a person is found drunk in any highway or other public place, whether a building or not, or on any licensed premises, and appears to be incapable of taking care of himself, he may be apprehended and dealt with according to law."

It is to be observed that s. 12 of the Licensing Act, 1872, gave no power to apprehend for merely being found drunk. Then s. 8 of the Act of 1902 defined "public place" as including any place to which the public have access, whether on payment or otherwise. It is clear that these premises at the time in question were a public place, a place to which the public had access. The front door was open,

and the premises were open for persons to go in and purchase non-intoxicants. Therefore it is clear that the respondent was found drunk in a public place, and there is no reason why she should not be equally liable for being found drunk on these premises, which were a public place at the time. The justices thought that when the premises were not open for the sale of intoxicating liquor they ceased to be licensed premises or a public place. *Young* v. *Gentle* (2) shows that view to be erroneous. Therefore the Case will be remitted to the justices with a direction to convict.

SALTER, J.—I am of the same opinion. With regard to the words "every person" in s. 12 of the Licensing Act, 1872, I see no warrant in the statute or in the cases for reading any limited meaning into them. They mean "every person whatever." Then in the succeeding words the section imposes a penalty not on drunkenness simply, but on drunkenness involving offence or scandal. The words "licensed premises" mean licensed premises which are open to the public and which may be a place of public resort. In this case the premises were open by permission of the Central Control Board though not for the sale of intoxicants. I think, therefore, that the case falls within the meaning of the section and the mischief at which it is aimed, and the justices should have convicted.

Case remitted.

Solicitors: *Taylor, Rowley & Lewis*, for *F. Lyndon Cooper*, Newport, Mon.; *Kinch & Richardson*, for *D. Edward Jones*, Abertillery.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

Re BOKS & CO. AND PETERS, RUSHTON & CO.

[COURT OF APPEAL (Swinfen Eady, M.R., and Scrutton, L.J.), January 13, 14, 1919]

[Reported [1919] 1 K.B. 491; 88 L.J.K.B. 351; 120 L.T. 516]

Arbitration—Award—Enforcement as judgment—Leave for—When granted—When refused—Award on illegal contract.

Where there are no substantial objections to an award made in an arbitration, or where the objections thereto are such that they can be readily disposed of, summary procedure is the proper remedy as being prompt and convenient; but where there are matters which may gravely affect the validity of the award, the court should not give leave to enforce the award as a judgment, but should leave the parties to their remedy by action.

By a contract dated Jan. 17, 1918, sellers sold palm kernels to be shipped from the Congo to a French port. The contract contained an arbitration clause. A dispute arose between the parties, the buyers refused to pay, the sellers referred the dispute to arbitration, the buyers did not attend the arbitration, and on April 20, 1918, the arbitrators awarded that the buyers should pay the purchase price to the sellers. By an order made under the Defence of the Realm Regulations no person might sell, purchase or deal in palm kernels except under a licence. The sellers had no licence at the time they made the contract, but the buyers did not realise this, neither did the arbitrators.

Held: as it was arguable whether the award was binding or bad on the ground that the contract was illegal, the court would refuse the sellers leave

to enforce the award as a judgment, leaving the sellers to bring an action on the award if they saw fit to do so.

Notes. Distinguished: *David Taylor & Son* v. *Barnett*, [1953] 1 All E.R. 843. Considered: *Union Nationale, etc.* v. *R. Catterall & Co., Ltd.*, [1959] 1 All E.R. 721.

As to opposing applications to the Court to enforce an arbitrator's award, see 2 HALSBURY'S LAWS (3rd Edn.) 50, 51; as to disputes which cannot be arbitrated in law, see ibid. 6, 7; and for cases see 2 DIGEST (Repl.) 701–703, *433–436*. For the Arbitration Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 89.

Cases referred to in argument:

North Western Salt Co., Ltd. v. *Electrolytic Alkali Co., Ltd.*, [1914] A.C. 461; 83 L.J.K.B. 530; 110 L.T. 852; 30 T.L.R. 313; 58 Sol. Jo. 338, H.L.; 12 Digest (Repl.) 338, *2619*.

Middleton v. *Hill* (1595), Cro. Eliz. 588.

Owens v. *Denton* (1835), 1 Cr.M. & R. 711; 5 Tyr. 359; 4 L.J.Ex. 68; 149 E.R. 1266; 12 Digest (Repl.) 521, *3921*.

Wohlenberg v. *Lageman* (1815), 6 Taunt. 251; 1 Marsh. 579; 128 E.R. 1031; 2 Digest (Repl.) 715, *2294*.

Steers v. *Lashley* (1794), 6 Term. Rep. 61; 101 E.R. 435; 2 Digest (Repl.) 462, *265*.

Gedge v. *Royal Exchange Assurance Corpn.*, [1900] 2 Q.B. 214; 69 L.J.Q.B. 506; 82 L.T. 463; 16 T.L.R. 344; 9 Asp.M.L.C. 57; 5 Com. Cas. 229; 12 Digest (Repl.) 338, *2618*.

Interlocutory Appeal by sellers from a decision of LUSH, J., in chambers, refusing them leave to enforce an arbitrator's award as a judgment. The facts, which are summarised in the headnote, are stated in the judgment of SWINFEN EADY, M.R.

R. A. Wright, K.C., and *C. Claughton Scott* for the appellants.
Leck, K.C., and *H. L. Tebbs* for the respondents.

SWINFEN EADY, M.R.—This is an appeal from an order of LUSH, J., reversing an order of Master JELF, which order of Master JELF had sanctioned the enforcement of an award in a summary manner, arising out of a contract between Messrs. Boks & Co. as sellers and Peters, Rushton & Co., Ltd., as buyers.

The sellers contended that the order of LUSH, J., was erroneous, and, that having obtained an award in the matter of this contract whereby a large sum is paid by the buyers to the sellers, they ought to be at liberty to enforce it in a summary way as sanctioned by the order of the master; they ask that the order of the master may be restored and that of LUSH, J., reversed. The claim arises out of a contract entered into on Jan. 17, 1918, whereby the sellers sold to the buyers about ninety tons of Congo palm nut kernels. The contract was a c.i.f. contract to La Pallice or other French port; war risk included in the price; payment to be made 95 per cent. cash against documents in London and the balance fourteen days after date. Then there was a provision that

> "Any dispute in this contract to be settled by arbitration in Liverpool, as provided for by the conditions of sale, except that non-members of this association, engaged in the palm kernel trade in Liverpool, shall be eligible for nomination as arbitrators on questions of quality only."

That contract having been entered into on Jan. 17, 1918, it appears from the correspondence that the goods in question were loaded on board a ship that came into collision and put into the port of Dacca. There was some question whether the portion of the cargo in question had sustained serious damage or not. At one time there was a claim as for a total loss, the buyers took the objection that under the circumstances they were not liable to pay against documents, they were pressed to pay and declined to pay, and on that account there was a reference to arbitration. The request for arbitration is referred to in the correspondence as a request received

from the sellers, but we have not the actual request before us. In consequence of that request there was a reference to arbitration, and an award was made. The sellers alone appeared before the arbitrators, and the result of the award which was made on April 20, 1918, was that the sellers on Mar. 9 duly tendered the documents as required by cl. 9 of the contract, and the buyers accordingly came under an obligation to pay. The award was that the buyers "shall forthwith pay to sellers the sum of £2,795 plus interest at 5 per cent. from Mar. 9 to the date of payment." The goods, or the cases in which the goods were, were only slightly damaged, but goods were sold for whom they might concern, and this sum awarded was the difference between the contract price and what was realised. The award proceeded thus:

> "The said payment under cl. b hereof to be without prejudice to the rights of either party which may thereafter arise under any clauses of the said contract in regard to any balance or any adjustments or cancellation or otherwise."

Having obtained that award, the sellers pressed for payment. Payment was not made, and an order was obtained from Master JELF on May 13, 1918, giving leave to enforce the award in a summary manner. The buyers were thereupon making arrangements to pay, and an appointment was made to attend the solicitors' offices to make the payment upon production of the licence authorising the transaction in question.

By the terms of an order made by the Ministry of Munitions of War under the Defence of the Realm Regulations no person was to sell, purchase, or deal in any of the articles mentioned in the order, whether used within or without the United Kingdom, except under or in accordance with the terms of a licence; and in the schedule to that order palm kernels were included; so that it was unlawful to deal with palm kernels except under the authority of a licence. On the appointment to make the payment pursuant to the award, a request was made for the production of the licence. The licence was not produced. Then there was an adjournment, and the licence was produced on the day of the adjournment. Ultimately on May 17, 1918, the buyers attended at the offices of the Ministry of Munitions of War, the Fats, Oils and Food Branch, and were informed that in fact no licence had been issued authorising the transaction in question. Thereupon an application was at once made to LUSH, J., who granted a stay of execution under the order until the matter could be disposed of with liberty to apply to discharge the stay. Ultimately a suggestion was made that under the circumstances the proper plan was to move to set aside the award, and subsequently there was a motion before the Divisional Court to set aside the award. The view taken by the Divisional Court was that it would not be right to set aside the award, the matter being treated as if it were a matter arising out of an illegal transaction where the court could not interfere in any way either to enforce the award or to set it aside, but ought to let the parties remain in whatever position they were. The Divisional Court on those grounds declined to set aside the award. That being so, time being extended, there was an appeal from Master JELF's order to LUSH, J., asking him to discharge that order giving leave for the summary enforcement of the award. He did discharge it. Hence the appeal to this court.

We are now pressed to say that there is no ground for interfering with the master's order, and that as the sellers have obtained the award, they ought now to be allowed to proceed to enforce it: it was argued that as they have obtained an order giving them leave to proceed summarily, the case is in the same position as it would have been if they had obtained an actual judgment against the buyers for the amount in question. We cannot deal with it on that footing. The appeal to the judge at chambers was from the order of the master, and the order giving leave to enforce the award in a summary manner was the subject of appeal and was discharged. It is well settled that the procedure by action on an award is one that ought to be pursued where the objections raised are such as to render the

validity of the award a matter of doubt. Where there are no substantial objections to the award, or where the objections raised are such as that they can be readily disposed of, summary procedure is prompt and convenient, but where there are matters which may gravely affect the validity of the award, they should be dealt with in an action in which the facts can be properly ascertained, and no order should be given to proceed summarily.

The practice is thus stated in RUSSELL ON ARBITRATIONS (9th Edn.), p. 322, in which it is said that under s. 12 of the Arbitration Act, 1889:

> "An award may be enforced as a judgment or order although the right to bring an action is not thereby taken away the necessity for an action no longer exists to the same extent as formerly, but an action is still the proper mode of procedure where the submission is by parol or where the award ascertains only the amount to be paid and not the liability in law to pay or where the validity of the award or the right to proceed upon it is so doubtful that leave to enforce it under the above section cannot be obtained."

In my opinion, that is applicable to the present case, and the point as to validity of the award is such that leave to enforce it in a summary manner ought not to be given. It must be remembered that the sellers were insisting that they had a licence which extended to this particular transaction, and no question arose in the arbitration with regard to the licence. The fact that there was no licence extending to this transaction had not then been discovered by the purchasers, and it was not till after delay in producing the licence, which seems to have given rise to suspicion, that a direct inquiry at the Government offices led to the fact being ascertained that there was no licence in existence. Those facts were not ascertained till after the award, and were not in any way before the arbitrator, and it was a matter not discovered till after the publication of the award. In the circumstances the proper course was and is to leave the buyers to bring such action upon the award as they may be advised; it is not a case in which summary relief ought to be given by way of enforcing it in a summary manner. For these reasons I am of opinion the order of LUSH, J., reversing the order of the master was right and ought to be upheld. LUSH, J., set the matter aside without costs, and I think the proper order will be to let the costs below and the costs of this appeal abide the ultimate result; that is to say, whoever shall ultimately succeed shall be entitled to these costs.

SCRUTTON, L.J.—Messrs. Boks & Co. sold to Peters, Rushton & Co., Ltd., certain palm nut kernels c.i.f., price 95 per cent. cash against documents in London, with a provision that if the ship for any reason whatever should not have the goods on board or not arrive in France the contract was to be void. The ship got into collision and put into Dacca and discharged the goods for repairs. The sellers then presented the documents, the buyers putting forward the objection which they said, I have no doubt rightly, had been taken by the buyers from them that the ship has not the goods on board and is not proceeding on her voyage. They said that if the ship does not arrive in France with the goods on board the contract will be void and you cannot present the documents. There was an arbitration clause in the contract. Thereupon the sellers called upon the buyers to appoint their arbitrator. The buyers, though they were saying nothing was due and the sellers were saying something was due, made the very foolish reply that commercial men often do make, that there was nothing in dispute and nothing to arbitrate about although they disputed the whole question that anything was due, and did not attend the arbitration. The Liverpool Association Arbitrators then made an award that the sum claimed was due subject to the provision of cancellation remaining in the contract which was to this effect, though the buyers might have to pay on presentation of documents, if the ship ultimately did not arrive then the contract was void and nothing could be recovered. Having got that award the sellers asked for leave to enforce it as a judgment and Master JELF made the

order. Up to that time the point of legality had not come forward. The transaction was in fact illegal unless a licence covering it had been obtained from the proper authority. The sellers said they had such a licence. The point was not raised before the arbitrators. The buyers were not there to say they did not know anything about it. For the same reason it was not raised before Master JELF. But after the expression of opinion by the Divisional Court—which I need not trouble about as it does not seem to be of much use to anybody, and the responsibility for which does not lie with the parties but the Divisional Court—an appeal came before LUSH, J., from Master JELF, and then for the first time it was said to the court that it ought not to grant leave to enforce this award, the transaction being illegal. It was not disputed that the transaction was illegal, but it was said that here is an award perfectly good on the face of it; that here is a point that might have been raised before the arbitrators before whom the buyers did not go; that the court has nothing to do with what the buyers now say; and that it is good on the face of it.

I entirely agree with the view stated by the Master of the Rolls, which accords with my experience of the practice, that this summary manner of enforcing awards is only to be used in reasonably clear cases. It is not intended on the application for leave to enforce the award to try a complicated or difficult question of law. If it is not reasonably clear the award should be enforced, the party seeking to enforce it must be left to his remedy by action when the matter can be raised and dealt with by proper pleadings. Without expressing any opinion what may happen it seems to me that this is not a case where the right to proceed on the award is so clear that leave ought to be given to enforce it as a judgment in a summary way. I have no doubt that if this point as to illegality had been before Master JELF he would have made the order that the learned judge made. In the other court we made an exactly similar order in a case where it was arguable whether the award was sustainable or binding and we left the parties to the action. For the reasons I have stated, without expressing any opinion as to the result with the matter as properly before the court, I think that the order which LUSH, J., made is quite in accordance with the practice and should be supported, and I agree with the judgment of the Master of the Rolls.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.*; *Nunn, Popham & Starkie.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

GONSKY *v.* DURRELL

[COURT OF APPEAL (Pickford, Warrington and Scrutton, L.JJ.), May 2, 1918]

[Reported [1918] 2 K.B. 71; 87 L.J.K.B. 836; 119 L.T. 174; 62 Sol. Jo. 622]

Distress—For rent—Privileged goods—Onus of proof of value of goods left on premises—Law of Distress Amendment Act, 1888 (51 & 52 *Vict.*, *c.* 21), *s.* 4 —*County Courts Act*, 1888 (51 & 52 *Vict.*, *c.* 43), *s.* 147.

In an action for wrongfully distraining on a tool of the tenant's trade, contrary to s. 4 of the Law of Distress Amendment Act, 1888, the onus is on the tenant to prove that £5 worth of wearing apparel, bedding, and tools and implements of the tenant's trade was not left by the landlord on the premises, in accordance with s. 147 of the County Courts Act, 1888.

Decision of the Divisional Court, [1918] 1 K.B. 104, affirmed.

Notes. The Law of Distress Amendment Act, 1888, s. 4, has been amended by the Administration of Justice Act, 1956, s. 37, by increasing the amount of the value of privileged goods. The County Courts Act, 1888, was repealed and replaced by the County Courts Act, 1934, which has (with exceptions) been repealed and replaced by the County Courts Act, 1959. For s. 147 of the Act of 1888, see now s. 124 of the Act of 1959.

As to what may and what may not be distrained, see 12 HALSBURY'S LAWS (3rd Edn.) 100 et seq.; and for cases see 18 DIGEST (Repl.) 279 et seq. For the Law of Distress Amendment Act, 1888, s. 4, see 6 HALSBURY'S STATUTES (2nd Edn.) 166; and for the County Courts Act, 1959, s. 124, see 39 HALSBURY'S STATUTES (2nd Edn.) 198.

Cases referred to:

(1) *Boyd, Ltd.* v. *Bilham*, [1909] 1 K.B. 14; 78 L.J.K.B. 50; 99 L.T. 780; 72 J.P. 495; 18 Digest (Repl.) 286, *339*.

(2) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 13 Digest (Repl.) 467, *918*.

(3) *Sales Agency, Ltd.* v. *Elite Theatres*, [1917] 2 K.B. 164; 86 L.J.K.B. 1060; 117 L.T. 6; [1917] H.B.R. 163, C.A.; 13 Digest (Repl.) 471, *951*.

(4) *Nargett* v. *Nias* (1859), 1 E. & E. 439; 28 L.J.Q.B. 143; 32 L.T.O.S. 313; 5 Jur.N.S. 198; 120 E.R. 974; 18 Digest (Repl.) 286, *331*.

(5) *Dawson* v. *Alford* (1572), 3 Dyer, 312 a; 73 E.R. 706; 18 Digest (Repl.) 287, *354*.

Also referred to in argument:

Churchward v. *Johnson* (1889), 54 J.P. 326, D.C.; 18 Digest (Repl.) 286, *335*.

Appeal from a decision of the Divisional Court (DARLING, AVORY, and SANKEY, JJ.), affirming the decision of the county court judge sitting at Whitechapel.

The plaintiff, a tailor's presser, was tenant to the defendant at a rent of 13s. per week. Rent to the amount of £4 13s. being in arrear, a distress was put in by the landlord, and the bailiff seized a sewing machine. The tenant sued to recover damages for wrongful distress, alleging in his particulars of claim that the landlord had distrained in contravention of the Law of Distress Amendment Act, 1888, s. 4 of which provides:

> "The following goods and chattels shall be exempt from distress for rent; namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under s. 96 of the County Courts Act, 1846, or any enactment amending or substituted for the same."

By s. 147 of the County Courts Act, 1888 (which is substituted for s. 96 of the Act of 1846):

"Every bailiff or officer executing any process of execution issuing out of the court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting the wearing apparel and bedding of such person or his family and the tools and implements of his trade to the value of £5, which shall to that extent be protected from such seizure). . . ."

The plaintiff gave no evidence at the trial to the effect that the defendant did not leave £5 worth of apparel, bedding, tools and implements of trade on the premises after the levy, and the judge entered judgment for the defendant. There was evidence that there was no other tool of trade on the premises. The plaintiff asked at the trial for leave to amend his particulars of claim, so as to claim at common law, but leave was refused. The Divisional Court held that, under the statute, the onus of proof that the landlord had not left £5 worth of the exempted goods on the premises was on the tenant, and they affirmed the decision of the county court judge.

The tenant appealed.

H. S. Q. Henriques for the plaintiff, the tenant.
G. W. H. Jones for the defendant, the landlord.

PICKFORD, L.J.—This case depends entirely on technicalities. I doubt whether its merits have been tried, but we cannot express an opinion on any point which was not taken in the county court. The action was brought to recover damages for wrongful distress, and the particulars of claim alleged that "the defendant wrongfully distrained on the plaintiff's goods at No. 470, Mile End Road, Stepney, by distraining on a Singer sewing machine in contravention of s. 4 of the Law of Distress Amendment Act, 1888." Therefore, the action is brought on the statute and on the statute alone. The evidence showed that the machine was in good going order when distrained on, but it did not show whether there was any other tool of trade on the premises, nor whether any other goods were distrained on, nor what was left on the premises. There was no evidence that less than £5 worth of privileged goods was left. There was no evidence, therefore, whether £5 worth of wearing apparel and bedding of the plaintiff or his family was left on the premises. The county court judge was asked to amend by allowing a claim for wrongful distress at common law, but he refused, and, as it was a matter within his discretion, we cannot interfere. I think it would have been better if he had allowed the amendment so as to have the case fully tried. Personally, I think that an amendment ought always to be allowed so as to have a case fully tried out, unless some injustice would be caused thereby. In the Divisional Court, the only question raised was as to the onus of proof. A further point was sought to be raised here, namely, that the £5 value specified in s. 147 of the County Courts Act, 1888, is to be read distributively, that is to say, that the exception extends to wearing apparel and bedding of the value of £5, and to tools and implements of trade of the value of £5. If it had been desired to raise that point here, it ought to have been taken in the county court. It was not taken in the county court, and, therefore, we cannot entertain it. I express no opinion on it. I will only say that it is contrary to the judgment of CHANNELL, J., in *Boyd, Ltd.* v. *Bilham* (1).

There remains only one question: Were the judge and the Divisional Court right in holding that the onus was on the plaintiff to prove that wearing apparel and bedding and tools and implements of trade to the value of £5 were not left on the premises? Section 147 of the County Courts Act, 1888, after allowing the bailiff to seize and take "any of the goods and chattels of such person," proceeds to enact an exception—

"excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of £5, which shall to that extent be protected from such seizure."

Therefore, wearing apparel and bedding and tools and implements of trade to the value of £5 are protected, and, unless the plaintiff proves that the distress has infringed the protection by showing that £5 worth of those goods has not been left, he has not proved that the distress is wrongful. The plaintiff has to prove that the person distraining has distrained on the £5 value of protected goods, and, unless he proves that, he has no cause of action. The plaintiff gave no evidence that the defendant had not left £5 worth of the protected articles, and the judge stopped the case at the close of the plaintiff's case. I doubt if I should have stopped it, but he was entitled to do so. Counsel for the defendant took the point. I agree with the Divisional Court that the onus of proving that £5 in value of the protected articles was not left on the premises was on the plaintiff, and he gave no evidence of it. The appeal must be dismissed.

WARRINGTON, L.J.—I agree. The plaintiff seeks to establish that the defendant, when distraining, has seized an article which is exempted from distress by s. 4 of the Law of Distress Amendment Act, 1888. It is for the plaintiff to prove his cause of action—that is, a seizure of something which is exempt from distress under the Act. Section 4 of that Act exempts from distress certain goods—

> "namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under s. 96 of the County Courts Act, 1846, or any enactment amending or substituted for the same."

Section 147 of the County Courts Act, 1888, has been substituted for s. 96 of the Act of 1846, and it provides as follows [His Lordship read the section, and continued:] Therefore, the wearing apparel and bedding of the plaintiff or his family and the tools and implements of his trade to the value of £5 are to that extent protected from distress. I assume that the law laid down in *Boyd, Ltd.* v. *Bilham* (1) is correct, namely, that the limit of £5 extends to all the goods specified in the exception in s. 147 as one class. The defendant did not take any goods of the class exempted from distress, unless he failed to leave on the premises goods of that class to the value of £5. If he left goods of the class worth £5, the goods taken were not exempt from distress. The plaintiff has to prove that the goods seized were exempt, and, in order to do that, he must prove that £5 worth of goods of that class was not left. The onus, therefore, lay on the plaintiff. He gave no evidence of the value of the goods of that class left on the premises. The decision of the Divisional Court was, therefore, right, and the appeal must be dismissed.

SCRUTTON, L.J.—I agree. I also regret that the merits of the case have not been dealt with owing to the course taken at the trial. A sewing machine may be a tool or implement of a man's trade. There are three ways in which, as a tool of trade, it may be exempt from distress. First, if it is in actual use; secondly, if there is other sufficient distress on the premises; and, thirdly, under s. 4 of the Law of Distress Amendment Act, 1888. The first two are common law exemptions; the last is statutory. This action was brought for wrongful distress by reason of a breach of the statutory exemption, and not by reason of a breach of the common law protection. The plaintiff has to prove his case, and, therefore, that the sewing machine comes within the exemption enacted by s. 4 of the Law of Distress Amendment Act, 1888. That section makes the exemption from execution enacted by s. 147 of the County Courts Act, 1888, applicable to a distress for rent. Section 147 provides that "any of the goods and chattels" of the person may be seized,

> "excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of £5, which shall to that extent be protected from seizure."

The plaintiff, to bring himself within the exception, has to prove, not only that a tool of his trade has been seized, but also that wearing apparel and bedding of the plaintiff or his family and tools and implements of his trade to the value of £5

have not been left on the premises. The onus under this enactment of proving that is on the tenant.

The other point which was taken in this court for the first time is that the decision in *Boyd, Ltd.* v. *Bilham* (1) was wrong. That case decides that the value of £5 applies to all the goods mentioned in the exception, and that, therefore, it is sufficient to leave £5 worth of those goods on the premises. The point that the words in s. 147, "to the value of £5," are to be read distributively was not taken in the county court, and, consequently, it is not open to the plaintiff to take it here. That was decided by the House of Lords in *Smith* v. *Baker & Sons* (2), and we acted on it recently in *Sales Agency, Ltd.* v. *Elite Theatres* (3). The only point open to the plaintiff is whether, when a tool of trade is seized, the onus is on him to prove that wearing apparel and bedding and tools and implements of trade of the total value of £5 were not left on the premises, and, as I have said, in my opinion the onus is on him. The county court judge was, therefore, technically right.

I desire to add for myself that, as at present advised, I do not agree with the opinion expressed by the Divisional Court that the same rule does not apply at common law. My present opinion is that the same rule applies. No doubt in *Nargett* v. *Nias* (4) LORD CAMPBELL, C.J., in delivering the judgment of the court said (1 E. & E. at p. 447):

> "it is not necessary for the plaintiff in his declaration to allege that there were other goods of sufficient value which might have been distrained; but the defendant must show in his answer, when he justifies, that no other sufficient distress could be found."

I desire to reserve my decision whether the view of LORD CAMPBELL is correct; and I notice that so eminent a lawyer as Mr. Blackburn, afterwards LORD BLACKBURN, during his argument in that case said (ibid. at p. 443), in reference to *Dawson* v. *Alford* (5), that

> "that was a special case on the statute [(of Marlebridge), as prescribed by FITZHERBERT in the note just cited], and the case shows that the allegation 'against the form of the statute' [which was in the count for distraining beasts of the plough] may be taken to include an allegation that there was other sufficient distress."

I think that view is correct, and I say so with the greater absence of hesitation because I find that in BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.), at pp. 317, 318, in a count for distraining beasts of the plough, there is an allegation that there were on the land other goods of the plaintiff liable to the distress and sufficient to satisfy the arrears of rent and charges. Therefore, I do not accept, without hearing further arguments, the position that at common law the decision in this case would have been different. I, too, regret that an amendment was not made by the county court judge in the particulars allowing this point to be raised. I agree that the appeal should be dismissed.

PICKFORD, L.J.—SCRUTTON, L.J., has discussed the question whether the Divisional Court were right in the opinion they expressed that, at common law, the onus of proof would be different. I desire to express no opinion on the point.

WARRINGTON, L.J.—Nor do I express any opinion on it.

Appeal dismissed.

Solicitors: *G. Vandamm*; *Forbes & Son.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

CHAPMAN *v.* LEACH

[COURT OF APPEAL (Bankes and Scrutton, L.JJ.), December 2, 1919]

[Reported [1920] 1 K.B. 336; 89 L.J.K.B. 155; 122 L.T. 421; 64 Sol. Jo. 207]

Slander—Interrogatory—Source of information—Name of informant sought—Action brought to vindicate plaintiff's character and not merely to obtain informant's name.

In a slander action the defendant pleaded privilege, and the plaintiff sought to interrogate him as to what information he had before speaking the alleged slander which led him to believe that the words were true, and what inquiries he made before publishing the words to ascertain whether they were true, and "when, where, and of whom were such inquiries made?" In correspondence the defendant was asked to apologise and to give the name of the informant and furnish the plaintiff with such evidence as would enable the plaintiff to bring an action against the informant. In reply the defendant said he had been misinformed and tendered an apology. The plaintiff's solicitors replied stating that they had offered to let the defendant off provided he gave the name of the informant and assisted the plaintiff with his evidence. The defendant objected to that part of the interrogatory which asked "of whom" the inquiries were made, contending that the informant's name was not asked bona fide for the purposes of the action against himself, but to enable the plaintiff to sue the informant.

Held: (i) the interrogatory was admissible to test the claim of privilege, as the correspondence showed that the plaintiff was not suing the defendant merely to compel the defendant to disclose the name of the informant so that the plaintiff might be able to sue the informant, but was prepared to vindicate his good name by suing the defendant even though he would prefer to sue the informant alone: *Edmondson* v. *Birch & Co., Ltd.* (1), [1905] 2 K.B. 523, distinguished. (ii) the interrogatory did not in fact ask for the name of the informant directly, and, as it had not been shown that the interrogatory was not put bona fide, it was not inadmissible on the ground that the plaintiff might thereby be able indirectly to obtain the name.

Notes. As to interrogatories as to the original author of a defamatory statement, see 24 HALSBURY'S LAWS (3rd Edn.) 100; and for cases see 18 DIGEST (Repl.) 184–187, 190, 191, 192.

Case referred to:

(1) *Edmondson* v. *Birch & Co., Ltd.*, [1905] 2 K.B. 523; 74 L.J.K.B. 777; 93 L.T. 462; 54 W.R. 52; 21 T.L.R. 657, C.A.; 18 Digest (Repl.) 185, *1609*.

Also referred to in argument:

White & Co. v. *Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K.B. 653; 74 L.J.K.B. 419; 92 L.T. 817; 53 W.R. 369; 21 T.L.R. 337; 49 Sol. Jo. 364, C.A.; 18 Digest (Repl.) 187, *1616*.

Interlocutory Appeal by the plaintiff from an order of SALTER, J., in chambers, striking out part of an interrogatory sought to be delivered by the plaintiff to the defendant.

The action was to recover damages for slander. The statement of claim was as follows:

"1. The plaintiff is, and was at the date hereinafter mentioned, a merchant shipper and contractor in the city of London. He was an original member of the London Shipping Exchange which in 1903 was amalgamated with the Baltic, whereupon he became a member of the Baltic and so continued till 1916, when he resigned his membership, and is chairman of the coal trade

section and a member of the council of the London Chamber of Commerce and a member of the London Court of Arbitration. 2. On April 28, 1919, the defendant falsely and maliciously spoke and published of and concerning the plaintiff in relation to his said business to C. Lacey Bathurst . . . the words following, that is to say: 'He' (meaning the plaintiff) 'has been expelled from the Baltic.' ''

Paragraph 4 contained the innuendo. By his defence the defendant admitted the publication of the words complained of, but did not admit the innuendo, and he pleaded that he spoke and published the words bona fide and without malice under such circumstances as rendered the occasion privileged. The plaintiff applied for leave to administer to the defendant the following interrogatory (amongst others):

"What information, if any, had you before speaking the words set out in para. 2 of the statement of claim which induced you to believe that the said words were true, and what steps and/or precautions and/or inquiries, if any, did you take and/or make before speaking and publishing the said words to ascertain whether they were true or not? When, where, *and of whom* were such inquiries made? Were such information and/or inquiries oral or in writing, and if the latter identify the documents? Did you publish the said words as the result of any such inquiries?''

A correspondence had taken place before action of which the following are the material letters: On May 19, 1919, the plaintiff's solicitors wrote to the defendant:

"Dear Sir,—We are instructed by our client, Mr. John Chapman, to communicate with you in reference to a slander concerning him which you uttered on or about April 28 last to a mutual friend, Mr. Bathurst. The statement complained of was that our client had been expelled from the 'Baltic.' This allegation is wholly untrue, and we are instructed to call upon you to retract the slander and apologise. At the same time we must ask you to give us the name of your informant and furnish us with such evidence as will enable our client to bring an action against him. If you do that our client will be satisfied as far as you are concerned, but if you are not prepared to comply with our request in every particular please furnish us with the name of a solicitor who will accept service of a writ on your behalf.''

On May 21 the defendant replied:

"Dear Sir,—I have seen the gentleman who gave me the verbal information about Mr. Chapman's affairs, and now find I was misinformed about the Baltic. I understand that Mr. Chapman resigned his membership there, and I am sorry that there has been any misunderstanding on this point, and now tender my apologies to Mr. Chapman.''

The plaintiff's solicitors replied on May 22:

"Dear Sir,—We have your letter of yesterday's date and can scarcely believe that you appreciate the seriousness of the matter. You have uttered in respect of our client the most serious slander that could be uttered concerning him in his profession, viz., that he has been expelled from the 'Baltic.' This slander as a matter of fact as you perfectly well know has gone all round Sydenham, and you now calmly say that you find you were misinformed. We offered on behalf of our client to let you off, provided you gave us the name of your informant and assisted us in reaching him by your evidence. To our mind you add fuel to the fire when you purport to express sorrow for what you now call a misunderstanding. Our client is not prepared to accept the apology which you make in your letter under the circumstances, and we are issuing a writ for slander. . . .''

The writ was accordingly issued on May 24. The defendant objected to that part of the first interrogatory (printed above in italics) "and of whom," on the ground

that it was not put bona fide for the purpose of the action, but merely to enable the plaintiff to bring an action against the person who gave the information: *Edmondson* v. *Birch & Co., Ltd.* (1). The master allowed the interrogatory. On appeal the judge, on the authority of the above-mentioned case, struck out the words objected to, "and from whom," the sentence as altered running: "When and where were such inquiries made?" and allowed the interrogatories as so amended. The plaintiff appealed.

E. W. Hansell for the plaintiff.

BANKES, L.J.—The interrogatory does not, in form at any rate, ask for the name of the informant, but it merely asks of whom the inquiries were made. No doubt the object of the interrogatory was to ascertain the name of the informant, but if it in fact does not ask that question, there can be no objection to it.

Sir Hugh Fraser for the defendant.

BANKES, L.J.—I think that in this case the view of the master was right. It was right on two grounds, one of which does not appear to have been dealt with or referred to either before the master or the learned judge. In the first place I have assumed that the interrogatory was an interrogatory put to ask from whom the original information was derived. It is said that, having regard to these letters the interrogatory so put was not put bona fide for the purpose of testing the defence of privilege, but was really put for the purpose of obtaining the name of the person who gave the information, so that a second action might be brought against him. Reliance is placed on the decision in *Edmondson* v. *Birch & Co., Ltd.* (1). The facts in that case and this are very different. In *Edmondson* v. *Birch & Co., Ltd.* (1) what the plaintiff had said before action in effect was this: "I do not want to bring an action against you, the present defendants, but I am so determined to bring an action against the real author of this libel that I shall bring an action against you to discover the name of that person, unless you give it to me, and in that way to procure evidence on which I can take action against the person against whom I desire to take action." In this case what was said is what is often said: "I do not want to bring an action against two persons; I am determined to bring an action against somebody in respect of this slander, but I do not want to bring an action against you if you will tell me the name of the person who made the statement to you." He does not say that in any case he will bring an action against the defendant for the purpose of discovering the name of the person who gave the information. There is a clear distinction in the facts of this case from the facts of *Edmondson* v. *Birch & Co., Ltd.* (1). I think the master took the right view of it, and his view is to be preferred to that of the learned judge, if counsel's note is a full reproduction of the grounds on which the learned judge decided.

There is, however, another ground on which this appeal may be decided. When one looks at the interrogatory carefully it is not an interrogatory in the ordinary form as to the person from whom the information was derived, but it is what I may call the third interrogatory that is generally put, namely: Did you make any inquiries to ascertain if the original information you obtained was accurate, and if so, from whom did you make those inquiries? In the ordinary case that interrogatory would be quite free from the objection that was taken in *Edmondson* v. *Birch & Co., Ltd.* (1), and the objection which is urged here; but it is said that the facts are such that, though the interrogatory is put in that form, the plaintiff will be able to obtain the same information indirectly as if he asked from whom the information was obtained. I do not think that that is a sufficient objection unless it is clearly shown that the question put in that form is not bona fide. On those grounds I am of opinion that the learned master took the right view of these letters, and was right in deciding that the interrogatory as originally drawn was admissible, and on these grounds the appeal must be allowed and the interrogatory allowed in the form in which it was originally granted.

SCRUTTON, L.J.—I have had some doubt, but on consideration I have come to the conclusion that the appeal should be allowed for the reasons given by the president of the court, which I do not propose to repeat.

Appeal allowed.

Solicitors: *Cave, Darch, Crickmay & Rundle*; *Druces & Attlee.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

LYLE-SAMUEL *v.* ODHAMS, LTD.

[COURT OF APPEAL (Bankes and Scrutton, L.JJ.), July 30, 1919]

[Reported [1920] 1 K.B. 135; 88 L.J.K.B. 1161; 122 L.T. 57; 35 T.L.R. 711; 63 Sol. Jo. 748]

Libel—Interrogatory—Source of information—Newspaper—Name of informant sought—Special circumstances justifying discovery of informant's name—Undertaking by plaintiff not to sue informants if names were disclosed—Words complained of defamatory of plaintiff's private life.

The plaintiff, a member of Parliament, sued the proprietors and publishers of a newspaper for libel in respect of statements which appeared in the newspaper at a time when the plaintiff was a Parliamentary candidate. The defendants pleaded fair comment. The statements attacked the private life and character of the plaintiff, and suggested that he was not a proper person to be elected to Parliament, and the plaintiff sought to interrogate the defendants as to the information which they had when they published the statements and from whom they obtained it. He undertook that he would not take proceedings against any persons whose names should be so disclosed.

Held: under the settled rule of practice laid down in *Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders Publishing Association, Ltd.* (1), [1906] 1 K.B. 403, the defendants could not, in the absence of special circumstances, be compelled to disclose the names of their informants, and neither the fact that the plaintiff had undertaken not to sue the informants if their names were disclosed, nor, in the circumstances of the case, the fact that the attack was directed to the private life and character of the plaintiff were "special circumstances" which took the case out of the general rule.

Notes. Considered: *South Suburban Co-operative Society, Ltd.* v. *Orum and Croydon Advertiser, Ltd.*, [1937] 3 All E.R. 133.

As to interrogatories in actions of libel, see 24 HALSBURY'S LAWS (3rd Edn.) 100; and for cases see 18 DIGEST (Repl.) 183 et seq.

Cases referred to:

(1) *Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K.B. 403; 75 L.J.K.B. 259; 94 L.T. 258; 54 W.R. 319; 22 T.L.R. 266, C.A.; 18 Digest (Repl.) 186, *1610.*

(2) *Hennessy* v. *Wright* (*No. 2*) (1888), 24 Q.B.D. 445, n.; 36 W.R. 879; 4 T.L.R. 662, C.A.; 18 Digest (Repl.) 185, *1606.*

(3) *Hope* v. *Brash*, [1897] 2 Q.B. 188; 66 L.J.Q.B. 653; 76 L.T. 823; 45 W.R. 659; 13 T.L.R. 478, C.A.; 18 Digest (Repl.) 63, *502.*

(4) *Adam* v. *Fisher* (1914), 110 L.T. 537; 30 T.L.R. 288, C.A.; 18 Digest (Repl.) 186, *1611.*

Also referred to in argument:

White & Co. v. *Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K.B. 653; 74 L.J.K.B. 419; 92 L.T. 817; 53 W.R. 369; 21 T.L.R. 337; 49 Sol. Jo. 364, C.A.; 18 Digest (Repl.) 187, *1616*.

Elliott v. *Garrett*, [1902] 1 K.B. 870; 71 L.J.K.B. 415; 86 L.T. 441; 50 W.R. 504; 18 T.L.R. 498, C.A.; 18 Digest (Repl.) 191, *1645*.

Harle v. *Catherall* (1866), 14 L.T. 801, N.P.; 32 Digest 146, *1766*.

Barham v. *Lord Huntingfield*, [1913] 2 K.B. 193; 82 L.J.K.B. 752; 108 L.T. 703, C.A.; 18 Digest (Repl.) 189, *1635*.

Maass v. *Gas Light and Coke Co.*, [1911] 2 K.B. 543; 80 L.J.K.B. 1313; 104 L.T. 767; 27 T.L.R. 473; 55 Sol. Jo. 566, C.A.; 18 Digest (Repl.) 195, *1680*.

Appeal by the plaintiff from an order by ROCHE, J., in chambers.

The plaintiff brought an action for libel in respect of alleged defamatory statements published at a time when he was a Parliamentary candidate for the Eye Division of Suffolk at the general election of December, 1918. The plaintiff was afterwards elected to Parliament. The statement of claim stated that the defendants, the National News, Ltd., owned and published, the defendants, the Victoria House Printing Co., Ltd., printed and published, and the defendants, Odhams, Ltd., distributed and published, a weekly newspaper, the "National News," and that in the issue of that newspaper dated Sunday, Dec. 8, 1918, the defendants published the alleged libel. The statement complained of as libellious was headed "Clean Candidates," and it stated that

> "there never was a time when the electors were called upon to scrutinise with more meticulous care the character and records of candidates. Upon the new House of Commons responsibilities of a momentous character will rest. . . . In this issue, acting as we do from a keen sense of public duty, we have thrown some light on the career of Mr. Lyle-Samuel [the plaintiff] who is the Coalition candidate for the Eye Division. . . ."

The statement proceeded:

> "An unfitted candidate. Mr. Lyle-Samuel and the Eye Division. Past record of a Coalition nominee. 'Samuel.—In affectionate memory of Eva Louisa Samuel, late wife of Alexander Wenyon Lyle-Samuel, who departed this life at the London County Council Asylum, Colney Hatch, London, N., Aug. 11, 1914.—"Morning Post," Aug. 10, 1918.' Behind that 'in memoriam' advertisement lurks an unhappy domestic tragedy. But what is more it serves to remind us that the man whose wife died in the pauper lunatic asylum is to-day seeking the suffrages of the electors in the Eye Division as the Coalition candidate."

The newspaper then referred to the plaintiff's dealing with his first wife's money; to his being adjudicated bankrupt; to his financial transactions; and it stated that he visited America and while he was there his first wife died in a pauper lunatic asylum, that he afterwards married in America a rich widow, that his bankruptcy was annulled, and that he returned to England and "nursed" the Eye Division. The statement of claim stated that "by the words hereinbefore set out the defendants meant, and were understood to mean, that the plaintiff was an unscrupulous and dishonest adventurer, who had married his first wife solely for the sake of her money, had tricked her out of her money, had by his conduct driven her insane, and had then deserted her and left her to die in a pauper lunatic asylum; that he had married his second wife solely for the sake of her money; that he had engaged in company promoting transactions of a dishonest character; that he had an unclean record; that he was a person of ill repute, devoid of commercial integrity or decent instincts; and that, by reason of the allegations above set out, he was unfit to be elected a member of Parliament, and was unworthy of the trust or confidence of any respectable person." The defendants pleaded (inter alia) justification and fair comment.

The plaintiff made an application for leave to administer interrogatories to the several defendants. The interrogatories were in similar form, those sought to be administered to the Victoria House Printing Co. being (so far as material) as follows: "(1) Before publishing the words complained of had you any and what information with respect to the statements therein contained, or any and which of them? *From whom, and when, and how was any such information obtained?* Identify all documents, *and/or state the dates of, parties to, and substance of all interviews.* (2) Before publishing the words complained of, did you take any and what steps to verify the truth of the statements complained of in this action, or any and which of them, and/or did you make any and what inquiries with a view to ascertaining whether such statements, or any and which of them, were true or not? *Of whom, and when, and how were any such inquiries made?* Identify all documents, *and/or state the dates of, parties to, and substance of all interviews.* (3) Did you receive any and what answer or answers, *and from whom*, to any and which of the inquiries (if any) mentioned in your answer to the last preceding interrogatory? State the date or respective dates on which you received such answer or answers and identify all documents, *and/or state the parties to and substance of all interviews.*" The plaintiff gave an undertaking that if the names of the defendants' informants were disclosed he would not bring any action against them. The master disallowed the portions of the interrogatories printed above in italics, and ROCHE, J., affirmed his order. The plaintiff appealed by leave.

Douglas Hogg, K.C., and *H. St. J. Field*, for the plaintiff.

Sir Hugh Fraser for the defendants, Odhams, Ltd., and Victoria House Printing Co.

Barrington-Ward, K.C., and *du Parcq* for the defendants, the National News, Ltd.

BANKES, L.J.—This is an appeal from an order of ROCHE, J., who affirmed an order of the master disallowing certain parts of interrogatories which the plaintiff sought to administer. The action is for libel. There are three defendants, and the statement complained of as libellous appeared in a weekly newspaper called the "National News." The defences are justification and fair comment. The interrogatories are administered as regards the defence of fair comment, and their object is to ascertain what information the defendants had upon which they founded their comment, and the sources from which that information was obtained.

It is well settled that in an action of libel against an individual—as distinct from the case of a newspaper—who pleads fair comment, it is permissible to interrogate him on both those matters in order to ascertain whether his comment was justifiable or whether he may not have been actuated by malice. That is the general rule. But it is also well settled, at any rate so far as concerns this court, that there is an exception to that rule in the case of newspapers. This exception is clearly stated in *Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.* (1) when this court treated the exception as long-established and as binding on the Court of Appeal. In that case STIRLING, L.J., said ([1906] 1 K.B. at p. 418):

> "With regard to the seventh interrogatory, which asks from whom the defendants obtained the information on which they relied in publishing the alleged libel, I agree with my Lord in thinking that the cases of *Hennessy* v. *Wright* (*No. 2*) (2) and *Hope* v. *Brash* (3) have laid down a rule from which we are not at liberty to depart, namely, that the court ought not in such a case as this to compel discovery of the names of the persons from whom the information on which the defendants acted in publishing the alleged libel was derived, in the absence of special circumstances."

He there stated that the exception, or as he called it the rule, was binding on this court, and there would be little use in considering the grounds upon which the rule is based had it not been that counsel for the plaintiff based an argument on the fact that, though the court in that case had stated the rule as indicated by

STIRLING, L.J., it had said that the rule was only binding in the absence of special circumstances. No indication is given in that case or elsewhere as to what constitutes special circumstances. The plaintiff's contention, as I understand it, comes to this, that special circumstances will exist in any case in which it can be shown that the alleged libel must necessarily be outside the grounds upon which the rule or exception, whichever it may be called, is founded. In order to deal with that contention it is necessary to consider the possible grounds upon which the rule or exception is based.

The matter has already been considered in *Adam* v. *Fisher* (4) where BUCKLEY, L.J., said (30 T.L.R. at p. 288):

> "His Lordship had asked in the course of the argument why newspapers had been treated differently from other people in this matter. It seemed that two answers might be given. One was that it might be assumed that the object of getting the name of the informant of a newspaper was to sue the informant, which was plainly improper."

Pausing there, I cannot see that that reason is more applicable in the case of a newspaper than in any other case. It seems to me that it is difficult to draw a distinction between the case of publication in a newspaper and any other case. The lord justice went on (ibid. at p. 288):

> "The second answer was that a newspaper stood in such a position that it was not desirable on grounds of public interest that the name of a newspaper's informant should be disclosed."

It may be that in that passage the lord justice was alluding to what is compendiously spoken of as the freedom of the press, that it is in the public interest to maintain the freedom of the press; and that it would be difficult to maintain that freedom if the editor of a newspaper felt that he might be compelled to disclose the name of the persons upon whose information he was acting in making the comments or inserting the statement. I do not know whether that is what the lord justice was referring to, but it is unnecessary to discuss the rule, or the wisdom of it or, except for the purpose of dealing with counsel for the plaintiff's argument, the grounds upon which it is founded.

Counsel for the plaintiff put forward a somewhat different reason for the rule. As I understand him, his suggestion is this—that the foundation of the rule is that it is or may be in the public interest that newspapers should be at liberty freely to criticise the conduct and private character of individuals, but only in cases where such conduct and character affect their fitness for some public position; and, assuming that to be the foundation of the rule, he went on to contend that special circumstances must exist where it is shown that the case is not covered by that ground, and that the present case is not so covered because the court can see, on reading the alleged libel, that it is an attack on the private character and private life of the plaintiff, entirely unwarranted from any point of view of the desirability of publishing statements in the public interest.

Whether that criticism of the language of the alleged libel is justified depends upon the meaning which is placed upon the language used. It is true that the plaintiff suggests that the language complained of means by an innuendo that he was an unscrupulous and dishonest adventurer, who married his first wife solely for her money, and that he tricked her out of her money, and by his conduct drove her insane. But it is not for us to decide an issue which is for the jury, nor can we say that special circumstances exist in the present case for not applying the well-established exception. I am unable to accept counsel for the plaintiff's suggestion as to what constitutes special circumstances, or to agree that the test which he suggests is correct. Junior counsel for the plaintiff suggested another test as to what constitute special circumstances, namely, that special circumstances exist when the court is satisfied by perusal of the libel that the defendant may have gone to an unreliable source for the informa-

tion. I fail to see how the court can ascertain by perusal of the libel that in this particular case the defendants may have gone to an unreliable source. They may or may not: it is not for me to say what the libel means or as to the good taste or justice of writing such articles as are here complained of. All I say is that this is an action of libel against the publishers of a newspaper; that it is well established that in the case of newspapers there is an exception to the rule requiring a defendant to disclose the source of his information where he pleads either privilege or fair comment. I am unable to accept either of the tests suggested as to what constitute special circumstances, and I cannot by applying any test of my own, see that there are special circumstances in this case. Upon these grounds I think that the appeal should be dismissed.

SCRUTTON, L.J.—The question in this appeal is briefly this: In an action for libel against the proprietors and publishers of a newspaper, who plead fair comment, is it admissible to administer interrogatories to the defendants to ascertain, not only the information which they had when they published the libel, but also from whom they obtained that information? It has been clearly decided that interrogatories as to what information and materials the defendants had are admissible questions where privilege or fair comment is pleaded. In the case of privilege the information which the defendants had in their possession when they made the statements may obviously be relevant to the proof of malice which would destroy the privilege; and in the case of fair comment, a comment which may be objectively and primâ facie fair, may become unfair if made with a malicious motive. Therefore in either case it has been held that it is relevant to the issue to ask what information was in the possession of the person responsible for the libel. If one approached the question unfettered by authority, it seems to me that on principle there would be a great deal to be said for allowing the name of the informant to be asked in a case like the present, and that in questions of malice it would ordinarily be relevant to ask, not only what the defendant knew when he published the libel, but also who gave him the information. The informant may be a person who has been convicted of perjury, or a well-known libeller who has frequently been cast in damages; he may be a person of such a character that, if called as a witness, any jury would say that anyone who acted on his information deserved whatever happened to him. If the matter had been free from authority I should have thought that there was a great deal to be said for the proposition that the name of the informant was as relevant as the information which he gave, unless it could be said that there was sufficient public policy in allowing newspapers to make attacks on people without imposing any obligation on them to disclose the name of the person from whom the materials for those attacks were obtained to override what otherwise would seem to be a matter of principle. But it is said that the practice in the King's Bench Division has established a rule under which interrogatories such as these are not permissible in the case of libels in newspapers.

On looking at the authorities, I find that in 1888, more than thirty years ago, in a libel action brought by Sir John Pope Hennessy, the Governor of Mauritius, against the publisher of "The Times"—*Hennessy* v. *Wright* (2)—in which fair comment was pleaded, similar interrogatories to those in the present case were delivered. While LORD ESHER, M.R., and LOPES, L.J., the two common law members of the court, did not say anything in their judgments about the rule, LINDLEY, L.J., said this (24 Q.B.D. at p. 449):

> "The judges of the Queen's Bench Division have arrived, as I understand, at a tolerably settled practice never to order production of such documents as this for reasons which I appreciate, although perhaps I should not have given effect to them in the first instance. Although, therefore, I have some doubt whether, looking at it as a pure question of principle, the plaintiff is not entitled to a further answer to the eighth interrogatory, I do not dissent from the view of my learned brethren that there are considerations on the other side which are entitled to greater weight."

It is fairly obvious that, although LORD ESHER and LOPES, L.J., who were very familiar with the nisi prius practice, did not in their judgments say anything about the rule, they were the sources of the information on which LINDLEY, L.J., stated that there was that rule. It is made fairly clear in *Hope* v. *Brash* (3) in 1897, where the court was composed of LORD ESHER, M.R., A. L. SMITH and RIGBY, L.JJ., LORD ESHER, referring to *Hennessy* v. *Wright* (2), said ([1897] 2 Q.B. at p. 191):

> "LINDLEY, L.J., after being informed that the general practice of the judges of the common law courts had been for a long series of years not to order inspection in such a case, or to force the defendant to disclose who gave the information on which the libel was published, accepted that practice as binding upon him, and did not dissent from the view taken by myself and LOPES, L.J. Therefore in that case the Court of Appeal recognised the existence of a general rule that inspection of such a document as this should not be given to the plaintiff in an action for libel. It is not necessary to say that the court will never under any circumstances allow such inspection, but in the exercise of its discretion it will not, as a general rule, in the absence of any special reason to the contrary allow it."

Lastly, comes *Plymouth Mutual and Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.* (1), where VAUGHAN WILLIAMS, L.J., after having discussed the authorities, said [1906] 1 K.B. at p. 415):

> "the question which we have to ask ourselves is whether there are any special circumstances in this case which would justify a departure from the general rule of practice as to not compelling the disclosure of the names of the persons who supplied the information on which the alleged libel was based in cases of this kind, where the proprietors of a newspaper or other periodical publication set up a defence such as is here pleaded."

STIRLING, L.J., used similar language: "A rule from which we are not at liberty to depart." And FLETCHER MOULTON, L.J., apparently thinking that it was relevant, declined at that stage to order the information to be given.

I think that there is in these three decisions of the Court of Appeal, spread over a period of thirty years, a recognition of a settled rule of practice in the King's Bench Division applying to alleged libels published in newspapers, and not applying to alleged libels published elsewhere. Whatever I may personally think of the desirability of such a rule, I do not think I am at liberty to depart from a rule of practice which has been acted upon for over thirty years and recognised in three judgments of this court. I could have wished that the learned judges in the *Plymouth Case* (1), who stated the rule, and who said that special circumstances might justify an exception from it, had given a little information as to what kind of special circumstances they thought would justify a departure. In this case three have been suggested to us by counsel for the plaintiff. It is said that there is an undertaking not to sue the persons whose names are asked for, and that that undertaking is a special circumstance which will justify the court in ordering the names to be given. I agree with my Lord that that cannot be the reason for a greater privilege being accorded to the proprietors or publishers of newspapers than to other persons, and I do not think that that can be a special circumstance enabling us to depart from the rule. It is said next that the rule only applies to enable newspapers freely to criticise public men in those respects which relate to their public lives, and does not apply to an attack on their private lives. I think that this contention fails on the ground of fact. The private life of a member of Parliament may be material to his fitness to occupy his public office. His private life may be such as to show that he is wholly unfit to exercise any public functions or to occupy any public office. Thirdly, it is said that there is a special circumstance in this case, in that, by looking at this alleged libel one can extract from it that the defendants must have acted on unreliable sources for their information. All I can say is that, having looked at the libel, I find myself unable to extract

that from it and that contention fails. Therefore, feeling myself bound by the previous decisions of this court, whatever my view might have been had I approached the question unfettered by authority, and finding nothing that I can see to be a special circumstance in any way weakening the effect of the rule, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*; *John T. Monks.*

[*Reported by* EDWARD J. M. CHAPLIN, *Barrister-at-Law.*]

Re HARRISON. HUNTER *v.* BUSH

[CHANCERY DIVISION (Younger, J.), March 15, 1918]

[Reported [1918] 2 Ch. 59; 87 L.J.Ch. 433; 118 L.T. 756; 62 Sol. Jo. 568]

Trust—Rule in Lassence *v.* Tierney—*Absolute gift to be held on trust—Trusts qualifying original trust—Failure of qualifying trusts—Re-establishment of gift.*

The rule in *Lassence* v. *Tierney* (1) (1849), 1 Mac. & G. 551, applies where the original gift is to trustees in trust for a legatee absolutely equally with a case where the original gift is to a legatee direct, provided that the legacy is effectually separated from the testator's estate.

A testator gave four legacies of £20,000 to his trustees in trust for a son and his three daughters and a further legacy of £30,000 in trust for his son W., and directed that the legacies should not be paid until after the death of his wife, to whom he gave an annuity, but that after the death of the survivor of himself and his wife each legacy bequeathed in trust for a son or daughter should be invested and held upon trust to pay the income thereof to such son or daughter for his or her life, with remainder upon such trusts for his or her children or remoter issue as he or she should by deed or will appoint, and in default of and subject to any such appointment in trust for the children of such son or daughter in equal shares. The testator made a residuary bequest. W. survived both the testator and his wife, and died a bachelor without issue, so that the trusts in remainder after his life interest failed.

Held: the legacy was separate from the testator's estate, and, applying the rule in *Lassence* v. *Tierney* (1) (1849), 1 Mac. & G. 551, the absolute gift to W. prevailed.

Lassence v. *Tierney* (1) (1849), 1 Mac. & G. 551, and *Hancock* v. *Watson* (2), [1902] A.C. 14, applied. *Rucker* v. *Scholefield* (3) (1862), 1 H. & M. 36, *Re Currie's Settlement*, *Re Rooper*, *Rooper* v. *Williams* (4), [1910] 1 Ch. 329, and *Re Connell's Settlement*, *Re Benett's Trusts*, *Fair* v. *Connell* (5), [1915] 1 Ch. 867, followed.

Notes. As to the rule in *Lassence* v. *Tierney* (1), see 34 HALSBURY'S LAWS (2nd Edn.) 214; and for cases, see 43 DIGEST 644.

Cases referred to:

(1) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; sub nom. *Lassence* v. *Tierney*, *Lassence* v. *Lescher*, 14 Jur. 182, H.L.; 43 Digest 643, *790*.

(2) *Hancock* v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 43 Digest 644, *792*.
(3) *Rucker* v. *Scholefield* (1862), 1 Hem. & M. 36; 32 L.J.Ch. 46; 9 Jur.N.S. 17; 11 W.R. 137; 71 E.R. 16; 40 Digest (Repl.) 614, *1108*.
(4) *Re Currie's Settlement*, *Re Rooper*, *Rooper* v. *Williams*, [1910] 1 Ch. 329; 79 L.J.Ch. 285; 101 L.T. 899; 54 Sol. Jo. 270; 43 Digest 644, *793*.
(5) *Re Connell's Settlement*, *Re Benett's Trusts*, *Fair* v. *Connell*, [1915] 1 Ch. 867; 84 L.J.Ch. 601; 113 L.T. 234; 43 Digest 649, *836*.

Adjourned Summons.

Henry Harrison, by his will, dated Nov. 21, 1892, after appointing executors and trustees thereof and making various specific and pecuniary bequests free of duty and giving an annuity of £3,000 a year to his wife Susannah Elizabeth, bequeathed to his trustees four several legacies of £20,000 in trust for his son Francis William Harrison and his three daughters, Elizabeth Mary Kay, Kate Hunter, and Susannah Bush respectively, and a further legacy of £30,000 in trust for his son William Mountain Harrison, and he directed that if his wife should survive him the said five legacies should not become payable till after her death, but should carry interest at the rate of 4 per cent. per annum from the death of the survivor of the testator and his wife, and the testator declared that if any of his sons or daughters should die in his lifetime leaving children or a child living at the testator's death, the legacies thereinbefore bequeathed in trust for each son or daughter so dying should not lapse, but be held upon the same trusts as if such son or daughter had survived him and died immediately after his decease. And, subject to and charged with the payment of the legacies and annuities thereinbefore bequeathed and the interest and duty in respect of such of the legacies and annuities as were bequeathed free of duty, he devised his real estate, and bequeathed the residue of his personal estate, to his sons and daughters thereinbefore named in equal shares as tenants in common. He declared that each legacy thereinbefore bequeathed to his trustees in trust for a son or daughter should, after the death of the survivor of the testator and his wife, be invested by his trustees, and that his trustees should hold the same legacy and the investments thereof upon trust to pay the income thereof to such son or daughter for his or her life, and after his or her death upon such trusts and subject to such powers and provisions for the benefit of any child or children or remoter issue of such son or daughter as he or she should by deed or will appoint, and in default of and subject to any such appointment upon trust for all the children or any the child of such son or daughter who should being male attain the age of twenty-one years or being female attain that age or marry, and if more than one in equal shares, with a proviso that each son or daughter might by deed or will appoint that the whole or any part of the income of his or her legacy should after his or her death be paid to a surviving wife or husband for life or any less period. And the testator declared as to each legacy thereinbefore bequeathed in trust for a son that his trustees might at any time or times during the life of such son, if they should in their uncontrolled discretion think fit so to do, revoke by deed all or any of the trusts thereinbefore declared concerning such legacy or any part thereof, and declare any new or other trusts of or concerning such legacy or any part thereof in favour of any of the following persons, viz., his same son, any wife of his, any issue of his, and any other issue of the testator.

The testator died on Oct. 20, 1893, and his will was duly proved. All his children survived him. The testator's widow died on June 26, 1899, and shortly after her death the trustees of the will appropriated investments representing the legacy of £30,000 in trust for William Mountain Harrison. Various appointments of new trustees were made, and, on April 15, 1910, separate trustees were appointed for the legacy of £30,000. By a deed poll, dated Oct. 30, 1913, these separate trustees revoked the trusts declared by the will of £5,650 3% Sheffield Corporation Redeemable Stock 1925, part of the investments representing the legacy of £30,000, and declared that the said stock should be held in trust for William Mountain

Harrison absolutely. William Mountain Harrison died on Oct. 12, 1917, a bachelor, without having had any issue, and having by his will, dated June 22, 1914, appointed executors who duly proved the will.

This summons was taken out by one of the trustees of the legacy of £30,000 to William Mountain Harrison, to determine whether the balance of such legacy, as to which the trusts had not been revoked, belonged to the executors of his will, or was divisible between the residuary legatees under the will of Henry Harrison, including William Mountain Harrison, in equal shares. The executors of the will of William Mountain Harrison and the residuary legatees under the will of Henry Harrison were the defendants.

E. E. H. Brydges for the trustee.
Owen Thompson for the executors of William Mountain Harrison.
Percy Wheeler for the residuary legatees.

YOUNGER, J.—As I understand the authorities on this point, the rule of construction, which is commonly known as the rule in *Lassence* v. *Tierney* (1) or *Hancock* v. *Watson* (2), is based upon this proposition, that if, on the language used, you find what amounts to an absolute gift with limitations subsequently engrafted upon that absolute gift which do not exhaust in every event the whole capital, the principle of sound construction is that, to the extent to which the subsequent dispositions do not exhaust the whole interest of the beneficiary in the property, the original absolute gift which is given in the first instance prevails. In my view, that is a sound rule of construction, and not an artificial one, and is not limited to any one class of instrument, nor to direct gifts only as distinguished from gifts made through the medium of a trust, but extends to all gifts, whether made directly or not, to which the language is apt. In the case before me it is not seriously disputed that if the testator had bequeathed these legacies in favour of his sons and daughters by words of direct gift, engrafting upon that gift the trusts which follow, then, on the principle of *Lassence* v. *Tierney* (1) and *Hancock* v. *Watson* (2), the absolute gift would in the case of the son who has recently died a bachelor have taken effect. But it is said that the rule does not apply to this will because the testator has given the legacies through the medium of the trustees, who are directed to deal with them as provided by the will, and therefore, it is said, there is no provision which has separated the legacies absolutely from the testator's estate, restricting only the mode of enjoyment thereof, but that, the legacies being retained throughout by the trustees of the will, the testator has not segregated them from his estate, so as to bring them within the operation of the rule of construction to which I have referred. I should be sorry if I thought it necessary, upon such a ground as that, to hold that the rule, which in my opinion is a thoroughly sound rule, was inapplicable; but I do not feel in any way compelled to do so, because, if segregation is necessary for the application of the rule, I do find such segregation in this will in the fact that the legacies are, in the first instance, given to the trustees on out-and-out trusts for the legatees, and that there is therefore, both legally and equitably, a complete separation of them from the testator's estate.

The only argument then remaining is that, in dealing with dispositions of this kind, made through the medium of a trust, and not by way of direct gift, the court is to apply a different rule of construction from that which is applicable to a gift made directly to the legatee. But, so far from that being the case, it appears to me that there is ample authority to the contrary, of which *Rucker* v. *Scholefield* (3), *Re Currie's Settlement* (4), and *Re Connell's Settlement* (5) are instances, in each of which cases the rule in question was applied, although the gift was made through the medium of trustees. The capital of this legacy, therefore, not having been completely disposed of by the trusts engrafted on the original gift, and there being nothing in the fact that the gift is made through the medium of a trust to

prevent me from applying the well-recognised rule of construction, I hold that, in the events which have happened, the executors of the testator's son William are entitled to this legacy, so far as it has not been disposed of, and I make a declaration accordingly.

Solicitors: *King, Wigg & Brightman*, for *Broomhead, Wightman & Moore*, Sheffield; *Sharpe, Pritchard & Co.*, for *Bramley & Son*, Sheffield.

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

Re HEYL. Ex parte D. P. MORGAN, LTD.

[Court of Appeal (Swinfen Eady, Bankes, L.JJ., and Eve, J.), February 8, 1918]

[Reported [1918] 1 K.B. 452; 87 L.J.K.B. 603; 118 L.T. 546; [1918–19] B. & C.R. 23]

Bankruptcy—Petition—Adjournment—Discretion—Bankruptcy Rules, 1915, *r.* 178.

The provision of r. 178 of the Bankruptcy Rules, 1915, that "after the expiration of one month from the date appointed for the first hearing of a petition . . . no further adjournment of the hearing merely by consent of the parties shall be allowed . . ." does not by inference direct that during the first month adjournment of the first hearing of a petition ought as a matter of course to be granted simply because the petitioning creditor and the debtor concur in making application for an adjournment. It is in the discretion of the registrar before whom the petition comes on for hearing whether an adjournment shall or shall not be allowed.

Re Farleigh (1) (1905), 21 T.L.R. 198, considered and explained.

Notes. The Bankruptcy Rules, 1915, have been replaced by the Bankruptcy Rules, 1952 (S.I. 1952 No. 2113). Rules 167 (2) and 173 of the 1952 Rules correspond to rr. 171 and 178 of the 1915 Rules, respectively. Rule 173 of the Bankruptcy Rules, 1952, differs from the earlier provision in that it omits reference to the granting of an adjournment by consent of the parties during the first month.

Considered: *Re A Debtor, Ex parte Petitioning Creditor* (1920), 89 L.J.K.B. 432.

As to the power to make a receiving order, see 2 Halsbury's Laws (3rd Edn.) 285; for cases see 4 Digest (Repl.) 169 et seq. As to adjournment of the hearing, see 2 Halsbury's Laws (3rd Edn.) 309; and for cases see 4 Digest (Repl.) 159. For the Bankruptcy Rules, 1952, see 3 Halsbury's Statutory Instruments (First Re-issue) 155.

Case referred to:

(1) *Re Farleigh* (1905), 21 T.L.R. 198, D.C.; 4 Digest (Repl.) 160, *1459*.

Appeal from a receiving order in bankruptcy made by the registrar.

The following statement of facts is taken from the judgment of Swinfen Eady, L.J. The debtor claimed to have discovered or invented processes connected with the distillation of coal tar, shale and other raw materials, and was engaged in the business of manufacturing motor spirit, fuel oil, and other products in accordance with those processes. He had established works at Barking and at Corton in Dorsetshire, and for a time carried on business under the name of the Rapid Distillation and Power Co., and afterwards for a time, under his own name. He then entered into arrangements with a company called Partners' Trust, Ltd., whereby he admitted them, or persons nominated by them, to a participation in his dealings, they finding considerable sums of money. After this course had proceeded for some time, and after many debts had been incurred, a company was

promoted and formed, called the Rapid Distillation and Power Co., Ltd. In May, 1917, this company was registered with a capital of one million sterling in £1 ordinary shares. The company was formed with a view to taking over the interests which all the parties had then acquired in the processes, together with the works, the machinery, and the effects of the concern. On Nov. 27, 1917, agreements were entered into providing for the company to acquire the processes and all the work, plant, machinery and the whole concern, lock, stock and barrel, on terms. The agreements made provision for an alteration in the constitution of the company. The proposal was to convert the ordinary shares into preference shares and to call them preferred ordinary shares, and to give them a non-cumulative preferential dividend at the rate of 7 per cent. It was further proposed to increase the capital by another £50,000, divided into shares of 1s. each, and to attach certain rights to these. The agreements also provided that when the company's capital had been so altered, there was to be paid to the debtor, as part of the consideration for the sale of the company, £125,000 in fully paid shares; as to £100,000 of that in the preferred ordinary shares of £1 each, and as to £25,000 in 1s. shares. In addition the company was to make payments of between £57,000 and £58,000 in cash to the debtor and others. The company was registered as a private company. Two shares were subscribed for by the subscribers to the memorandum, one of whom was described as a typist, and the other as a clerk, and £2 represented the whole of the subscribed capital. There was no evidence before the court of any contracts or agreements by any person to subscribe to the company any capital whatever. The above agreements were entered into on Nov. 27, 1917, at a time when one or more bankruptcy notices against the debtor were running, and on Nov. 30, 1917, this bankruptcy petition was presented. On Dec. 19, 1917, the petition came before the registrar, it was the first date fixed for hearing the petition, it was not an adjourned date. There was, then, no dispute with regard to the debt of the petitioning creditors or of the act of bankruptcy, and there were five petitions on the file, this petition being the first. There was no evidence before the registrar of the formation of the company and of the details of the agreements for sale, but the substance of the position was stated to him, and though, the parties not anticipating that evidence would be wanted at that hearing, the affidavits had not been filed, yet the facts were fairly and properly stated to the registrar. Upon that the parties were desirous of having an adjournment. The agreements provided for completion on Feb. 25, 1918, and it was suggested that the petition should have been adjourned to see if the agreements were in fact carried out on that date. The registrar did not assent to the adjournment and the debtor appealed.

Clayton, K.C., and *E. W. Hansell* for the debtor.
Douglas Hogg, K.C., and *Tindale Davis* for the petitioning creditors.
Gordon Hewart, K.C., and *Roland Burrows* for the official receiver.

SWINFEN EADY, L.J.—This is the appeal of the debtor from a receiving order made Dec. 19, last, and the debtor by his notice of appeal asks that the receiving order may be discharged and the petition adjourned for such time as the court may think fit.

[HIS LORDSHIP stated the facts, and continued:] The petitioning creditors were not willing to consent to an order in that form, because if the receiving order is now discharged the effect of it would be that there would have to be a hearing de novo before the court below on some future occasion to which the petition may be adjourned. It is suggested on behalf of the debtor that nothing but the discharge of the order would be of assistance to him. The existence of the receiving order, he suggests, prevents the agreement from being carried through, and that an adjournment of the present condition of things would be of no use to him. The petitioning creditors, as I have said, oppose the receiving order being discharged.

In my opinion, there is no ground for interfering with the order made by the

registrar. True it is that there are agreements, which I will take for this purpose to have been sufficiently proved. True it is that the company has affixed its seal to contracts binding itself to pay large sums of money and to issue the fully paid shares. But upon the materials before us those contracts are paper contracts only, there is no substance in them. There is nothing to show that there is any reasonable probability of the capital being obtained by the company or being subscribed in order to make these paper agreements effective. There is nothing to indicate it in any shape or form. No one pledges himself to any statement that arrangements have been made or are in progress of being made to obtain the capital, or that there is reasonable probability of the capital being subscribed, or of a sufficient amount being subscribed to justify the directors in proceeding with these agreements. Nobody says anything of the kind. So far as we know, in the period that has elapsed between Nov. 27 up to the present time it does not appear that those interested in promoting the company are more forward with regard to obtaining the capital than they were when the company was first registered. The only passage in the evidence with regard to the capital is that in para. 10 of the debtor's affidavit where he says:

> "I am informed by my solicitor and believe that persons interested in the company have promised to purchase sufficient of the shares to be allotted to me as aforesaid to enable me, together with the cash payable to me by the company, to pay all my liabilities in full in cash."

That is the utmost that is said. The debtor says that he is informed by his solicitor, and believes; the solicitor does not make any affidavit at all pledging himself to the truth. Moreover, it will be observed that according to the language of the debtor himself it is that persons interested have promised to take sufficient shares of those allotted to him, not that any money whatever will be subscribed and paid to the company for the shares to be allotted by the company, but the debtor may be able to sell some of his own shares if and when he obtains them. That is the whole statement. In my opinion the proposal is altogether too vague and shadowy and nebulous to justify reliance being placed upon it. The receiving order was, I think, rightly made.

Then it is said that, having regard to the decisions in *Re Farleigh* (1), it was the duty of the registrar to have adjourned the petition when both sides requested it. Speaking generally I have formed the opinion that bankruptcy petitions are adjourned, and adjourned from time to time, much more frequently than they should be. It is in the discretion of the court, the registrar, before whom the petition comes, whether an adjournment should be granted or not. It is not in my opinion the true construction of r. 178 of the Bankruptcy Rules, 1915, to say that by inference it directs that during the first month the hearing of a petition should be adjourned almost as a matter of course. That prohibits an adjournment. The rule provides as follows:

> "After the expiration of one month from the date appointed for the first hearing of a petition (provided such petition shall have been duly served) no further adjournment after hearing merely by consent of the parties shall be allowed, except for the reasons set forth in r. 171 of these Rules, or for such other sufficient reason, to be stated in the order for adjournment, as the court shall think fit; but in every such case, unless an order for adjournment is made, the court shall either make a receiving order or dismiss the petition."

Although that rule, therefore, contains a provision against a further adjournment it is not true to say that by inference it provides that during the first month adjournment ought to be as a matter of course granted if both parties desire it. I agree with the view expressed by the Divisional Court in *Re Farleigh* (1). It obviously was a case in which the petition there should have been adjourned. It was a case in which on the first hearing of the petition the debtor offered to settle the debt and costs. It may be he offered to pay it, or, it may be, to settle it by

paying it in instalments, or to settle it in some other way that the parties were prepared to assent to. It does not clearly appear from the report what provision was to be made except that it was to be settled. It does not appear either from the report whether there were other creditors of the debtor; but upon the facts as stated, merely that on the hearing of the petition the debtor offered to settle the debt and costs, and the petitioning creditor, being represented by a solicitor, considered that the offer was reasonable and wanted time to consider it, and therefore that the parties asked for the adjournment of the petition, in my opinion it was obviously a case in which the petition ought to have been adjourned.

That case, however, certainly does not lay down any rule that upon the first hearing of the petition, if both parties desire it, it is necessarily a matter of course that the petition shall be adjourned. It must be remembered that in the present case there are five petitions on the file, and that the debtor is very largely indebted. The figures before us show that his debts are very large. There is a schedule of upwards of £18,000 due to creditors. There is an overdraft at the bank of between £9,000 and £10,000, and, in addition, it appears that the debtor owes money in respect of sums borrowed. Under these circumstances, I am of opinion that the receiving order was rightly made and that the appellant has not made out any case on this appeal for its discharge. In my opinion, therefore, the appeal fails.

BANKES, L.J.—I agree, and nothing that I say must be taken to encourage the idea that an adjournment of the first hearing of a petition is a matter of course simply because the petitioning creditor and the debtor concur in making application for an adjournment. But having said that, I must say for myself that, had I been in the registrar's position, I think that upon the materials he had before him, I should not have taken the course which he took at that time. I think that I should either have granted the application in the form in which it was made or have granted a short adjournment, in order that the documents of which he was informed might be brought before him, in order that he might form a truer appreciation of the effect of them than he could possibly have done upon a mere statement. I say that for this reason; the registrar was told in substance what the facts of the case were, and I think, without suggesting to the gentleman who told him that they either intended to misrepresent the position or to say anything unfair, one may assume that at any rate they put a somewhat better complexion upon the case than appears after a fuller examination of the documents. The registrar had also the fact that the assets of this debtor were of a kind which might at the present moment be extremely valuable, and he had the fact that considerable sums of money had been expended in developing, and he had the fact, and this is what would have weighed with me more than anything, that both classes of creditors were, after investigation of the position, anxious that an adjournment should be granted in order to give the persons interested in carrying through this arrangement some opportunity of getting it through. I am inclined, therefore, to think, speaking for myself, that the registrar acted somewhat hastily in the matter. But there has been an appeal, and upon the appeal we have had before us, the actual materials upon which these statements were made to the registrar, and a full investigation of them, a much fuller investigation than could have been possible upon the materials before him. It does not appear that there is now any reasonable hope of carrying through these proposals by the date to which the adjournment was applied for. Under those circumstances, and also having regard to the attitude which is now taken up by the creditors, I think that the appeal fails.

EVE, J.—Although I share to the full my Lord's view that frequent adjournments of a bankruptcy petition are to be deprecated and are not infrequently indicative of a pernicious practice of resorting to courts for other objects than the administration of the debtor's affairs by the court, yet I do not myself think that an arrangement or agreement to adjourn on the first return day is open to serious criticism or to be disregarded without adequate cause. But in the present case it

must be borne in mind that we are considering the condition of things at a date approximating to the date to which the adjournment was proposed, and on which it was represented that the debtor hoped to be able to pay his creditors in full. From this point of view I do not think that it can be held that the evidence discloses any reasonable probability of the debtor's hopes being realised, or that if the evidence which we have to-day had been before the registrar the order would not have been properly made, or, again, that the adjournment then asked for would have been of the slightest use to the debtor. In these circumstances, I think that at this stage it is quite impossible to discharge the order, and I agree in thinking that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Ernest A. Fuller*; *W. B. Glasier*; *Solicitor to the Board of Trade.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

MANUBENS *v.* LEON

[King's Bench Division (Lush and Bailhache, JJ.), November 15, 1918]

[Reported [1919] 1 K.B. 208; 88 L.J.K.B. 311; 120 L.T. 279; 35 T.L.R. 94; 63 Sol. Jo. 102]

Master and Servant—Wrongful dismissal of servant—Damages—Right to receive compensation for loss of gratuities from customers.

The plaintiff was employed by the defendant as a hairdresser's assistant at a weekly wage and commission on the takings under an agreement of which it was an implied term that the plaintiff should be at liberty to receive gratuities from customers. The plaintiff having been wrongfully dismissed, on a claim by him for damages,

Held: the plaintiff was entitled to claim as damages in addition to one week's wages in lieu of notice and loss of commission the loss he sustained in respect of the gratuities which he would have received but for the wrongful dismissal.

Notes. As to measure of damages for wrongful dismissal, see 25 Halsbury's Laws (3rd Edn.) 523, 524, and for cases see 34 Digest 103 et seq.

Case referred to in argument:

Re Rubel Bronze and Metal Co. and Vos, [1918] 1 K.B. 315; 87 L.J.K.B. 466; sub nom. *Vos* v. *Rubel Bronze and Metal Co., Ltd.*, 118 L.T. 348; sub nom. *Rubel Bronze and Metal Co.* v. *Vos*, 34 T.L.R. 171; 34 Digest 105, *782*.

Appeal from the deputy judge of the Westminster County Court.

The plaintiff was employed by the defendant as a hairdresser's assistant at a weekly wage of 30s. and certain commission on the takings. In addition he received gratuities from the customers whom he served, averaging 30s. a week. There was no express contract with the employer as to the receipt of tips, but the practice of receiving them was open and notorious and sanctioned by the employer. The plaintiff having been wrongfully dismissed sued in the county court for damages.

The learned deputy county court judge found that it was an implied term of the contract that the plaintiff should be at liberty to receive gratuities. He fixed the damages in respect of tips at one day's "tips"—i.e., 5s—and the sole question on appeal was whether the judgment should be increased by that amount. In the

course of his judgment in which he held that the gratuities should not be taken into account in assessing damages, the learned deputy county court judge said:

"In some cases, as in those of piecework or work paid for by way of compensation, the wages are not of fixed weekly amount, and would have to be estimated. Probably the workman would also be entitled to the estimated value of fixed perquisites such as barristers' clerk's fees or the driver's mileage fees for posting. These are items of the man's direct remuneration though the burden of paying them is thrown by custom or otherwise on third parties. Moreover, their amount is known to the employer, and he is in a position to compute and tender an appropriate sum in compensation. But the amount of tips is not known to the employer, and if he is liable to make good the loss he cannot safely get rid of an undesirable workman by paying him off without notice. Nor, apparently, can he do anything during the employment that will diminish the man's opportunities for obtaining tips; for instance, by allotting him less than his share of work, or by putting all the men on short time without reduction of wages. There is no legal objection to such a contract, but it would be highly inconvenient, and the uncertainty of the amount of tips would lead to constant litigation. If this is the legal effect of the ordinary contract, it is remarkable that there is no reported case on the point. I suppose the practice of tipping has obtained from time immemorial. In some trades it has long been open and notorious, and innumerable occasions for claiming loss of tips must have arisen, yet I understand this is the first instance of such a claim being put forward. It may be that the men have all along been ignorant of their legal rights, but so to hold at the present day would have the practical effect of making a new law for employers and workmen, and I think that should be left to a higher court than this. There will be judgment for the defendant."

The plaintiff appealed.

Colam, K.C. (*Fortune* with him), for the plaintiff.

The respondent did not appear.

LUSH, J.—The question raised is one of some importance. The plaintiff was employed as a hairdresser, and in the ordinary course he would receive, in addition to his wages, a commission and gratuities from customers. The defendant wrongfully dismissed him. The defendant admits that he was bound to pay damages based on the salary and loss of commission, but he refused to admit any liability to pay in respect of the gratuities which the plaintiff might have earned, and the learned deputy county court judge has taken that view. I think it is erroneous. When the defendant repudiated the contract the plaintiff was entitled to recover damages for the loss he had sustained. His claim should include all such damages as necessarily flowed from the breach and were within the contemplation of the parties. Here the defendant must be taken to have known that the appellant would sustain the loss of his gratuities. The contract was not necessarily to allow him to cut the hair of customers, but not to prevent his earning gratuities as occasion arose. The appeal should be allowed.

BAILHACHE, J.—I agree.

Appeal allowed.

Solicitors: *Corbin, Greener & Cook.*

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law.*]

MANSEL *v.* WEBB

[COURT OF APPEAL (Swinfen Eady, M.R., Duke, L.J., and Eve, J.), December 10, 11, 1918]

[Reported 88 L.J.K.B. 323; 120 L.T. 360]

Highway—Nuisance—Fire—Sparks emitted by locomotive engine passing along highway—Damage to adjacent plantation—Claim for compensation—Need to prove negligence.

The defendant's locomotive engine, which was propelled by steam generated by fire, while travelling along a highway emitted sparks which set fire to the plaintiff's plantation. The engine had a special apparatus attached to it to prevent the emission of sparks.

Held: an engine generating steam was a dangerous thing for the defendant to bring on the public highway, and, although he was in no way negligent, he was liable for the injury to the plaintiff's plantation caused by the escape of the fire.

Principle stated in *Fletcher* v. *Rylands* (1) (1866), L.R. 1 Exch. at p. 279, applied.

Notes. As to damage caused by engine sparks, see 19 HALSBURY'S LAWS (3rd Edn.) 273, 274, and ibid., vol. 31, pp. 474, 475; and for cases see 26 DIGEST (Repl.) 492, 38 DIGEST (Repl.) 399 et seq.

Cases referred to:

(1) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(2) *Powell* v. *Fall* (1880), 5 Q.B.D. 597; 49 L.J.Q.B. 428; 43 L.T. 562; 45 J.P. 156, C.A.; 26 Digest (Repl.) 492, *1772*.

(3) *Jones* v. *Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733; 9 B. & S. 835; 37 L.J.Q.B. 214; 18 L.T. 902; 32 J.P. 693; 17 W.R. 28; 38 Digest (Repl.) 400, *613*.

Appeal by the defendant from an order of ROWLATT, J., sitting without a jury.

The plaintiff brought an action against the defendant in which he claimed damages in respect of injury to a plantation adjoining the highway which the plaintiff alleged had been set on fire by sparks from a locomotive engine passing along the public highway and in charge of the defendant's servants, the engine being propelled by steam generated by fire. ROWLATT, J., found for the plaintiff and the defendant appealed. The facts are set out in the judgment of SWINFEN EADY, M.R.

Cyril Atkinson, K.C., and *du Parcq* (with them *S. H. Emanuel*) for the defendant.

Randolph, K.C., and *T. H. Parr*, for the plaintiff, were not called on to argue.

SWINFEN EADY, M.R.—This is an appeal by the defendant from the judgment of ROWLATT, J., trying the case without a jury. The action was brought by the plaintiff to recover damages to a plantation at Erwddu, in the county of Carmarthen, which the plaintiff alleged had been set on fire from a locomotive engine passing along the public highway, and in charge of the defendant's servants. The learned judge found that the plaintiff had established that cause of action, and gave judgment for a sum, being the amount of the damages which the plaintiff had sustained. The judgment was for £600. The defendant appeals from the judgment, and contends that he is not liable, and that the plaintiff failed to show that he was liable. The fact that the plantation was on fire and was destroyed by fire is clear beyond dispute. But the defendant's case is this: First, it is not shown that he occasioned the fire; and, secondly, that he has shown that he did not occasion the fire, and that it was impossible that his engine should have started the fire, and,

whatever did create that fire, as to which he has no knowledge, it was not his engine. That is his first point. His second point is this: He says, even if it was his engine that occasioned the fire, he is under no legal liability, because he had no occasion to believe from the past history of engines of this character that it could occasion any fire whatever. That is his case.

The evidence shows that the defendant's engine passed along the highway in question, and, at a point before it reached the plantation, the road shows an incline —an incline of about 1 in 15, between 1 in 15 and 1 in 16 according to the bench marks on the Ordnance map. When the engine passed by the plantation there was no sign of fire; no one saw any fire, and there was no smoke. There were people who had passed along immediately before the engine. One witness was called who had been driving along in advance of the engine and heard the engine behind, and when that passenger drove along the road there was no fire. The engine came along behind and there was no fire and the occupants saw no sign of any fire, no smoke, nothing of the kind. The engine passed along. Then those in charge of the engine, the driver and his mate, looked back. They described that it was their habit to look back, because there might be some vehicle behind desirous of passing, some bicycle, or some vehicle being driven along the road, and they have to look back along the road to see if there is anyone desiring a clear passage, so that they may get more to the side of the road, and they looked back and they saw fire, a furious fire. A lady driving along the road looked back. She saw fire, and people then ran to assist to put out the fire, which to all appearances had started immediately. The hedge by the side of the road was on fire, and the fire was then spreading towards a haystack a little beyond the plantation. Persons went there then with water to prevent the haystack from catching fire. The fire therefore arose quickly, and the evidence discloses a state of facts in which it was likely to arise very quickly. The date of the fire was May 1, 1917. The weather then was and had been for some little time previously very dry. There was much gorse that had been killed in the previous winter, and that was very dry; the wood was very dry; the herbage by the side of the road was very dry. Everything was in that dry state that, when once fire was applied to any part of it, it would be likely to spread very rapidly. There was the combustible material ready for ignition, and then there was the wind behind, a fresh breeze driving in the direction in which the fire was seen. There was no suggestion at the trial of any other cause for the fire than a spark from the engine. If that were all, the conclusion to be drawn from that evidence would be that the fire was occasioned by some sparks coming from the engine—an accidental spark. Of course, it is not suggested there was anything done purposely. It was a pure accident.

The defendant called evidence with a view to showing that his engine was so constructed that no sparks could be emitted from it, and that was his case simply. He did not, he said, cause the fire. He knew nothing about the fire, and he did not cause it. He called evidence to show that the escape of sparks from his engine was impossible. What he said was that the engine had been tested on various occasions in order to see if it could be made to emit sparks, and in order to see whether it was safe to take into places where sparks would be specially dangerous, an arsenal, for instance, where there was very explosive material about and so on. The defendant put in evidence a section of his boiler with a view to showing that the furnace and boiler were so constructed that the escape of sparks would be impossible. His case was that it was a tubular boiler, and that, the smoke passing from the fire-box and through the tubes which run through the water space in the boiler, heat and smoke penetrating along those tubes, the smoke passes into a smoke-box at the opposite end of the engine; and it is said that there was there a baffle plate with a superheater projecting steam and vapour into the smoke-box so as to create such a damp and moist atmosphere that all combustible material or all hot material, including hot ash, passing along the tubes would be made so wet in the smoke chamber that it would be no longer capable of creating fire, and that it would not escape by means of the funnel, but would fall into an ash tray

at the bottom of the smoke-box. Of course, it is beyond dispute that material from the furnace would be carried through the tubes into the smoke-box. It is plain that that would be so. Indeed, the ash tray at the bottom of the smoke-box is so constructed as to receive the spent material so passing. But it is said that the construction of this smoke-box is such, and the way in which the exhaust is regulated is such, as to prevent the passage into the atmosphere of any particles, of whatever nature, sufficiently hot to start or create a fire.

Upon the materials before the learned judge in the court below he was unable to come to that conclusion, and I must say, having heard the evidence read, I am entirely of the same opinion. Although it is doubtless improbable for sparks to escape—by sparks I mean heated material sufficient to occasion a fire falling on a dry, hot surface—and although great care and great precaution, considerable skill and ingenuity, have been exerted in order to produce an engine which would be as reasonably safe as possible, I am satisfied that it is by no means impossible for heated material to escape from this engine so as to occasion a fire. Reviewing the evidence as a whole, I am satisfied that as a matter of fact the conclusion to which the learned judge in the court below came, that the fire was started by a cinder or ash or heated material escaping from this engine, was well founded, and that it was that that occasioned the fire in question.

Then it is argued as a second point that, if the defendant had no reason to anticipate that his engine would behave in that way, he is under no liability with regard to it. It has been pointed out that in cases that have been decided where the owner of a traction engine has brought it upon a highway, and has thereby occasioned damage, he has been held liable, without proof of any negligence on his part. In the case which has been cited of *Powell* v. *Fall* (2) negligence was negatived by the learned judge who tried it. It was a case in which a stack of hay belonging to the plaintiff had been set on fire by sparks from a locomotive engine being driven along a highway, and the learned judge said that the locomotive was managed and conducted with all reasonable care and without negligence. The case for the plaintiff was that it was wholly immaterial in the result that the injury arose from no want of care, or negligence, on the part of the defendant's servants in the management and use of the engine. The engine having been brought upon the highway, as the learned judge said, propelled by steam generated by fire, as that had caused damage to the plaintiff's property, the defendant was held liable for the damage so caused, without negligence being established. The learned judge followed the earlier case, the well-known case of *Jones* v. *Festiniog Rail. Co.* (3), where the same result happened. That was a case in which negligence was negatived. Nevertheless the defendant company, who had no special statutory power to use engines on their line, were held liable at common law for the damage occasioned by their engine, and they were so held liable upon the application of the common law principle that, where a person uses a thing of a dangerous nature, he uses it at his peril, if another is thereby damaged. It is an instance of the application of the well-known doctrine established and made clear in *Fletcher* v. *Rylands* (1). In that case the Exchequer Chamber overruled the opinion of the majority of the Court of Exchequer, and their view was ultimately supported in the House of Lords. It was there said that (L.R. 1 Exch. at p. 279):

> "It is agreed on all hands that [a person] must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second

be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect."

Having thus stated the question, it was said:

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape."

It was that principle which was applied in the cases of locomotives passing along highways, and by the emission of sparks setting fire to any matter as they passed by. I am of opinion that that is the present case. And, although upon the evidence it must be taken that the defendant has not in any way been negligent, yet as he has brought upon the public highway this dangerous engine and as he passed along the public highway with fire generating steam, some particles escaping from his fire having set light to the plantation in question, the defendant is liable, because he brought that fire on to and along the highway at his peril. He was bound at common law to keep it in his engine, and not to allow it to escape to damage third parties; he has failed and he must take the consequences. In my opinion the appeal fails, and should be dismissed with costs.

DUKE, L.J.—I agree. The defendant did what the defendant had done in *Powell* v. *Fall* (2). He brought along the public highway a locomotive engine, propelled by steam generated by fire. At the trial before ROWLATT, J., two answers to the plaintiff's claim were made. It was said the engine was so constructed that fire could not escape from it, and consequently did not escape; and it was contended also that the engine was so constructed that the defendant had all reason to have confidence that fire could not escape. Upon the first of those propositions, that fire could not and did not escape, the learned judge in the court below came to a conclusion, with which I must say I entirely concur, that fire not only could, but did escape. My own view of the case is that that disposes of all the questions between the parties. The real matter of consideration in the case is not that to which counsel endeavoured to limit our attention—namely, whether this was an engine which was exceptionally safe as a locomotive in which steam is generated by the use of fire—but whether in fact the defendant had taken on the highway what was so in contact with the atmosphere that particles of fire could escape. When it was established that he had, then, as it seems to me, he came within the principle laid down in *Fletcher* v. *Rylands* (1) that he had something in his charge upon the highway—he brought it there—which was likely to do mischief if it should escape; it did escape, and in *Fletcher* v. *Rylands* (1) the principle of the common law was enunciated that a man who has in his custody a thing likely to do mischief has it in his custody at his peril if it escapes. On those grounds I think that the judgment of the learned judge in the court below was right, and that this appeal ought to be dismissed with costs.

EVE, J.—I agree.

Appeal dismissed.

Solicitors: *Speechly, Mumford & Craig*, for *E. R. Ensor*, Southampton; *Goodale, Merson & Co.*, for *Bradford & Co.*, Swindon.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

HEMMINGS AND WIFE *v.* STOKE POGES GOLF CLUB, LTD., AND ANOTHER

[COURT OF APPEAL (Bankes, Scrutton and Duke, L.JJ.), October 24, 27, November 21, 1919]

[Reported [1920] 1 K.B. 720; 89 L.J.K.B. 744; 122 L.T. 479; 36 T.L.R. 77; 64 Sol. Jo. 131]

Trespass—Removal of trespasser—Right of owner of land—Use of no more force than necessary.

If an owner of real property finds a trespasser on his premises he may, without becoming liable in a civil action for damages, enter the premises and remove from them the trespasser and his property, using no more force than is necessary to obtain entry and to turn out the trespasser and his property. The justification of the landlord's action in entering the property covers not only that entry, but also the forcible expulsion of the trespasser, which is the object of the entry.

Quære, whether under the Statute of Forcible Entry, 1381 (5 Ric. 2, stat. 1, c. 7) (13 HALSBURY'S STATUTES (2nd Edn.) 841), which provides that "the King defendeth, that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner" and prescribes the penalty of imprisonment for contravention of the statute, an indictment for forcible entry would lie where the prisoner had the freehold and the right to enter and the prosecutor was only a tenant at will or on sufferance or a trespasser.

The plaintiffs, who were man and wife, lived in a cottage belonging to the defendants, the male plaintiff being in the service of the defendants and required by them to live in the cottage for the performance of his duties. On his leaving the employment of the defendants, they gave him notice to quit the cottage, but he refused to leave until he could get accommodation elsewhere. Thereupon, by the order of the defendants, several persons entered the cottage and removed the plaintiffs and their furniture, using no more force than was necessary for that purpose.

Held: as the defendants had a right to enter they were not liable in civil proceedings at the suit of the plaintiffs.

Newton v. *Harland* (1) (1840), 1 Man. & G. 644, *Beddall* v. *Maitland* (2) (1881), 17 Ch.D. 174, and *Edwick* v. *Hawkes* (3) (1881), 18 Ch.D. 199, overruled.

Notes. Referred to: *Anchor Trust Co.* v. *Bell*, [1926] Ch. 805; *Clifton Securities, Ltd.* v. *Huntley*, [1948] 2 All E.R. 283.

As to a landlord's right of re-entry, see 23 HALSBURY'S LAWS (3rd Edn.) 705, 706; and as to remedies against trespassers, see ibid., 2nd Edn., vol. 33, pp. 15–17. For cases see 31 DIGEST (Repl.) 514 et seq. and 43 DIGEST 395 et seq.

Cases referred to:

(1) *Newton* v. *Harland* (1840), 1 Man. & G. 644; 1 Scott, N.R. 474; 133 E.R. 490; 31 Digest (Repl.) 44, *2034*.

(2) *Beddall* v. *Maitland* (1881), 17 Ch.D. 174; 50 L.J.Ch. 401; 44 L.T. 248; 29 W.R. 484; 31 Digest (Repl.) 44, *2035*.

(3) *Edwick* v. *Hawkes* (1881), 18 Ch.D. 199; 45 L.T. 168; 29 W.R. 913; sub nom. *Edridge* v. *Hawker & Co.*, 50 L.J.Ch. 577; 31 Digest (Repl.) 116, *2571*.

(4) *Lady Russell* v. *Lord Nottingham* (1606), as reported in Moore, K.B. 786; 72 E.R. 906; 43 Digest 378, *57*.

(5) *Couch* v. *Steel* (1854), 3 E. & B. 402; 2 C.L.R. 940; 23 L.J.Q.B. 121; 22 L.T.O.S. 271; 18 Jur. 515; 2 W.R. 170; 118 E.R. 1193; 42 Digest 750, *1739a*.

(6) *Butler* (*or Black*) v. *Fife Coal Co., Ltd.*, [1912] A.C. 149; 81 L.J.P.C. 97; 106 L.T. 161; 28 T.L.R. 150; 5 B.W.C.C. 217, H.L.; 34 Digest 218, *1809*.

(7) *Stevens* v. *Jeacocke* (1848), 11 Q.B. 731; 17 L.J.Q.B. 163; 11 L.T.O.S. 101; 12 Jur. 477; 116 E.R. 647; 42 Digest 750, *1739*.

(8) *Gorris* v. *Scott* (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 22 W.R. 575; 2 Asp.M.L.C. 282, Ex. Ch.; 42 Digest 759, *1853*.

(9) *Taylor* v. *Cole* (1789), 3 Term. Rep. 292; 100 E.R. 582; affd. (1791), 1 Hy. Bl. 555, Ex. Ch.; 21 Digest 491, *693*.

(10) *Taunton* v. *Costar* (1797), 7 Term. Rep. 431; 101 E.R. 1060; 31 Digest (Repl.) 613, *7290*.

(11) *Argent* v. *Durrant* (1799), 8 Term. Rep. 403; 101 E.R. 1457; 43 Digest 406, *286*.

(12) *Turner* v. *Meymott* (1823), 1 Bing. 158; 7 Moore, C.P. 574; 1 L.J.O.S.C.P. 13; 130 E.R. 64; 31 Digest (Repl.) 613, *7292*.

(13) *Harvey* v. *Brydges* (1845), 14 M. & W. 437; 3 Dow. & L. 55; 14 L.J.Ex. 272; 5 L.T.O.S. 287; 9 Jur. 759; 153 E.R. 546; affd. (1847), 1 Exch. 261, Ex. Ch.; 43 Digest 406, *283*.

(14) *Blades* v. *Higgs* (1861), 10 C.B.N.S. 713; 30 L.J.C.P. 347; 4 L.T. 551; 25 J.P. 743; 7 Jur.N.S. 1289; 142 E.R. 634; 43 Digest 423, *486*.

(15) *Lows* v. *Telford* (1876), 1 App. Cas. 414; 45 L.J.Q.B. 613; 35 L.T. 69; 40 J.P. 741; 13 Cox, C.C. 226, H.L.; 15 Digest (Repl.) 796, *7510*.

(16) *Beattie* v. *Mair* (1882), 10 L.R.Ir. 208.

(17) *Jones* v. *Chapman* (1849), 2 Exch. 803; 18 L.J.Ex. 456; 14 L.T.O.S. 45; 13 J.P. 730; 154 E.R. 717, Ex. Ch.; 43 Digest 406, *284*.

(18) *R.* v. *Wannop* (1754), Say. 142; 96 E.R. 831; 15 Digest (Repl.) 799, *7560*.

(19) *R.* v. *Bathurst* (1755), Say. 225; 96 E.R. 860; 15 Digest (Repl.) 796, *7494*.

(20) *R.* v. *Taylor* (1703), 7 Mod. Rep. 123; 87 E.R. 1138; 15 Digest (Repl.) 799, *7556*.

(21) *R.* v. *Child* (1846), 2 Cox, C.C. 102; 15 Digest (Repl.) 798, *7529*.

(22) *R.* v. *Williams* (1829), 2 B. & C. 549; 4 Man. & Ry.K.B. 471; 2 Man. & Ry.M.C. 340; 7 L.J.O.S.M.C. 92; 109 E.R. 205; 15 Digest (Repl.) 800, *7585*.

(23) *Scott* v. *Matthew Brown & Co., Ltd.* (1884), 51 L.T. 746; 1 T.L.R. 54; 15 Digest (Repl.) 798, *7535*.

(24) *Jones* v. *Foley*, [1891] 1 Q.B. 730; 60 L.J.Q.B. 464; 64 L.T. 538; 55 J.P. 521; 39 W.R. 510, 7 T.L.R. 440, D.C.; 31 Digest (Repl.) 614, *7299*.

(25) *Hillary* v. *Gay* (1833), 6 C. & P. 284, N.P.; 15 Digest (Repl.) 798, *7546*.

(26) *Browne* v. *Dawson* (1840), 12 Ad. & El. 624; Arn. & H. 114; 4 Per. & Dav. 355; 10 L.J.Q.B. 7; 113 E.R. 950; 15 Digest (Repl.) 798, *7532*.

Also referred to in argument:

R. v. *Depuke* (1710), 11 Mod. Rep. 273; 88 E.R. 1035; 15 Digest (Repl.) 799, *7557*.

Butcher v. *Butcher* (1827), 7 B. & C. 399; 1 Man. & Ry.K.B. 220; 6 L.J.O.S.K.B. 51; 108 E.R. 772; 43 Digest 387, *121*.

Pollen v. *Brewer* (1859), 7 C.B.N.S. 371; 1 L.T. 9; 6 Jur.N.S. 509; 141 E.R. 860; 15 Digest (Repl.) 799, *7564*.

Lake v. *Campbell* (1862), 5 L.T. 582; 34 Digest (Repl.) 105, *780*.

R. v. *Westly and Walker* (1669), 2 Keb 495.

Allen v. *England* (1862), 3 F. & F. 49; 31 Digest (Repl.) 40, *1971*.

Davison v. *Wilson* (1848), 11 Q.B. 890; 17 L.J.Q.B. 196; 11 L.T.O.S. 125; 12 Jur. 647; 116 E.R. 706; 43 Digest 407, *295*.

Hooper v. *Lane* (1857), 6 H.L.Cas. 443; 27 L.J.Q.B. 75; 30 L.T.O.S. 33; 3 Jur.N.S. 1026; 6 W.R. 146; 10 E.R. 1368, H.L.; 31 Digest (Repl.) 610, *7261*.

Appeal by the defendants from an order of PETERSON, J., sitting as an additional judge of the King's Bench Division.

The facts appear in the judgments.

By the Statute of Forcible Entry, 1381 (5 Ric. 2, stat. 1, c. 7):

"Also the King defendeth, that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment [of his body, and thereof ransomed at the King's will]."

[The words in square brackets were repealed by the Statute Law Revision Act, 1948.]

Barrington-Ward, K.C., and *du Parcq* for the defendants.
S. O. Henn Collins for the plaintiffs.

Cur. adv. vult.

Nov. 21, 1919. The following judgments were read.

BANKES, L.J.—The plaintiff Hemmings was in the employ of the Stoke Poges Golf Club. He and his wife occupied a cottage, the property of the golf club, in virtue of his employment as a servant, and not as a tenant. In May, 1918, the plaintiff Hemmings left his employment to go to work for a neighbouring farmer. He worked for him during the week, and on Sundays he attended to some of his former duties for the golf club in looking after the caddies. On June 3 formal notice was given to the plaintiff and he was required to deliver up possession of the cottage by the 11th. The time was apparently extended to give the plaintiffs an opportunity of finding another house, but on July 14 the male plaintiff was definitely informed that he could not be allowed to remain after the 22nd, and that if he did not leave before that date steps would be taken to put him out. The plaintiffs did not leave, and the defendants thereupon employed an estate agent in the neighbourhood to remove the plaintiffs and their furniture. The agent attended at the cottage on Aug. 4 with three or four men. The plaintiffs did not actively resist, though they refused to leave voluntarily. The plaintiff Hemmings was either led or gently pushed out of the house, and, as his wife refused to leave the chair in which she was seated, she was carried in the chair and deposited outside. The furniture was then taken out of the house and placed in the adjoining garage. The learned judge who tried the action has found that no unnecessary force was used, and none beyond what was necessary for the purpose of ejecting the plaintiffs. He also found that no appreciable damage was done to the furniture and none beyond what was necessarily incidental to a removal under the circumstances under which it was removed. The plaintiffs never at any time set up any right or title to remain in the cottage, but the plaintiff Hemmings merely intimated that he did not intend to comply with the notice to quit until he could find some other cottage to suit him.

The action was brought to recover damages for forcible entry and for assault founded upon an alleged infringement by the defendants of the statute 5 Ric. 2, stat. 1, c. 7, which enacts that a forcible entry is a punishable offence. The learned judge found the facts as I have stated them. He gave judgment for the plaintiffs for £21 damages. He indicated that, had he not considered himself bound by authority, he would have held that the action was not maintainable. The authority to which the learned judge referred is open to review by this court. In the court below, and in this court, the defendants' counsel stated that they were willing that the case should be dealt with upon the footing that the entry made upon the cottage by their instructions was a forcible entry within the meaning of the statute of Richard II. In these circumstances this court must, I think, deal with the appeal upon that footing, but the decision must not be taken to imply concurrence with the view accepted on behalf of the defendants. The question has not been argued or considered, and I express no opinion upon it except to indicate that in considering what may amount to a forcible entry a distinction has apparently always and very naturally been drawn between the case of a person who occupies

premises by virtue of his employment as a servant, and the case of a person who occupies as a tenant: see *Lady Russell* v. *Lord Nottingham* (4); BACON'S ABRIDGMENT, Forcible Entry (D) (7th Edn., 1832), vol. 3, p. 719; STEPHEN'S DIGEST OF THE CRIMINAL LAW, Forcible Entry (5th Edn., 1894), art. 84, p. 61. There appears to have been quite a remarkable difference of judicial opinion dating from very early times as to the effect of the statutes against forcible entry, both on the question what constitutes a punishable offence under the statutes and on the question whether any and if so what civil remedy exists for the person forcibly evicted.

It is not necessary for the purpose of the present appeal to say anything or to come to any conclusion in reference to criminal proceedings. In reference to civil proceedings it is, I think, useful to consider the question in the first instance apart from the authorities upon which the learned judge rested his judgment. If the action lies at all it must be because of the admitted failure on the part of the defendants to observe the duty laid upon them by the statute of Richard II. The grounds upon which an individual can maintain an action for damages for breach by some other person of a statutory duty are well established. LORD CAMPBELL cites the oldest authorities in his judgment in *Couch* v. *Steel* (5) (3 E. & B. at p. 411):

> "The general rule is that 'where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages': COMYNS' DIGEST, Action upon the Case (A). The statute of Westminster 2 (1 stat., 13 Edw. 1, c. 50) [rep.: Civil Procedure Acts Repeal Act, 1879] gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute: see 2nd INSTITUTE, 486."

In *Butler (or Black)* v. *Fife Coal Co., Ltd.* (6) LORD KINNEAR, after discussing the terms of the statute which was under consideration in that case, says ([1912] A.C. at p. 165): "If the duty be established, I do not think there is any serious question as to the civil liability." In a later passage on the same page he lays down the rule in these words (ibid.):

> "But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention."

It is not, however, every prohibition which is imposed by statute which can be said to impose a duty for the benefit of any particular class or classes of persons, though the observance of the statute may be in the interest of the community in general, or of some particular section of the community. *Stevens* v. *Jeacocke* (7) is perhaps the authority which is most often cited in support of this proposition, and LORD CAMPBELL, C.J., in his judgment in *Couch* v. *Steel* (5), points out the distinction between that case and the case he was dealing with. He says (3 E. & B. at p. 413):

> "The case of *Stevens* v. *Jeacocke* (7) is clearly distinguishable from the present: no duty was, by the statute in that case, imposed upon the defendant: he was only prohibited under a penalty from exercising the right of fishing to the extent he had it at the common law. He was not bound to perform any particular duty created by the Act, but to forbear to do that which but for the Act he might have done."

Gorris v. *Scott* (8) may usefully be referred to in this connection as an instance where the breach of a statute creating a duty was held not to give the individual complaining any right of action. The headnote sufficiently explains the decision for the present purpose. I cannot find that it has ever been suggested that the statute of Richard II is a statute imposing any duty upon anyone in favour of the person complaining of a forcible entry upon land or tenement. In its terms it does not purport to create any such duty, and from the nature of things it could not be expected to do so—otherwise it would in effect be conferring some kind of

title upon persons who, like the plaintiffs in the present case, were not setting up any title and were in truth mere trespassers. This view of the effect of the statute is accepted by ERSKINE, J., in *Newton* v. *Harland* (1), where he refers to the early authorities and says (1 Man. & G. at p. 666):

> "There are, it is true, many cases (some of which were cited at the argument) in which it has been held that no action for trespass quare clausum fregit will lie at the suit of a tenant against the landlord for a forcible entry after the expiration of the term. The earlier authorities upon this point are collected in DALTON'S JUSTICE, c. 129, p. 431; and the same doctrine is clearly established by the cases of *Taylor* v. *Cole* (9), *Taunton* v. *Costar* (10), *Argent* v. *Durrant* (11), and *Turner* v. *Meymott* (12). But then the reason for this is also given, namely, that the plaintiff, having no title to the possession as against his landlord, can have no right of action against him as a trespasser for entering upon his own land, even with force, for, although the law had been violated by the defendant, for which he was liable to be punished under a criminal prosecution, no right of the plaintiff had been infringed, and no injury had been sustained by him for which he could be entitled to compensation in damages";

and by FRY, J., in *Beddall* v. *Maitland* (2), where he says (17 Ch.D. at p. 188):

> "He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Richard II creates a crime, it gives no civil remedy."

It seems material next to consider what acts or classes of acts fall within the mischief of the statutes relating to forcible entry and are covered by their provisions. These will be found collected in RUSSELL ON CRIMES (7th Edn., 1909), p. 447, and for the present purpose it is only material to notice the following: the entry may be forcible not only in respect of violence done to the person of a man, as by beating him if he refuses to relinquish his possession; but also in respect to any other violence in the manner of entry as by breaking open the doors of a house, and, perhaps, also by an act of outrage after the entry, as by carrying away the party's goods. BACON'S ABRIDGMENT, title Forcible Entry (B), states the law thus:

> "If a man enters peaceably into an house, but turns the party out of possession by force, or by threats frights him out of possession, this is a forcible entry."

In VINER'S ABRIDGMENT (Vol. xiii, p. 380) the law is stated thus:

> "If one enters peaceably, and when he is come in, useth violence; this is a forcible entry."

All the acts complained of by the plaintiffs in this action are, therefore, covered by the statute upon the assumption that the entry by the defendants was a forcible entry within the statute. It would seem, therefore, that if the plaintiffs have no remedy at common law for any breach or breaches of the statute their action must fail. The learned judge in the court below decided in the plaintiffs' favour upon the authority of certain decisions, which it, therefore, becomes necessary to examine.

Those decisions, I think, proceed upon the view of the law that a person who assaults another, however trivial that assault may be, must justify his action or be liable at common law to pay damages, and that, although an assault where no more force is used than is necessary may be justified where it is in defence of property, it cannot be justified if the possession, in defence of which the assault is committed, has been obtained by means of a forcible entry. This certainly was the view of the majority of the court in *Newton* v. *Harland* (1). The action there was for an assault. The defendants pleaded first Not Guilty, and, for a second plea, that "in defence of the possession of his said dwelling-house" the defendant

Harland and his servant by his command "gently laid their hands upon" the plaintiff's wife "in order to remove, and did then remove" her . . . "as they lawfully might for the cause aforesaid." From the evidence given at the first trial, before PARKE, B., it appeared that the defendants had probably been guilty of a forcible entry upon the premises in question, and that it was after possession had been obtained by that means that the alleged assault was committed. The case had a curious career. PARKE, B., directed the jury to find for the defendants on the ground that the second plea was proved. A rule was obtained on the ground of misdirection. The rule was made absolute, and a new trial ordered by a court consisting of TINDAL, C.J., PARK, BOSANQUET, and COLTMAN, JJ. No very definite opinion was expressed by any of the members of the court upon the main point argued, and COLTMAN, J., expressly refrained from expressing any opinion upon it. The new trial was ordered so that the facts as to the time and manner of the entry might be more precisely ascertained. The case was tried the second time by ALDERSON, B., who took the same view as PARKE, B., had done, and so directed the jury. A second rule was obtained on the ground of misdirection, which was argued before TINDAL, C.J., and VAUGHAN, COLTMAN and ERSKINE, JJ. The court took time to consider its judgment and subsequently, VAUGHAN, J., dying, and the opinion of COLTMAN, J., differing from that of the Lord Chief Justice and ERSKINE, J., the court desired that the case might be re-argued. This was accordingly done before TINDAL, C.J., and BOSANQUET, COLTMAN and ERSKINE, JJ. The majority of the court held that there had been a misdirection, and a new trial was ordered. COLTMAN, J., was the dissenting judge. The case was tried a third time, and on this occasion by COLTMAN, J., who felt bound to direct the jury in accordance with the decision of the Court of Common Pleas. The matter came before the court again on a rule to show cause why the postea should not be amended, but this rule was refused, and the litigation was then abandoned, and a bill of exceptions was not proceeded with. Although the decision of the point of law is that of the majority of the court upon making absolute the rule for the second new trial, the fact is that the opinions of the judges who actually dealt with the point, either upon the trial of the action or in banc, were equally divided, TINDAL, C.J., and BOSANQUET and ERSKINE, JJ., holding one view, and PARKE, B., ALDERSON, B., and COLTMAN, J., holding the other.

The decision was given in the year 1840, and, though the case has never been expressly overruled, it has been treated to a chorus of disapproval, both from judges and from text writers. In *Harvey* v. *Brydges* (13) PARKE and ALDERSON, BB., repeated their already expressed views, and PLATT, B., concurred. In *Blades* v. *Higgs* (14) ERLE, C.J., in delivering the judgment of the court, treated *Harvey* v. *Brydges* (13) as overruling *Newton* v. *Harland* (1). LORD SELBORNE in *Lows* v. *Telford* (15) accepts the authority of *Harvey* v. *Brydges* (13). PALLES, C.B., in *Beattie* v. *Mair* (16) obviously disagrees with the decision of the majority of the court in *Newton* v. *Harland* (1). Among the text writers, MR. COLE in his work on EJECTMENT, the successive editors of SMITH'S LEADING CASES, and SIR F. POLLOCK in his work on TORTS may be mentioned as questioning the authority of *Newton* v. *Harland* (1). So far as reported cases are concerned, I cannot find that *Newton* v. *Harland* (1) was accepted and acted upon as good law until the year 1880 and again in 1881, when FRY, J., in *Beddall* v. *Maitland* (2) and *Edwick* v. *Hawkes* (3) accepted that decision as settling the law on the point. Speaking for myself I consider that the view of the law expressed by COLTMAN, J., in his minority judgment in *Newton* v. *Harland* (1) is the correct one. I think that the view he takes is entirely confirmed by LORD SELBORNE'S comment on *Harvey* v. *Brydges* (13) in *Lows* v. *Telford* (15), where he expresses his concurrence with the view of the law that, so far as relates to the fact of possession and its legal consequences, it makes no difference whether it has been taken by the legal owner forcibly or not. In *Beddall* v. *Maitland* (2) FRY, J., admits that a plaintiff in the position of the plaintiffs in the present action can recover no damages for the entry, for the possession was not legally his, and he can recover none for the force used in the

entry because, though the statute of Richard II creates a crime, it gives no civil remedy. He, however, then goes on to speak of any force used to eject the plaintiff in that action as an "independent wrongful act," though not in excess of what the occasion required to expel the plaintiff, and he gives as his reason that the person using the force cannot allege that the acts were lawful unless justified by a lawful entry, and he cannot plead that he has a lawful possession.

I am unable to agree with the view thus expressed by the learned judge. In the present case the defendants were undoubtedly entitled to possession of the cottage. The plaintiffs had no right and did not pretend they had any right to remain there. Assuming, but without deciding, that the entry by the defendants was a forcible entry, the right to possession was in the defendants, and the acts which are alleged as giving the plaintiffs a right of action were done in defence of their right to possession: *Blades* v. *Higgs* (14), and of the possession which they had acquired by the alleged forcible entry. I have no fear that the present decision will encourage lawlessness as was suggested for the plaintiffs. A person who makes a forcible entry upon lands and tenements renders himself liable to punishment, and he exposes himself also to the civil liability to pay damages in the event of more force being used than was necessary to remove the occupant of the premises, or in the event of any want of proper care in the removal of his goods. If the view of the law expressed in *Newton* v. *Harland* (1) is correct, it must follow that the law confers upon the lawless trespasser a right of occupancy, the length of which is determined only by the law's delay. For the reasons I have stated I do not believe that this is a true view of the law, and I think that this court should say definitely that they do not agree with the view of the majority of the court in *Newton* v. *Harland* (1), or with the decisions of Fry, J., in *Beddall* v. *Maitland* (2) and *Edwick* v. *Hawkes* (3). In my opinion, the appeal must be allowed with costs, and the judgment entered for the plaintiffs must be set aside and judgment entered for the defendants with costs.

SCRUTTON, L.J.—This case raises a legal question of great interest and general importance. Shortly stated the question is whether, if an owner of landed property finds a trespasser on his premises, he may enter the premises and turn the trespasser out, using no more force than is necessary to expel him, without having to pay damages for the force used. So stated, common honesty and common sense would answer: "Of course he may." To answer the question at law takes us to a statute of Richard II and a number of conflicting legal decisions.

I accept and refer to the very careful statement of facts by the judge below. Briefly, Mr. Hemmings was a servant of the Stoke Poges Golf Club, managed by Mr. Jackson. As such servant, and to do his work as a servant, he occupied as part of his wages one of the club's cottages, used partly for the work of the club in connection with caddies, chauffeurs, and telephones. His service with the club was terminated, and the local tribunal, in excusing him from military service, required him to do work of national importance on a farm. He got such work, but continued to live in the club's cottage, as he had difficulty in getting another cottage. The club allowed him to stay for some little time, and then required him to leave. He still stayed on. Accordingly, the club, through Mr. Jackson, sent people to take possession. They entered without any disturbance or violence. Mr. and Mrs. Hemmings declined to leave. Thereupon they carried Mrs. Hemmings out sitting in a chair. They led Mr. Hemmings out. They carried the furniture out and put it in a garage with one side open to the weather. The weather was showery, and part of the furniture was wet. All these operations were carried out with no more force than was necessary to remove people who did not actively resist, but declined to go unless carried. Mr. and Mrs. Hemmings then brought an action for "trespass, assault, and battery." They alleged no right in themselves, except that they were in possession of a house, which they alleged the defendants "with strong hand and multitude of people" broke and entered, and assaulted and ejected them and their property. The judge below against his own

view, but following *Beddall* v. *Maitland* (2), a decision of FRY, J., which in turn accepted as law a decision of the court of Common Pleas in 1840 in *Newton* v. *Harland* (1), gave no damages "for the actual eviction," but gave twenty guineas damages for the assaults on Mr. and Mrs. Hemmings and the damage to the furniture. As these assaults appear to constitute "the actual eviction," the judge finding that no force was used beyond that which was actually necessary for the purpose of ejecting the plaintiffs, the distinction is difficult to grasp.

Newton v. *Harland* (1) is a much criticised case. It was tried three times, and the three trial judges, PARKE, B., ALDERSON, B., and COLTMAN, J., all differed from the decision of the three judges of the Common Pleas, TINDAL, C.J., BOSANQUET and ERSKINE, JJ., who against the view of COLTMAN, J., gave the majority decision of the court in banc. The Court of Exchequer in *Harvey* v. *Brydges* (13) in the year 1845 expressed, though obiter, a strong opinion against the decision. The Court of Common Pleas, again obiter, ERLE, C.J., presiding, in *Blades* v. *Higgs* (14) treated *Newton* v. *Harland* (1) as overruled by *Harvey* v. *Brydges* (13), though it seems it was inaccurate in any strict sense to say the case was overruled. When SIR JAMES SHAW WILLES edited the fourth edition of SMITH'S LEADING CASES in 1856 he inserted as a note to *Taylor* v. *Cole* (9), his co-editor being KEATING, J., the passage

> "it is believed that the almost universal opinion of the profession has been in accordance with the doctrine of the principal case and the opinion of the very learned judge, COLTMAN, J., who dissented from the majority of the court in *Newton* v. *Harland* (1)."

This note was allowed to stand by LORD COLLINS in the three editions he subsequently edited. In 1881, however, FRY, J., in *Beddall* v. *Maitland* (2) treated *Newton* v. *Harland* (1) as good law, and in *Edwick* v. *Hawkes* (3) in the same year repeated his approval. In 1882, PALLES, C.B., in *Beattie* v. *Mair* (16) after having *Newton* v. *Harland* (1) and the decisions of FRY, J., cited to him, reserved liberty to consider whether *Newton* v. *Harland* (1) was good law. Text writers have also taken a very unfavourable view of *Newton* v. *Harland* (1). COLE ON EJECTMENT in 1857 treated it as "in effect overruled." SIR F. POLLOCK in his work on TORTS (10th Edn., 1916), p. 404, incidentally takes the view that *Newton* v. *Harland* (1) was not reconcilable with the old decisions, and doubts whether FRY, J.'s position is correct. MR. FOA ON LANDLORD AND TENANT (5th Edn., 1914), p. 742, treats *Newton* v. *Harland* (1) as incorrectly decided. The last edition of WOODFALL ON LANDLORD AND TENANT (19th Edn., 1912), p. 857, speaks of *Newton* v. *Harland* (1) as repeatedly questioned though never formally overruled.

A case which is doubted by PARKE, B., SIR JAMES SHAW WILLES, LORD COLLINS and PALLES, C.B., has, in spite of eighty years' existence without being overruled, to justify its existence; and the hearing of this case appears to be the first time that a court having power to overrule it has had to consider it. The first question is what *Newton* v. *Harland* (1) decided and on what grounds, and to what extent FRY, J., approved it. The second, whether it was in accordance with the law when it was decided, and why so many eminent authorities have disapproved of it. Newton was a tenant for six months of rooms in a house occupied by Harland. The six months expired, and, no rent having been paid, Harland first broke open the door to distrain for rent, and then with four or five other persons entered the apartment and forcibly expelled Newton's family. PARKE, B., on the first trial, held that this gave no cause of action. The Court of Common Pleas sent the case down to ascertain the circumstances of the entry. ALDERSON, B., at the second trial held that the landlord was entitled to use reasonable force to expel a tenant who would not quit on the expiration of his term. The Court of Common Pleas by three judges to one held that, if there was force enough to make a forcible entry, the fact that it was no more than reasonable was no defence, as forcible entry being criminal by a statute, no possession gained by an illegal act could be lawful, or the ground for ejecting another person. They, therefore, ordered the case to

be re-tried to see whether there was a forcible entry as distinct from mere trespass vi et armis, and at the third trial the jury found there had been forcible entry, whereupon the defendant gave up the contest, and the plaintiff, who got as the result of the triple struggle forty shillings damages and forty shillings costs, was probably not at all contented with the result. The majority judges appear to have agreed that Newton could not bring trespass if dispossessed with only necessary force, because he had no right of possession against his landlord, but that an action of assault would lie even if the assault was justified as protecting Harland's possession, because that possession, being obtained by a criminal act, was unlawful, and could not authorise an assault to protect it.

In *Beddall* v. *Maitland* (2) Beddall employed Maitland as a manager of his nursery garden and allowed him to occupy a house on the premises in exclusive possession. Beddall claimed to terminate the service; Maitland alleged he was a partner. The judge found Maitland was in possession as a wrongdoer, when a forcible entry was made on him and he was ejected. He claimed damages. FRY, J., said (17 Ch.D. at p. 188):

> "The result of the cases appears to me to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Richard II creates a crime, it gives no civil remedy. But, in respect of independent wrongful acts which are done in the course of, or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry; and he cannot plead that he has a lawful possession."

In *Edwick* v. *Hawkes* (3), which was a case of expulsion by violence after peaceable entry of a landlord, FRY, J., repeated the views he had expressed in *Beddall* v. *Maitland* (2), and added, on the authority of LAMBARD'S EIRENARCHA, that the subsequent violence colours the original peaceable entry. Incidentally, this appears to be contrary to the law as stated by MAULE, J., in *Jones* v. *Chapman* (17), that if a person has a right to possess, and enters peaceably, his actual possession, plus his right, outweighs the actual possession of the person on whom he enters, who becomes a trespasser, and can be expelled. It did not occur to MAULE, J., that the subsequent expulsion coloured the original entry, and made the possession obtained by it unlawful. Indeed, in one old case (1334, 8 Ass., f. 17, pl. 25) cited in CHALLIS ON REAL PROPERTY (3rd Edn., 1911), p. 236, a person with a right to enter made entry and got seisin in deed by getting half through a window and being thrown out, and no judge took the view that he lost his seisin in deed because his struggles to avoid being thrown out coloured the original entry of half his body through the window, but he was given his assise, which depended on seisin in deed. The basis of these decisions appears to me to be that an assault on a trespasser on your possession by using reasonable force to expel him could not be justified if your entry and possession was criminal under the statutes of forcible entry. The early authorities are very difficult to follow, as there were several statutes against forcible entry, and various remedies under them, and the numerous abridgers frequently misunderstand the statute under which the proceeding was and the remedy being enforced, and in addition give constant wrong references to the cases they are purporting to abstract. SIR JAMES STEPHEN (DIGEST OF THE CRIMINAL LAW (5th Edn., 1894), Art. 84, p. 61) states as to the criminal remedy:

> "It is immaterial whether the person making such an entry had or had not the right to enter, provided that a person who enters upon land or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry."

Incidentally, this cottage had certainly been in the custody of Hemmings as servant until shortly before the entry, and I doubt very much whether his lingering on till he could find another cottage was sufficiently adverse possession to destroy his previous custody. If so, this element which was not present in *Newton* v. *Harland* (1) and *Beddall* v. *Maitland* (2) is enough to decide this case against the plaintiffs if, as I have found, the only assault is the lawful using of reasonable force to remove him from the custody. As STEPHEN, J., is only repeating, as to the servant, the decision of POPHAM, C.J., LORD COKE, and FLEMING, C.B., in the Star Chamber in *Lady Russell's Case* (4), that forcible entry into a castle of which the lady had the custody was not a riot, for the count had the castle and the possession, and the lady only the custody.

But though there is certainly authority that the magistrate on an inquisition of forcible entry does not inquire into title (the justice, says DALTON: THE COUNTRY JUSTICE (1655 Edn.), ch. 22, p. 64; (1742 Edn.), p. 96, ought to execute the statute 15 Ric. 2, "without any examining, questioning, or standing upon the right or title of either party"), yet there is a large amount of authority that on indictment the prosecutor must allege and prove his freehold title in proceedings on the earlier statutes or, in proceedings on the later statutes, a title mentioned in them such as a term of years. If he did not do so, the indictment would be quashed or the charge fail. For instance, in *R.* v. *Wannop* (18), the Court of King's Bench, including SIR MICHAEL FORSTER, quashed an indictment for forcible entry, which did not allege the estate of the person expelled. The court says:

> "It is absolutely necessary that this should appear. . . . The 5 Ric. 2, c. 7, the 15 Ric. 2, c. 2, and the 8 Hen. 6, c. 9, do only extend to freehold estates; and the 21 Jac. 1, c. 15, does only extend to estates holden by tenants for years. . . ."

In conformity with this there are numerous statements that there cannot be a forcible entry by a landlord against a tenant at will or on sufferance. In *R.* v. *Bathurst* (19) the court quashed a count on the statute which did not show what estate the prosecutor had in the messuage,

> "for he might be only tenant at will, and if he were so, a forcible entry upon the messuage is not an offence against the statute."

In *R.* v. *Taylor* (20), on a motion to quash an indictment for forcible entry, which did not allege disseisin of the prosecutor, LORD HOLT said:

> "The present case is upon the statute of Henry VI, upon which you must always allege a freehold and seisin in somebody; . . . and of necessity there must be a disseisin of the freehold laid."

If the prosecutor alleged a freehold and gave primâ facie evidence of possession, it would be defeated by showing he had no freehold. And there are numerous cases to the same effect. In *R.* v. *Child* (21), at the Old Bailey, and *R.* v. *Williams* (22), where there are rulings to the contrary, none of the numerous reported cases on the subject appears to have been cited. If it were necessary to decide whether an indictment for forcible entry lay where the prisoner had the freehold and the right to enter and the prosecutor was only a tenant at will, or on sufferance, or a trespasser, I should certainly require to look much further into the authorities before I answered in the affirmative.

But I will assume that the criminal remedy would lie in such a case. It is still clear that in such a case a civil action would not lie to the person expelled. LAMBARD'S EIRENARCHA, published in 1602, is a text-book of high authority for the country justice, and with DALTON'S work already cited is the source of most of the extracts of which the abridgments are full. Though LAMBARD says ((1602 Edn.), p. 139; (1619 Edn.), pp. 147–148):

> "I see no cause, why the justice of peace (who perhaps shall want sufficient learning in the law to discerne of the right, or title, and yet may be both a fit

person to remove the force, and able enough to restore the possession should be tied to the discussion of the right or title, of either of the parties,"

he continues:

"And this I gather upon the opinion of all the court (9 Hen. 6, 19) . . . that the action upon the statute 8 Hen. 6 is for the right onely, and must always say, Illicite ingressus est, or ubi ingressus non datur per legem: but the indictment is for the force in respect of the King, to whom the partie shall make fine, although his right be never so good and sound."

DALTON (COUNTRY JUSTICE (1635 Edn.), p. 193) puts the matter thus:

"At this day, if a man doth enter into any lands or tenements by force, or multitude of people, when his entry is lawfull, hee is not punishable by action eyther at the common law, nor by action upon any statute; for where the title of the plaintiffe is not good, there hee hath no cause of action, although the defendant doth enter with force."

The same law is to be found in three passages in VINER'S ABRIDGMENT (Forcible Entry, A. 13, P. 1, H. a, A. a. 1), which in their turn go back to FITZHERBERT, NATURA BREVIUM, 248 H, BROOKE'S ABRIDGMENT, Accion sur le Statute, pl. 7, and the YEAR BOOK of 9 Hen. 6 (1431, Trin., 9 Hen. 6, f. 19, pl. 12). A note to COKE UPON LITTLETON puts it thus (Co. Litt. (19th Edn., 1832), p. 257 a, note 1):

"In case an action is brought on these statutes, if the defendant make himself a title, which is found for him, he shall be dismissed without any inquiry concerning the force; for, howsoever, he may be punishable at the King's suit, for doing what is prohibited by statute, as a contemner of the laws and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself."

HAWKINS' PLEAS OF THE CROWN ((7th Edn., Leach, 1795), vol. 2, p. 29; (8th Edn., Curwood, 1824), vol. 1, p. 495) has the same statement. FRY, J., prefers to put it thus in *Beddall* v. *Maitland* (2):

"He [the person expelled] can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Richard II creates a crime, it gives no civil remedy."

I think with respect that the learned judge has overlooked the facts, first, that though the statute of Richard II did not in terms give a civil remedy, many actions were brought on it: see BROOKE'S ABRIDGMENT, Accion sur le Statute, and VINER, Action A. a.; and, secondly that the statute 8 Hen. 6, s. 6, did give a civil action for forcible entry, and that it is with regard to the civil actions under both statutes that it is held that they do not lie if the defendant had a right of entry against the plaintiff. They do lie if he had no right of entry. It appears to follow that the right of entry when forcibly exercised was not made ineffective or civilly unlawful by the force. Ordinarily a criminal prohibition would give a right of action to any person specially injured by the prohibition. It does not in this case because against the person damaged the entry was not wrongful, but rightful, and he, therefore, suffered no special damage. The wrong was against the King. In *Newton* v. *Harland* (1) ERSKINE, J., accepts the law as stated and gives reasons for it, but says that these reasons do not apply to an assault and removal of furniture, if they do to an entry or trespass. It seems to me that when the grievance complained of is the removal by no more force than is necessary of a trespasser and his property from premises which the landlord has a right to enter for that purpose, the justification covers not only the entry but the forcible expulsion which is the object of the entry, and which makes the entry a forcible one. It follows that I agree with the view taken by PARKE, B., and ALDERSON, B.,

in *Harvey* v. *Brydges* (13) and at the trials of *Newton* v. *Harland* (1), and think that *Newton* v. *Harland* (1) was wrongfully decided in the Common Pleas, and *Beddall* v. *Maitland* (2) by FRY, J. The case of *Scott* v. *Matthew Brown & Co., Ltd.* (23), where KAY, J., questioned *Beddall* v. *Maitland* (2), seems to me to have been rightly decided. Indeed, the fact that while *Newton* v. *Harland* (1) was taken as preventing a person entitled to possession from using force to expel a trespasser, *Jones* v. *Foley* (24) allowed such a person to pull the roof down over the trespasser's head, showed that the law was in a ridiculous state, from which I hope our decision may release it. It will still remain the law that a person who replies to a claim for trespass and assault that he ejected a trespasser on his property with no more force than was necessary may be successfully met by the reply that he used more force than was necessary if the jury can be induced to find it. The risk of paying damages and costs on this finding, and the danger of becoming liable to a prosecution under the statutes of forcible entry, may well deter people from exercising this remedy, except by order of the court. But I see no reason to add to the existing privileges of trespassers on property which does not belong to them, by allowing them to recover damages against the true owner entitled to possession, who uses a reasonable amount of force to turn them out. I am giving effect to the learned judge's own view in the court below, by allowing the appeal with costs here and below.

DUKE, L.J.—The case for the plaintiffs was founded on the statutes relating to forcible entry upon lands and tenements. On their behalf it was contended that, although their occupation of the cottage was wrongful, they were possessed of it in fact; that although the defendant company was entitled to possession and had used no more force than was needful in ejecting the plaintiffs, the defendants by their agents had made what amounted in law to a forcible entry upon the cottage; and that, although the eviction itself gave the plaintiffs no cause of action, they could maintain an action for the incidents in it—namely, the putting of the defendants over the threshold and the removal of furniture. *Newton* v. *Harland* (1) and *Beddall* v. *Maitland* (2), although not precisely identical in point of fact with this case, contain statements of the law sufficient, if they are well founded, to entitle the plaintiffs to maintain the judgment they have recovered. The gist of the matter is found in the judgment of FRY, J., in *Beddall* v. *Maitland* (2), where he holds that the possession taken by the defendants was illegal by reason of the statutes against forcible entry and that by reason of this illegality the assaults upon the plaintiffs were wrongful acts and the removal of the furniture was wrongful. Some expressions of LORD LYNDHURST, C.B., in *Hillary* v. *Gay* (25), the judgments already mentioned, and a judgment of FRY, J., in *Edwick* v. *Hawkes* (3) are the authorities on which the plaintiffs' claim rests. The contention of the defendants upon the appeal was that these several decisions and opinions are inconsistent with the general tenor of the law of real property, unwarranted by the statutes on which they depend, and erroneous in principle. For the decision of the appeal some examination of the authorities on forcible entry earlier than *Newton* v. *Harland* (1) and of the law relating to possession is required.

The first question is whether there was a forcible entry. The successive statutes from Richard II to James I distinguish between forcible entry and forcible detainer, and there is a body of decisions as to each set of enactments. The distinction is in some respects material to the present inquiry. It was long ago judicially declared that a peaceable entry of the true owner followed by a forcible detainer of the premises from a previous disseisor gave no ground for indictment and no cause of action for recovery of possession. The early writers on forcible entry also laid emphasis on the fact that the force which is involved in such an entry as the statutes forbid is actual force. FITZHERBERT, J., deals with the matter in his treatise of the sixteenth century on JUSTICES OF THE PEACE (L'OFFICE DE JUSTICES DE PEACE) (1606 Edn.), pp. 68 et seq, and LAMBARD in his EIRENARCHA (1619 Edn.), p. 140, enlarges upon FITZHERBERT, J.'s view. Force which is

"rather intellectual than actual, and may therefore be termed a force in the consideration of law, which accounteth all that to be vis which is contrary to jus . . ."

is said not to be the kind of force aimed at by the statute. That, on the contrary, is force which is apparent by the act itself. PETERSON, J., says in his judgment in this case: "I will assume that the entry was peaceable," and finds himself bound by the cases already mentioned to hold that even so the subsequent acts of the defendants were actionable wrongs. I should myself have been disposed to hold as matter of fact that the entry was peaceable. But PETERSON, J., did not expressly so hold, and the defendants were content to assume against themselves a finding to the contrary.

Assuming a peaceable entry, was the subsequent expulsion of the plaintiffs wrongful and actionable? The opinion of FITZHERBERT, J., is stated in the treatise already mentioned in these terms (L'OFFICE DE JUSTICES, Forcible Entrie, f. 68, s. 5):

"Nul des dits estatutes extende ou home enter en peaceable maner, et apres cel detient oe force."

COMYNS, C.B., deals with the subject in his DIGEST (Com. Dig., Forceable Entry, D. 7), and says this:

"No writ of restitution shall be awarded . . . where he, who used force, has the possession by operation of law: as, if a disseisee enters, and afterwards, by force, ousts his disseisor; the possession shall not be restored; for it was re-vested in the disseisee by his entry."

Both these statements of the law are based upon ancient decisions recorded in the YEAR BOOKS. In modern times the principle involved has often been considered in our courts. The statement of MAULE, J., in *Jones* v. *Chapman* (17), which was affirmed as an accurate exposition of the law by LORD SELBORNE and LORD CAIRNS in *Lows* v. *Telford* (15), is in these terms (2 Exch. at p. 821):

"As soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who had so entered."

The rule of law as laid down in the old authorities and declared in *Jones* v. *Chapman* (17) appears to me to be fatal to the claim of the plaintiffs in this case if the defendants' actual entry upon the cottage was peaceable.

The defendants, however, as I have said, accepted the burden of defending their proceedings upon the footing that there was a forcible entry as well as a forcible expulsion of the plaintiffs, and they justified themselves firstly upon the basis of the finding of PETERSON, J., that the male plaintiff held the cottage at the time of the events in question as a servant of the defendant company. They relied upon passages in HAWKINS' PLEAS OF THE CROWN, BACON'S ABRIDGMENT, and STEPHEN'S DIGEST OF CRIMINAL LAW. The statements of the text writers on this subject appear to be founded upon decisions given by the Court of King's Bench and the Star Chamber in *Lady Russell's Case* (4) early in the reign of James I, and to have the sanction of the two Chief Justices and the Chief Baron, one of the Chief Justices being SIR EDWARD COKE. The effect of the decisions is to establish that the forcible entry of an owner where his premises are held against him by his servant is not indictable under the statutes of forcible entry or as a riot. COMYNS, C.B. (Com. Dig., Forceable Entry, D. 11), says:

"It will not be a riot . . . if the servants of the owner of a house enter by force, by command of their master, when the servants of him, who has the custody of the house, oppose them."

For this is cited the report of *Lady Russell's Case* (4) in MOORE.

In my view of the evidence in the present case, the occupation of the plaintiffs

was that of mere trespassers. The service had been for some time at an end, and the holding was adverse as against the defendant company. But this does not dispose of the matter in favour of the plaintiffs. Whether an indictment for forcible entry can be maintained when the complainant has no interest in the premises is a question upon which varying opinions have been entertained. Cases decided in the seventeenth and eighteenth centuries to which reference was made in the argument, clearly establish that at any rate until the time of Queen Anne it was essential that the title of the complainant should appear in an indictment for forcible entry and that a tenancy at will was not an estate or interest in respect of which an indictment for forcible entry would lie. On the other hand, it was held in *R.* v. *Williams* (22) and in *R.* v. *Child* (21) that title is immaterial, that the material question as to the complainant is whether he was in possession, and the material question as to the defendants whether they in a violent and tumultuous manner deprived him of possession. Modern practice has, I think, proceeded upon the later decisions, but the practice of criminal courts as to the forms of indictments does not affect the question whether a man who was wrongfully in occupation of land can maintain an action in respect of moderate and necessary force used by the owner to expel him, and there is authority extending at any rate from the fifteenth century to the nineteenth to the effect that such an action cannot be maintained. The YEAR BOOK of 15 Hen. 7 (Hil. 15 Hen. 7, f. 17, pl. 12) records a decision of all the judges that if a man enters with force upon a party who has no title to possession the complainant has no cause of action, but he who enters by force may be punished upon indictment. LORD KENYON'S declaration in *Taunton* v. *Costar* (10) (7 Term. Rep. at p. 432):

> "If indeed the landlord had entered with a strong hand to dispossess the tenant [who was holding over] by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term";

the judgment of the Court of King's Bench in *Browne* v. *Dawson* (26); and the opinion of PARKE, B., in *Harvey* v. *Brydges* (13) that (14 M. & W. 437)

> "where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party";

are merely some instances of declarations of opinion which have been made on numerous occasions by common law judges of eminence with regard to the questions here at issue. In my opinion, the law is correctly stated in the long series of pronouncements adverse to the claim of the present plaintiffs which were cited, and the decisions in *Newton* v. *Harland* (1) and *Beddall* v. *Maitland* (2) were erroneous. I think the appeal should be allowed and judgment in the action entered for the defendants.

Appeal allowed.

Solicitors: *Torr & Co.*, for *Herbert H. Ryland*, Windsor; *Edwin Herrin.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

HURD AND OTHERS *v.* WHALEY AND OTHERS

[KING'S BENCH DIVISION (McCardie, J.), February 4, 5, 8, 14, 1918]

[Reported [1918] 1 K.B. 448; 88 L.J.K.B. 260; 118 L.T. 593; 34 T.L.R. 253]

Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Covenant to repair—Notice of breach—Demised property comprising five houses all in state of disrepair—Notice referring to one house only—Validity—Conveyancing Act, 1881 (44 *& 45 Vict., c.* 41), *s.* 14 (1).

Landlord and Tenant—Forfeiture—Relief—Breach of covenant—Covenant to repair—Under-lessee—Under-lessee in breach of covenant—Relief from forfeiture not granted to head lessee—Right to relief of under-lessee—Conveyancing Act, 1892 (55 *& 56 Vict., c.* 13) *s.* 4.

By a lease made in 1863 predecessors in title of the lessor demised certain land to W. on a building lease for ninety-eight years. The lease contained covenants by W. to repair the houses then being erected and to paint the outside of the houses every three years and the inside every six years. The lease also contained the usual proviso for re-entry on breach of any of the covenants in the lease. Five houses were built on the demised land, numbered 23, 25, 27, 29 and 31 Bognor Street. The defendant O. was the assignee of the lease and the defendant S. was the underlessee of Nos. 23 and 25 Bognor Street under a sub-lease, made in September, 1912, which contained repairing covenants substantially similar to those in the head lease. In November, 1916, the lessor, having found the five houses to be in a state of disrepair, prepared a schedule of dilapidations and served on O. a notice pursuant to s. 14 (1) of the Conveyancing Act, 1881. The notice related exclusively to the dilapidations in No. 31 and did not refer to the other four houses. It was duly served under the Act of 1881, but was not complied with, and the lessor brought an action against O., the lessee, and S., the under-lessee, claiming possession of all five houses.

Held: (i) although, in such a case, it was desirable that the notice should specify the breaches complained of as to all the houses, the strict law was that for the purposes of s. 14 (1) of the Act of 1881 a notice of dilapidations which related to a portion only of the property was a sufficient notice, since, on its true construction, s. 14 (1) did not require the lessor, before he exercised his power of re-entry, to specify the breaches of covenant with respect to each house comprised in the demised property; (ii) where, as in the present case, the head lessee was not granted relief from the forfeiture of the head lease, and so a forfeiture of that lease occurred, the court, in the exercise of its discretion under s. 14 (2) of the Act of 1881 and s. 4 of the Conveyancing Act, 1892, could grant relief from forfeiture to a sub-lessee.

Notes. This decision so far as it relates to the sufficiency of the notice served under s. 14 (1) of the Conveyancing Act, 1881 (now s. 146 (1) of the Law of Property Act, 1925), would seem to be contrary to *Fletcher* v. *Nokes* (1897), 1 Ch. 271, where NORTH, J., held that a notice which did not indicate in which of several houses default had been made, but merely stated that the tenant had "broken the covenants for repairing the inside and outside of the houses," was an insufficient notice. The authorities prior to the present case (see HALSBURY'S LAWS, infra) appear to establish that the notice must direct the tenant's attention to and sufficiently inform him of, the particular things complained of by the landlord. Section 4 of the Conveyancing Act, 1892, is now contained in s. 146 (4) of the Law of Property Act, 1925.

As to what notice is required before a right of re-entry or forfeiture can be enforced, see 23 HALSBURY'S LAWS (3rd Edn.) 675, and as to an under-lessee's right to relief, see ibid., 680. For cases on notice of breaches of covenant other

than for payment of rent, see 31 Digest (Repl.) 537 et seq., and for cases on an under-lessee's right to relief against forfeiture, see ibid., 553 et seq. For the Law of Property Act, 1925, see 20 Halsbury's Statutes (2nd Edn.) 739.

Cases referred to:

(1) *Darlington* v. *Hamilton* (1854), Kay, 550; 2 Eq. Rep. 906; 23 L.J.Ch. 1000; 24 L.T.O.S. 33; 69 E.R. 233; 31 Digest (Repl.) 360, *4913*.

(2) *Creswell* v. *Davidson* (1887), 56 L.T. 811; 31 Digest (Repl.) 553, *6730*.

(3) *Re Lloyds Bank, Ltd. and Lillington's Contract*, [1912] 1 Ch. 601; 81 L.J.Ch. 386; 106 L.T. 561; 56 Sol. Jo. 380; 40 Digest (Repl.) 152, *1165*.

(4) *Dendy* v. *Evans*, [1910] 1 K.B. 263; 79 L.J.K.B. 121; 102 L.T. 4; 54 Sol. Jo. 151, C.A.; 31 Digest (Repl.) 529, *6520*.

(5) *Mitchison* v. *Thomson* (1883), 1 Cab. & El. 72; 31 Digest (Repl.) 542, *6654*.

(6) *Matthews* v. *Smallwood*, *Smallwood* v. *Matthews*, [1910] 1 Ch. 777; 79 L.J.Ch. 322; 102 L.T. 228; 31 Digest (Repl.) 554, *6739*.

(7) *Ewart* v. *Fryer*, [1901] 1 Ch. 499; 70 L.J.Ch. 138; 82 L.T. 415; 83 L.T. 551; 48 W.R. 443; 49 W.R. 145; 17 T.L.R. 145; 45 Sol. Jo. 115, C.A.; affirmed [1902] A.C. 187; 71 L.J.Ch. 433; 9 Mans. 281; sub nom. *Watney, Combe, Reid & Co.* v. *Ewart*, 86 L.T. 242; 18 T.L.R. 426, H.L.; 31 Digest (Repl.) 552, *6724*.

(8) *London Bridge Buildings Co.* v. *Thomson* (1903), 89 L.T. 50; 31 Digest (Repl.) 552, *6725*.

(9) *Imray* v. *Oakshette*, [1897] 2 Q.B. 218; 66 L.J.Q.B. 544; 76 L.T. 632; 45 W.R. 681; 13 T.L.R. 411; 41 Sol. Jo. 528, C.A.; 31 Digest (Repl.) 554, *6738*.

(10) *Gray* v. *Bonsall*, [1904] 1 K.B. 601; 73 L.J.K.B. 515; 90 L.T. 404; 52 W.R. 387; 20 T.L.R. 335; 48 Sol. Jo. 310, C.A.; 31 Digest (Repl.) 551, *6716*.

Action tried by McCardie, J., without a jury.

The plaintiffs claimed possession of premises under a proviso for re-entry on breach of covenant in a building lease. The defendant lessee O'Mahoney claimed relief under s. 14 of the Conveyancing Act, 1881. The defendant under-lessee Saunders claimed relief under s. 4 of the Conveyancing Act, 1892. The facts of the case are fully set out in the judgment of McCardie, J.

J. D. Crawford for the plaintiffs.
Wallington and *Van den Berg* for the defendant O'Mahoney.
Cartwright Sharp for the defendant Saunders.

Cur. adv. vult.

Feb. 8, 1918. **McCARDIE, J.**, read the following judgment.—This action raises points of importance to landlords and tenants. The facts may be briefly stated as follows. In August, 1863, the plaintiffs' predecessors in title leased a piece of land in Battersea (of which they were the freeholders) to one William Whaley upon a building lease of ninety-eight years. The yearly rent was £17. The lessee entered into the usual covenants, including (a) a covenant to repair the buildings then being erected, (b) a covenant to paint the outside wood and iron work once in every three years, and (c) a covenant to paint the inside once in every six years. The lease contained the usual proviso for re-entry upon any breach of any of the covenants or conditions contained therein. The plaintiffs are now the owners of the freehold and entitled to the benefits of the lease. The defendant O'Mahoney is the assignee of the lease, and bound by the terms thereof. Upon the said piece of land five houses were built. They are numbered 23, 25, 27, 29, and 31, Bognor Street. The defendant Saunders is under-lessee of Nos. 23 and 25 under a sub-lease dated September, 1912, from a former assignee of the head lease. The sub-lease contains repairing covenants substantially similar to those contained in the head lease. In November, 1916, the plaintiff's architect (Mr. Hall) visited the premises and found them to be in a state of disrepair. Thereupon a schedule of dilapidations was prepared, and a notice was served pursuant to s. 14 of the Conveyancing Act, 1881. The notice is dated Dec. 11, 1916. It relates exclusively

to dilapidations in No. 31. It contains no reference whatever to the other houses. It is conceded by the defendants that, subject to the point hereinafter mentioned, the notice complies with the requirements of s. 14. It was served under the provisions of s. 67(3) of the Act of 1881 by affixment upon No. 31, Bognor Street. The defendants admit the validity of the notice. It was not complied with, and on May 4, 1917, the plaintiffs commenced this action claiming possession of the five houses and damages for breach of covenant against the defendant O'Mahoney.

At the trial before me the defendants contended that the action must fail on the ground that the requirements of s. 14 had not been complied with. It was argued that a notice of dilapidations relating to a portion only of the property was not a notice which would justify the plaintiffs in commencing an action to recover possession of the five houses. In my opinion, that contention fails. The lease of 1863 provides that the landlord may re-enter if any breach of covenant is committed. The disrepair of No. 31 obviously amounted to a breach of covenant. The house was in a dilapidated state. Before the Conveyancing Act, 1881, it was, I think, clear that a landlord could re-enter for a breach of covenant with respect to any part of the demised premises, and it was not material that different persons were in possession of different portions of the property whether as assignees or sub-lessees: see the observations of SIR W. PAGE WOOD, V.-C., in *Darlington* v. *Hamilton* (1). It is equally clear, I think, that the Conveyancing Act, 1881, has effected no alteration in the law on this point: see *Creswell* v. *Davidson* (2), per KAY, J.; and *Re Lloyds Bank, Ltd., and Lillington's Contract* (3), per WARRINGTON, J. The Act of 1881 merely provides that a landlord shall serve a notice of the breach which he complains of before he proceeds to exercise his power of re-entry. He is not bound to specify breaches with respect to each house comprised in the demised property. He is entitled to content himself with a notice of dilapidations with respect to one house only.

I desire, however, to say that this rigid exercise of the right of a landlord's power so to limit his notice does not receive my approval. If a demised property consists of five contiguous houses it is desirable, from every point of view, that the notice should specify the breach complained of, not only as to one, but as to all the houses. The lessee should be reminded of all his obligations. Unless this is done, he may be put to great doubt and perchance exposed to much unnecessary expense and inconvenience. It would be an abuse of a landlord's rights to serve five notices at different dates in respect of five houses covered by the same lease and forming one property. If the landlord—as in the present case—takes proceedings for possession, and the lessee applies for relief, it is desirable and most convenient that the court should have before it a notice of breaches, which will comprise all dilapidations in respect of the property of which possession is sought. Unless this is done, it is difficult for the court adequately to fulfil its function of granting relief. It follows from what I have said that the plaintiffs are entitled to an order for possession unless I exert the power of granting relief against forfeiture which is conferred by recent legislation.

It is necessary to consider separately the claims put forward by the two defendants. They involve distinct points. The defendant O'Mahoney, the assignee of the whole of the demised premises, claims relief under s. 14 of the Conveyancing Act, 1881. The defendant Saunders, the under-lessee of Nos. 23 and 25, Bognor Street, claims relief under s. 4 of the Conveyancing and Law of Property Act, 1892. I will take first the claim of the defendant O'Mahoney. He has undoubtedly committed a serious breach of the repairing and painting clauses of the lease. As already stated, No. 31 is in a dilapidated condition. I am also satisfied that No. 29 is in a state of obvious disrepair, and that No. 27 requires substantial expenditure in order to comply with the covenants. The interiors of Nos. 23 and 25 do not call for serious complaint. But I have no doubt that both the houses require immediate exterior painting as well as some exterior repairs. It is, however, rightly pointed out by counsel for the plaintiffs that the breaches of covenant have existed for a long period. On the other hand, the rack rentals of the three houses—Nos. 27, 29,

and 31—would amount to 10s. 6d. each per week, or a total of over £70 per annum. The amount required for repairs, insurance, &c., may be about 30 per cent. of the rack rentals. If I deduct £25 for such repairs it leaves £45 as the profit rental, less the £17 ground rent payable under the lease. Of this £17, however, the sum of £7 is payable by the defendant Saunders as sub-lessee. To forfeit the interest of O'Mahoney, therefore, under the lease would inflict a serious loss upon him. The object of s. 14 of the Conveyancing Act, 1881, is to enable the court, in appropriate cases, to save the lessee from such a loss. The courts of equity have ever inclined to relieve against forfeiture. But their powers were limited, and the enabling statutes prior to 1881 were restricted in character: see per Cozens-Hardy, M.R., in *Dendy* v. *Evans* (4), and 13 Halsbury's Laws (1st Edn.) at p. 153 [see now 3rd Edn., vol. 14, p. 621]. Section 14 of the Conveyancing Act, 1881, however, conferred wide and liberal powers upon the court, which powers are subject only to the restriction in sub-s. (b). The Act is of a remedial nature. The discretion of the court, in my opinion, should be exercised in a generous manner. The fact that the breaches, for example, of covenant to repair have been serious should not prevent relief: see *Mitchison* v. *Thomson* (5). Nor should the fact that the lessee has been guilty of serious negligence: see *Matthews* v. *Smallwood* (6) ([1910] 1 Ch. at pp. 793, 794). The court should be anxious to save the lessee from serious hardship, provided that the interests of the landlord can be safeguarded in a just manner, and that no special circumstances call for a refusal of relief. I am the more willing to grant relief here because I recognise that the outbreak of the present war has steadily increased the cost of labour and materials, and has placed upon lessees under covenant to repair a burden which has grown more onerous with the continuance of the war. But I cannot for a moment assent to the suggestion of counsel for the defendant that the existing difficulties in any way relieve a lessee from the full performance of his repairing covenants. He is bound to fulfil them, even though the expense is much greater than before the war. It was argued that public policy required me to abstain from insisting upon performance of the covenants at the present time in view of the demand for labour and materials for other national purposes. But, in my opinion, the national interests emphatically require that at all times the dwellings occupied by the working classes should be kept in a state of adequate repair. I am willing to grant relief to the lessee O'Mahoney in the present case, but only upon terms which I mention hereafter.

I will now proceed briefly to consider the claim to relief made by the under-lessee Saunders. But for the Conveyancing Act, 1892, he would have no right to appeal to the relieving powers of the court. By s. 4 of that Act it was provided that where a lessor seeks to enforce a right of forfeiture the court may, on application by an under-lessee, vest in him, for the whole term of the lease or any less term, the property comprised in the lease, or any part thereof, upon such terms and conditions as the court shall think fit. In my opinion, this provision was required to remedy many serious and obvious cases of hardship which might otherwise have occurred. It marks a distinct and satisfactory progress in the law of landlord and tenant. The sub-lease to Saunders of Nos. 23 and 25 was at a ground rent of £7. He paid for the sub-lease a premium of over £160. The rack rent of each of the two houses is 10s. 6d. per house. The annual rack rental of the two dwellings is therefore about £54 per annum. If I deduct one-third for rates, taxes, and repairs, &c., it leaves £36 as the net annual return upon a property of which the ground rent is £7. To refuse relief to Saunders would, therefore, inflict serious loss upon him. Now Saunders, I may add, was in no way to blame for the state of disrepair of Nos. 27, 29, and 31. Primâ facie, I should desire to exercise my powers under s. 4 of the Conveyancing Act, 1892, and grant him relief upon appropriate terms. But a difficulty at once arises. I have already stated my willingness to grant relief to the lessee. If the conditions of that relief be complied with by the lessee, then the result will be that no forfeiture of the lease takes place. The lease will remain unimpaired and fully operative: see *Dendy* v. *Evans* (4). It will follow, therefore,

in my opinion, that in such case relief cannot be given to Saunders if relief is secured by O'Mahoney. For I think that s. 4 of the Conveyancing Act, 1892, can only be applied in favour of an under-lessee where forfeiture of the original lease has actually occurred. If the original lease stands, the under-lessee does not require relief. It is only in the event of its forfeiture that he requires the assistance of the court. I deem it to be reasonably clear that s. 4 of the Act of 1892 does not empower the court to grant relief as to one part of the demised property to the lessee and relief as to the other part of such property to the sub-lessee. It would require clear statutory enactment to confer such an unusual power upon the court. The difficulties in the way of exercising the power are obvious. My view with regard to the limited effect of the joint operation of s. 14 of the Conveyancing Act, 1881, and s. 4 of the Conveyancing Act, 1892, is confirmed by the observations of KEKEWICH, J., in *Ewart* v. *Fryer* (7) ([1901] 1 Ch. at p. 505). See also the observations of VAUGHAN WILLIAMS, L.J., and ROMER, L.J., in affirming the decision of KEKEWICH, J., upon appeal: *Ewart* v. *Fryer* (7) (ibid. at pp. 512, 514). The curious position already existing is shown by the remarks of JOYCE, J., in *London Bridge Buildings Co.* v. *Thomson* (8) (89 L.T. at p. 53).

But it may be that the lessee O'Mahoney will fail to comply with the terms which I impose. In such a case the question of relief to the under-lessee Saunders will arise. Counsel for the plaintiffs has, however, vigorously and ably contended that I am precluded in any event from granting relief to Saunders by reason of the judgments of the Court of Appeal in *Imray* v. *Oakshette* (9). It is said that because Saunders has failed to keep Nos. 23 and 25 in proper repair he has, therefore, committed a personal breach of covenant as between O'Mahoney and himself and is debarred from the beneficial provisions of s. 4 of the Act of 1892. As already stated, I find that the interior of both houses requires certain repairs, and it is clear that neither house has been painted in accordance with the provisions of the under-lease. The vital words in *Imray* v. *Oakshette* (9) appear in the judgment of LOPES, L.J. ([1897] 2 Q.B. at p. 225). In my opinion, however, those words have no application to the present action. They relate only to a case where the under-lessee is applying for relief after a forfeiture of the original lease has taken place by reason of a breach of the covenants or conditions mentioned expressly in s. 14 (6) of the Act of 1881, as, for example, the breach of a covenant not to assign the demised premises. In such a case the lessee himself can secure no relief, but s. 4 of the Conveyancing Act, 1892, is to be treated as a substantive and independent enactment, and a sub-lessee can obtain relief thereunder, even though the breach of covenant committed by the lessee precludes the latter from seeking the assistance of the court. Where, however, forfeiture arises from a breach within s. 14 (6) of the Conveyancing Act, 1881, the sub-lessee must show that he himself is not to blame. For the jurisdiction under s. 4 of the Conveyancing Act, 1892, is to be exercised—so the Court of Appeal held in *Imray* v. *Oakshette* (9)—sparingly and with caution. The words of LOPES, L.J., however, have no application to a case where the original lessee has incurred a forfeiture in respect of which the court can grant relief—for example, by breach of a covenant to repair. I follow, with respect, the views expressed by LORD PARKER in *Matthews* v. *Smallwood* (6) ([1910] 1 Ch. at pp. 793, 794) with regard to the effect of *Imray* v. *Oakshette* (9). There is nothing in *Imray's Case* (9) to deter me from granting relief to Mr. Saunders should it become necessary to exercise my discretion under s. 4 of the Act of 1892. I regard *Gray* v. *Bonsall* (10) as supporting the views which I have just expressed. I venture to hope that *Imray* v. *Oakshette* (9) may some day be considered by the House of Lords. The views expressed by LOPES, L.J., and RIGBY, L.J., seem, if I may say so with the deepest respect, to cut down in the severest manner the beneficial intention of s. 4 of the Act of 1892. I myself entertain the view that s. 4 should be construed with a generous desire to save an under-lessee from the grave loss which may fall upon him unless the section is liberally construed. The notion of personal negligence, founded on the artificial doctrine of constructive notice, seems to me to be in conflict with the object of

the Act of 1892 and the scope of s. 4, and to be opposed to the well-established inclination of equity not to enforce a forfeiture.

It only remains to state the form of the order that I make. The substance of the order appears in Chitty's King's Bench Forms (14th Edn.) at p. 706. I need not read it in detail. I fix the period for performance of the covenants at four months. If the parties do not agree upon a surveyor, then a master in chambers will nominate. Proper security must be given as settled. I fix the surveyor's and solicitors' fees in respect of the dilapidations notice of Dec. 11, 1916, at £8 8s. The form of the order can be settled by counsel. There will be liberty to apply. I give the defendant O'Mahoney until next Thursday to consider whether he will accept these terms or not. If he declines them, I must refuse relief, and I will proceed to consider the terms upon which relief will be granted to Saunders.

Feb. 14, 1918.—The case was again mentioned. As the head lessee, O'Mahoney, was unable to accept the terms laid down by McCardie, J., relief was refused to him. But relief, by virtue of s. 4 of the Act of 1892, was granted to the under-lessee upon terms.

Judgment accordingly.

Solicitors: *H. H. Wells & Sons*; *Wakeford, May, Woulfe & Gwyther*; *Blount, Lynch & Petre.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

HOUSTON AND OTHERS *v.* BURNS AND OTHERS

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Shaw), December 17, 18, 1917, January 29, 1918]

[Reported [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219]

Charity—Uncertainty—Public purposes—Public, benevolent, or charitable purposes—Effect of reading phrase disjunctively—Punctuation to assist in interpretation.

A will contained the following clause: "I hereby direct my trustees to hold such residue until such time or times as they see fit, and apply the same for such public, benevolent, or charitable purposes in connection with the parish of [L.] or the neighbourhood in such sums or under such conditions as they in their discretion shall think proper."

Held: having regard especially to the punctuation, the words "public, benevolent, or charitable" were to be read disjunctively, and since "public purposes" was entirely uncertain (and could not be rendered certain by reference to a particular locality), the gift failed for uncertainty.

Blair v. *Duncan* (1), [1902] A.C. 37, applied.

Dictum of Lord Romilly in *Dolan* v. *MacDermot* (2) (1867), L.R. 5 Eq. 60, overruled.

Decision of the Second Division of the Court of Session, [1917] 2 S.L.T. 11, affirmed.

Notes. The words "charitable or benevolent objects" were construed by the Court of Appeal in *Re Diplock*, [1941] 1 All E.R. 193. It was held that a gift for such objects was void for uncertainty.

Explained: *Re Bennett, Gibson* v. *A.-G.*, [1920] All E.R.Rep. 624; Considered: *Caldwell* v. *Caldwell* (1921), 91 L.J.P.C. 95; *A.-G.* v. *National Provincial and Union Bank of England*, [1923] All E.R.Rep. 123; *Re Gwyon, Public Trustee* v. *A.-G.* (1929), 46 T.L.R. 96; *Re Smith, Public Trustee* v. *Smith*, [1931] All E.R.Rep. 617; *Re Ogden, Barclays Bank, Ltd.* v. *Stockton-on-Tees Corpn.*, [1937] 3 All E.R. 684; *Williams' Trusts Trustees* v. *I.R.Comrs.*, [1947] 1 All E.R. 513; *Re Shaw, Public Trustee* v. *Day*, [1957] 1 All E.R. 745. Referred to: *Re Davis, Thomas* v. *Davis*, [1923] 1 Ch. 225; *Re Stratton, Stratton* v. *A.-G.*, [1930] 2 Ch. 151; *Re Hadden, Public Trustee* v. *More*, [1932] 1 Ch. 133; *Re Corelli, Watt* v. *Bridges*, [1943] 2 All E.R. 519; *Re Baynes, Public Trustee* v. *Leven Corpn.*, [1944] 2 All E.R. 597; *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson*, [1944] 2 All E.R. 60; *Re Strakosch, Temperley* v. *A.-G.*, [1947] 2 All E.R. 607; *Re Wood, Barton* v. *Chilcott*, [1949] 1 All E.R. 1100; *I.R.Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525.

As to gift for alternative purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 269 et seq.; and for cases see 8 DIGEST (Repl.) 394 et seq.

Cases referred to:

(1) *Blair* v. *Duncan*, [1902] A.C. 37; 71 L.J.P.C. 22; 86 L.T. 157; 50 W.R. 369; 18 T.L.R. 194, H.L.; 8 Digest (Repl.) 394, *865*.

(2) *Dolan* v. *MacDermot* (1867), L.R. 5 Eq. 60; 16 W.R. 68; affirmed (1868), 3 Ch. App. 676; 17 W.R. 3, L.C.; 8 Digest (Repl.) 399, *902*.

(3) *Grimond* v. *Grimond* (1904), 6 F. (Ct. of Sess.) 285; reversed, [1905] A.C. 124; 74 L.J.P.C. 35; 92 L.T. 477; 21 T.L.R. 323, H.L.; 8 Digest (Repl.) 396, *882*.

(4) *Shaw's Trustees* v. *Esson's Trustees* (1905), 8 F. (Ct. of Sess.) 52; 8 Digest (Repl.) 398, **291*.

(5) *Sanford* v. *Raikes* (1816), 1 Mer. 646; 35 E.R. 808; 44 Digest 542, *3591*.

(6) *Gordon* v. *Gordon, Gordon* v. *Gordon* (1871), L.R. 5 H.L. 254, H.L.; 44 Digest 542, *3592*.

(7) *Oppenheim* v. *Henry* (1853), 9 Hare, 802, n.; 62 E.R. 742; sub nom. *Openheim* v. *Henry*, 20 L.T.O.S. 291; 1 W.R. 126; 23 Digest (Repl.) 243, *2949*.

(8) *Walker* v. *Tipping* (1852), 9 Hare, 800; 19 L.T.O.S. 177; 16 Jur. 442; 68 E.R. 740; 44 Digest 579, *3994*.

(9) *Gauntlett* v. *Carter* (1853), 17 Beav. 586; 23 L.J.Ch. 219; 17 Jur. 981; 1 W.R. 500; 51 E.R. 1163; 44 Digest 680, *5216*.

(10) *Manning* v. *Purcell* (1855), 7 De G.M. & G. 55; 3 Eq. Rep. 387; 24 L.J.Ch. 522; 24 L.T.O.S. 317; 3 W.R. 273; 44 E.R. 21, L.JJ.; 44 Digest 711, *5560*.

(11) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

(12) *Crichton* v. *Grierson* (1828), 3 Wils. & S. 329; 3 Bli.N.S. 424; 4 E.R. 1390, H.L.; 8 Digest (Repl.) 399, *900*.

(13) *Weir* v. *Crum-Brown*, [1908] A.C. 162; 77 L.J.P.C. 41; 98 L.T. 325; 24 T.L.R. 308; 52 Sol. Jo. 261, H.L.; 8 Digest (Repl.) 390, *833*.

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland, reported [1917] 2 S.L.T. 11, recalling an interlocutor of the Lord Ordinary so far as appealed from.

The testatrix, the widow of the Rev. Thomas Hardie Turnbull, one of the ministers of the parish of Lesmahagow, by her trust disposition and settlement, dated June 2, 1894, directed her trustees, in the events which happened, to apply the residue of her estate

> "for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood in such sums and under such conditions they in their discretion shall think proper."

The testatrix died on Oct. 23, 1894. The question before the House was whether this bequest was void for uncertainty. The Lord Ordinary (LORD ORMIDALE) held

the bequest was not void, but the judges of the Second Division by a majority (the Lord Justice-Clerk and LORD SALVESEN, LORD DUNDAS dissentiente) were of opinion that it was void for uncertainty. The appellants, while admitting that the authorities laid down the rule both in England and Scotland that while "charitable purposes" had a defined meaning, "public purposes" were in their nature entirely uncertain. But it was contended that the fact that here the local limits of the bequest being defined made a distinction, and, further, that the claim should not be read as applying to public, or benevolent, or charitable purposes, but that on its true reading it was for the benefit of benevolent or charitable purposes of a public nature in connection with the parish and that so construed it would be good as "benevolent or charitable purposes."

Chree, K.C., and *M. P. Fraser* (both of the Scottish Bar) for the appellants.

Clyde, K.C. (Lord Advocate and Dean of Faculty), and *J. W. Forbes*, of the Scottish Bar, for the Crown.

The House took time for consideration.

Jan. 29, 1918. The following opinions were read.

LORD FINLAY, L.C.—The question in this case is as to the validity of a clause in the trust disposition and settlement of Mrs. Turnbull, dated June 2, 1894. The testatrix directed that the residue of her estate should be disposed of as she should direct by any writing or codicil under her hand. The clause then proceeded as follows:

> "And failing any such, then I hereby direct my trustees to hold such residue until such time or times as they see fit, and apply the same for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood in such sums or under such conditions as they in their discretion shall think proper."

No direction in writing or by codicil was given by the testatrix, and the question arises whether the bequest for public, benevolent, or charitable purposes is good. It has been settled by a decision of this House (*Blair* v. *Duncan* (1)), that a bequest "for such charitable or public purposes as my trustee thinks proper" is void for uncertainty. In such a clause the words "charitable or public" are used disjunctively, and, as LORD SHAND said ([1902] A.C. at p. 42):

> "a bequest for public purposes to be taken by a person or persons named by the testator, unlike a bequest expressly limited to a charitable purpose, is not sufficiently definite, but is too vague and wide to form the subject of a valid bequest."

While "charitable purposes" have a defined meaning both in England and Scotland, "public purposes" are in their nature entirely uncertain. The same rule has been applied in *Grimond* v. *Grimond* (3), reversing the decision of the Court of Session, in the case of a bequest to "such charitable or religious institutions or societies" as the trustees might select. The term "religious" was held to be too vague, and as the words were to be read disjunctively, the bequest was void on the principle which was applied in *Blair* v. *Duncan* (1).

Counsel for the appellants in the present case sought to distinguish these authorities on the ground that there was no local limit in the bequests there, while in the present case the purposes are to be in connection with a particular parish or the neighbourhood. It is quite true that the absence of any restriction as to locality is adverted to in some of the judgments in *Blair* v. *Duncan* (1) as adding an additional element of vagueness to the bequest. LORD ROBERTSON says (ibid. at p. 47):

> "It seems to me that this testatrix has done nothing like selecting a particular class or particular classes of objects. She excludes individuals, and then leaves the trustee at large, with the whole world to choose from. There is

nothing affecting any community on the globe which is outside the ambit of his choice."

But while this consideration emphasised the vagueness of the bequest in the particular case, it was not really necessary for the decision, which rests on the vagueness of the purpose, whatever the locality within which the purpose is to be served. This sufficiently appears from the judgments of LORD HALSBURY, LORD SHAND, and LORD DAVEY in *Blair* v. *Duncan* (1), and the vagueness of the purpose itself, apart from locality, is pointed out in the clearest terms by LORD ROBERTSON himself. The addition of a local limit might well make a difference in favour of a bequest if the bequest was in favour of institutions within a certain area, the particular institution to be selected by the trustee. This distinction is pointed out by LORD STORMOUTH-DARLING in his judgment in *Shaw's Trustees* v. *Esson's Trustees* (4), where the whole subject is discussed in a very lucid and valuable judgment. Counsel for the appellants relied in support of his contention on *Dolan* v. *MacDermont* (2), where LORD ROMILLY, M.R., after saying that a bequest for such public purposes as the trustees select would be bad, goes on to say that if a place is connected with the gift, so that the public purposes must be for the benefit of the place specified, then it is good. I do not think this dictum is correct. The decision of LORD ROMILLY was affirmed on appeal by LORD CAIRNS, L.C., but not on this ground. It follows from the decision to which I have referred that if the clause is to be construed as being for such public or benevolent or charitable purposes in connection with the locality as the trustees think proper it would be bad. The purpose is too vague, and the vagueness of the purpose is not cured by the specification of the locality to be benefited. It was contended, however, on behalf of the appellants, that the clause should not be read as applying to public or benevolent or charitable purposes, but that on its true reading it was for the benefit of benevolent or charitable purposes of a public nature in connection with the parish, and that so construed it would be good, as "benevolent or charitable purposes" would be held to be charitable purposes. It appears to me that without the punctuation which appears in the will as printed in the appendix this is quite a possible construction, and where words are ambiguous a construction should be adopted which will not make the bequest void. But we are informed that the comma after the word "public" and that after the word "benevolent" appear in the original will, and this points plainly to the conclusion that "public" was intended as an alternative to "benevolent or charitable." In other words, that the clause must be read disjunctively.

The authorities as to the effect to be given to punctuation in a will are not quite uniform. In *Sanford* v. *Raikes* (5), SIR W. GRANT says (1 Mer. at p. 651): "That it is from the words, and from the context, not from the punctuation, that the sense of a will must be collected"; and in *Gordon* v. *Gordon* (6) LORD WESTBURY said obiter that he concurred in the opinion so expressed by SIR W. GRANT. But there are opinions the other way. WOOD, V.C., in *Oppenheim* v. *Henry* (7) as reported in a note in *Walker* v. *Tipping* (8), SIR JOHN ROMILLY, M.R., in *Gauntlett* v. *Carter* (9), and KNIGHT BRUCE, L.J. (see the note to *Manning* v. *Purcell* (10)), expressed the opinion that the punctuation in the original will might be looked at for the purpose of construction. I think that for this purpose the punctuation of the original will may be looked at, and, reading this clause as punctuated, the words "public, benevolent, or charitable" are clearly to be read disjunctively. It follows that the bequest is bad for uncertainty. In my opinion the appeal should be dismissed.

VISCOUNT HALDANE (read by LORD DUNEDIN).—By the law of Scotland, as by that of England, a testator can defeat the claim of those entitled by law in the absence of a valid will to succeed to the beneficial interest in his estate only if he has made a complete disposition of that beneficial interest. He cannot leave it to another person to make such a disposition for him unless he has passed the beneficial interest to that person to dispose of as his own. He may, indeed, provide that a

A special class of persons, or of institutions invested by law with the capacity of persons to hold property, are to take in such shares as a third person may determine, but that is only because he has disposed of the beneficial interest in favour of that class of his beneficiaries. There is, however, an apparent exception to the principle. The testator may indicate his intention that his estate is to go for charitable purposes. If these purposes are of the kinds which the law recognises in somewhat B different ways in the two countries as charitable, the courts will disregard a merely subordinate deficiency in particular expression of intention to dispose of the entire beneficial interest to a class, and will even themselves, by making a scheme of some kind, give effect to the general intention that the estate should be disposed of for charitable purposes. To the expression "charitable" the courts respectively of the two countries attach the meanings which were discussed in this House in C *Income Tax Special Purposes Comrs.* v. *Pemsel* (11). It is not necessary in this appeal to define the significance of the expression, for all that is necessary on this occasion is to point out that by other decisions of this House, such as *Blair* v. *Duncan* (1), it has been settled that the expression "public purposes" has a wider meaning than "charitable purposes," and includes such that does not fall within the latter expression. To take the illustration given by Lord Robertson in D advising this House in *Blair* v. *Duncan* (1), if a trustee handed over a sum of money to an election fund or a yeomanry regiment he would be giving it for a public, but not for charitable purpose. Trusts for charities have been regarded with favour as constituting a particular class recognised as sufficiently definite to enable a testator to leave his property on such a trust, and to empower a third person to determine the shares in which those falling within the class are to E participate in his bounty. Trusts for public purposes have not been regarded by the courts as constituting a class so particular and definite as to be capable of taking under an analogous disposition. In the case before us the direction to the trustee is to hold the testator's residue

> "for such public, benevolent, or charitable purposes in connection with the F parish of Lesmahagow or the neighbourhood in such sums and under such conditions as they in their discretion shall think proper."

Notwithstanding the reference to Lesmahagow or its neighbourhood, the purposes are not the less of the very general and indefinite character which is all that the word "public" connotes. And I am of opinion that the word "or," especially as G the commas which follow appear in the original will, shows what the testatrix intended was to make a disjunction. The disposition is therefore inoperative as regards the residue, for the trustees are not bound to distribute the property among objects restricted to any defined class which can form a valid object of a disposition. I think that the appeal must therefore be dismissed.

H **LORD ATKINSON.**—Having regard to the wording and punctuation of the clause in the will of the testatrix, on which the question for decision in this case turns, I do not think it can be legitimately construed as if it ran "Public purposes, either benevolent or charitable," or "purposes benevolent or charitable of a public character." I think the Lord Justice-Clerk was right in assuming that the clause meant the same thing as if it ran thus: "Public purposes or benevolent purposes I or charitable purposes"; the conjunction "or" being in each case disjunctive. If the clause stopped there and contained no reference to the parish of Lesmahagow or its neighbourhood it would appear to me to be clear, on the authority of *Blair* v. *Duncan* (1), that the bequest would be void by reason of the vagueness and uncertainty of the words "public purposes," no particular class or particular classes of individuals or objects being defined or precisely indicated from amongst which the trustees are empowered to make their selection of the recipients of the bounty of the testatrix. The bequest therefore does not satisfy the test suggested by Lord Lyndhurst in *Crichton* v. *Grierson* (12).

No doubt in *Blair* v. *Duncan* (1) there was no indication of a defined area within which the public purposes were to be comprised. The testatrix, to use LORD ROBERTSON'S words,

> "excludes individuals, and then leaves the trustee at large, with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice";

but the vast extent of this "ambit of choice" was not the only thing which, in the opinion of the House, rendered the bequest in that case void. It was rendered void, according to LORD HALSBURY, because a disposition which left it to the trustee to determine what particular public purpose should be the object of the trust was too vague and uncertain for any court, either in England or Scotland, to administer. And it was void, according to LORD DAVEY, because "public purposes" were not so within the description of a particular class of objects as to satisfy the test which LORD LYNDHURST suggested. The purposes which would come within the description were, as he pointed out, vast in number, and were sometimes of a kind which would have reduced the gift in the case before him to an absurdity. It is the insufficiency of these words, "public purposes," because of their vagueness and uncertainty, to identify and fix the limits of the class of individuals or objects from which the trustees are to choose that renders void a bequest for "public purposes." That is their weakness, and that weakness is not cured by coupling them with a definition or description of the physical area within which the public purposes are to be comprised. It may possibly be that the words "public purposes" are more vague and uncertain where the trustees have the whole world as the ambit of choice than where the ambit is limited to a much smaller area, but they are sufficiently vague and uncertain, even if applied to parishes, to render them insufficient to define and fix the limits of the class or classes from which the trustees are to make their selection.

I do not think that this case has the slightest resemblance to those in which property is vested in trustees to be applied for the support or benefit of such institutions of a particular class as may be in existence, or in the course of creation, in any given town or area at the time at which the will speaks. There is no vagueness or uncertainty in such cases at all. The class from which the trustee is to make his choice can be at once ascertained and identified; but if, as in *Shaw's Trustees* v. *Esson's Trustees* (4), the trustees are not confined to applying the trust funds for the benefit of such institutions, objects, charitable, benevolent, or religious, as they may select from amongst those existing in the limited area at the time from which the will speaks, but are at liberty to institute within the area any new religious objects or purposes they think fit, the whole definition then becomes loose again. This was well pointed out by LORD STORMONTH-DARLING in his judgment in the latter case. It is, I think, fallacious to contend that because it must now be taken as established that, according to the law of Scotland, the courts will give effect to a bequest for charitable purposes to be selected by a third party they ought by analogy to give effect to a bequest for "public purposes" to be similarly selected. As LORD DAVEY pointed out in *Blair* v. *Duncan* (1), the expression "charitable" is not as vague as the word "public," but, whether it be so or not, a long course of decision has established on the one hand the validity of a bequest for such charitable purposes as an individual should select, and on the other the invalidity of a similar bequest for such public purposes as an individual should select.

I think the passage cited from the judgment of LORD LOREBURN in *Weir* v. *Crum-Brown* (13) ([1908] A.C. at pp. 166, 167) by some of the judges in the Second Division has really been divorced from the particular matter to which it referred. LORD LOREBURN said the recipients of the bounty were, amongst other things, to be widowers or bachelors of fifty-five years of age or upwards, whose lives had been characterised by sobriety and other specified virtues. They were to be indigent, a provision which stamps the bequest as charitable. These conditions were not

really canvassed in argument, and need not be further considered, for no one of them is such as to impart to the bequest an uncertainty which will disentitle it in law. The only point seriously made against the contested clause in that will was that the recipients of the charity were to be persons who have "shown practical sympathy in the pursuit of science." LORD LOREBURN then deals with the criticisms made by counsel on this particular clause, and in reference to them makes use of the language quoted. LORD MACNAGHTEN deals with the same clause. He shows that the word "science" is by no means a word of a definite or particular meaning; that there are many enactments in favour of institutions for the advancement of science, and that the generality of the word had never prevented the court from applying to the particular case before it the provisions of the Act under consideration. As to the words "practical sympathy," he said, though not happily chosen, they are perfectly intelligible; that the wish of the testator was to help those who were in need of help and who may have been something, much or little, in the way of promoting some branch of science. LORD ROBERTSON, after saying that the case was perfectly clear, proceeded to say (ibid. at p. 169):

> "If it is said of anyone that he had shown practical sympathy in the pursuits of science, that is merely a roundabout way of saying that he has helped the pursuits of science; just as to show practical sympathy in A. B. means to help A. B. Again, the word 'science' embraces a wide but perfectly ascertainable range of subjects. Accordingly I consider the meaning of this testator to be plain and intelligible."

I do not think that it is legitimate to treat LORD LOREBURN'S observations as laying down an absolute rule for the solution of all doubts in the construction of clauses in wills such as that to be construed in this case. I think the appeal fails and should be dismissed.

LORD SHAW.—By the trust settlement of Mrs. Turnbull she directed her trustees to hold the residue of her estate

> "till such time or times as they shall see fit, and apply the same for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood, in such sums and under such conditions as they in their discretion shall think proper."

The Lord Advocate maintains that this bequest is void from uncertainty, and that, as Mrs. Turnbull left no heirs entitled to succeed to her property ab intestato the residue thereof falls to the Crown as ultimus haeres. Counsel for the appellants, in his admirable argument, admitted that a bequest "for such public, benevolent, or charitable purposes" as the trustees might select would, if these purposes were construed disjunctively, be void. This admission was inevitable in the state of the authorities. These need not be resumed. *Blair* v. *Duncan* (1) and *Grimond* v. *Grimond* (3) are directly in point. But, it was suggested, the words "public, benevolent, or charitable purposes" can, and therefore should, be read conjunctively as meaning charitable purposes which are of a public and benevolent nature. So, it was said, the gift was only meant to be applied to charities, in which case the law would protect it as valid, and would write out therefrom benevolence or charities which are of a private nature. I cannot so read the words themselves. The punctuation also is against such a reading. I beg to give my special concurrence with the opinion just delivered from the woolsack on this latter subject. Punctuation is a rational part of English composition, and is sometimes quite significantly employed. I see no reason for depriving legal documents of such significance as attaches to punctuation in other writings. Taking the phrase as it is framed, it seems to me impossible to exclude from its range public purposes as such, and, therefore, public purposes which are not necessarily of a charitable character. Accordingly, everything with a public purpose—say, party political propaganda selected by the trustees for the advantage or proper enlightenment, in their opinion, of the parishioners of Lesmahagow—could be financed from the funds of

Mrs. Turnbull's trust. In the eye of the law charity has this saving grace, that it is held to be by itself denominative of a distinct class. This extends far. But the law has taken a firmer and more rigorous line in regard to public or religious purposes. It demands from the testator the selection by himself of the particular classes of individuals or objects. The classes may be wide, but they must be infinite and clear. The ambit of the classes being thus fixed by the testator, then a power of selection within that ambit may be entrusted to others.

Substantially, the argument of the appellants was that this law against uncertainty, now too well established to be shaken, does not apply in the present case, because the uncertainty and consequent ineffectiveness of the bequest are removed by the local limitations imposed. But local limitations expressed by the words "in connection with the parish of Lesmahagow or the neighbourhood" do not add any definiteness to the class of purposes or objects which it was in the mind of the testator to benefit or promote. The foundation of political clubs, schools of art, a zoological garden, or an astronomical observatory in Lesmahagow, along with a thousand other things in connection with that parish or its neighbourhood, might, in the trustees' opinion, be excellent, but the bequest is void by reason of the uncertainty as to which of them or which class of them the truster meant to favour. This is exactly the reason which invalidates the bequest where there is no geographical reference. Local limitations do come into play and make the bequest effective if and when they provide the means of identifying the particular objects or institutions which the testator has meant to benefit. I am of opinion that the local connection cannot limit the area of selection of purpose, unless the reference of the testator is to persons, societies, agencies, or institutions actually existing or projected to be established in a particular district. I agree respectfully with the opinions in the case pronounced by the Lord Justice-Clerk and Lord Salvesen.

LORD DUNEDIN.—I have had the advantage of seeing the opinion which has just been delivered by the noble and learned Lord on the Woolsack. That opinion so clearly and precisely expressed the views I have formed on the case that it is unnecessary that I should trouble your Lordships with any further remarks.

Appeal dismissed.

Solicitors: *Grahames & Co.*, for *Moncrieff, Warren, Paterson & Co.*, Writers, Glasgow, and *Webster, Will & Co.*, W.S., Edinburgh; *Treasury Solicitor*, for *James Ross Smith*, S.S.C., Edinburgh.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

Re WRIGHT. HEGAN AND ANOTHER *v.* BLOOR AND OTHERS

[CHANCERY DIVISION (P. O. Lawrence, J.), April 30, May 1, June 17, July 16, 1919]

[Reported [1920] 1 Ch. 108; 88 L.J.Ch. 452; 121 L.T. 549; 64 Sol. Jo. 21]

Power of Appointment—Exercise—Fraudulent exercise—Corrupt purpose—Appointment pursuant to bargain beneficial to non-object.

Under a settlement made in 1881 the testatrix had a general power of appointment over part of the trust funds and as to the residue a power to appoint to her blood relations, and in default of appointment such trust funds were given to her next-of-kin. In 1911, on her brother's death, his two sons, who were the executors of his will, wrote to the testatrix to ask her the meaning of an item in their father's written directions to his executors: "Legacy on Mrs. H. Press Wright's death as promised by her, say £2,300." The testatrix on Oct. 9, 1911, wrote to them stating that in 1891 she had verbally agreed with her brother that she would appoint to him or to some of his family £2,000 out of that part of the trust funds comprised in the settlement of 1881 over which she had a special power of appointment in favour of her blood relations on condition he should allow her £80 per annum. The testatrix received this £80 per annum until her brother's death in 1911, and thereafter until her death she received an annuity of £80 per annum under her said brother's will. By her will made in 1917 the testatrix in the first place disposed of the funds over which she had a general power of appointment under the settlement, describing such funds as "the only part of my money I can leave to other than blood relations," and gave certain legacies to blood relations, including £600 to each of her two nephews, the residue to be divided between her sister and the two nephews. No direct reference to the settlement was made in the will.

Held: (i) the will of the testatrix operated as an exercise of the special power of appointment conferred on her by the settlement, as it contained a sufficient reference to such special power and sufficiently indicated that, when making the bequests in favour of her blood relations, she intended such bequests to operate on and be satisfied out of that part of the trust funds over which she had the special power;

(ii) in view of the letter of Oct. 9, 1911, it was clear that the testatrix considered herself bound by the bargain which she had made with her brother, and accordingly the burden of showing that the appointment which she made in favour of her nephews was not made from an improper motive (i.e., that the testatrix had abandoned her corrupt intention) fell on the nephews; and since that burden had not been discharged, the appointment to them was void as being a fraud on the power.

Humphrey v. *Olver* (1) (1859), 28 L.J.Ch. 406, applied.

Notes. Considered: *Re Crawshay, Hore-Ruthven* v. *Public Trustee*, [1948] 1 All E.R. 107. Referred to: *Re Nicholson's Settlement, Molony* v. *Nicholson*, [1938] 3 All E.R. 532; *Re Dick, Knight* v. *Dick*, [1953] 1 All E.R. 559.

As to corrupt purpose in exercising a special power, see 30 HALSBURY'S LAWS (3rd Edn.) 276 et seq.; and for cases see 37 DIGEST 504 et seq.

Cases referred to:

(1) *Humphrey* v. *Olver* (1859), 28 L.J.Ch. 406; 33 L.T.O.S. 83; 5 Jur.N.S. 946; 7 W.R. 334, L.JJ.; 37 Digest 515, *1062*.

(2) *Vatcher* v. *Paull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737, P.C.; 37 Digest 492, *865*.

(3) *Lloyd* v. *Powell Duffryn Steam Coal Co., Ltd.*, [1914] A.C. 733; 83 L.J.K.B. 1054; 111 L.T. 338; 30 T.L.R. 456; 58 Sol. Jo. 514; 7 B.W.C.C. 330, H.L.; 22 Digest (Repl.) 104, *839*.

(4) *Rowley* v. *Rowley* (1854), Kay, 242; 2 Eq. Rep. 241; 23 L.J.Ch. 275; 23 L.T.O.S. 55; 18 Jur. 306; 69 E.R. 103; 37 Digest 516, *1078*.

Also referred to in argument:

Nannock v. *Horton* (1802), 7 Ves. 391; 32 E.R. 158, L.C.; 37 Digest 389, *38*.

Re Huddleston, Bruno v. *Eyston*, [1894] 3 Ch. 595; 64 L.J.Ch. 157; 43 W.R. 139; 8 R. 462; 37 Digest 447, *504*.

Re Marsden's Trust (1859), 4 Drew. 594; 28 L.J.Ch. 906; 33 L.T.O.S. 217; 5 Jur.N.S. 590; 7 W.R. 520; 62 E.R. 228; 37 Digest 513, *1048*.

Re Ackerley, Chapman v. *Andrew*, [1913] 1 Ch. 510; 82 L.J.Ch. 260; 108 L.T. 712; 37 Digest 454, *562*.

Adjourned Summons.

The following facts are taken from His Lordship's judgment.—"By a settlement made in 1881 on the marriage of the testatrix certain trust funds were settled in trust for the testatrix for life and after her death as to part of the trust funds, consisting of the balance of a legacy of £1,000 therein mentioned, on trust for such persons as the testatrix should by deed or will appoint, and as to the residue of the trust funds on trust for such of the blood relations of the testatrix as she should in like manner appoint, and in default of appointment on trust for her next-of-kin. By her will, dated Jan. 31, 1917, the testatrix in the first place disposed of the balance of the £1,000 legacy, describing such balance as 'the only part of my money I can leave to other than blood relations,' in favour of certain persons therein named. She then proceeded to give certain legacies to blood relations (including a legacy of £600 to each of her nephews the defendants Underwood Fisher and Charles Dickinson Fisher, who were described in the will as children of her late brother Robert Harry Underwood Fisher), and concluded her will by expressing her desire that, after her debts and funeral expenses were paid, the residue of her money, other than the balance of the £1,000 legacy, should be equally divided between her sister Emily Punch and the defendants Underwood Fisher and Charles Dickinson Fisher. As a matter of fact the testatrix had by a deed, executed many years before the date of her will, appointed the balance of the £1,000 legacy in favour of certain other persons, and therefore her will, in so far as it purported to exercise the general power of appointment conferred on her over the balance of the £1,000 legacy, was inoperative. This fact, however, does not affect the construction of her will. The testatrix at the date of her will and of her death had practically no property of her own. I now come to the second question. The relevant facts are shortly as follows: From 1891 down to his death in 1911, Robert Harry Underwood Fisher, a brother of the testatrix, made the testatrix an allowance of £80 a year. By his will he bequeathed to the testatrix an annuity of £80, which she duly received from the date of her brother's death down to the date of her own death. Shortly after the death of Robert Harry Underwood Fisher, his two sons, the defendants Underwood Fisher and Charles Dickinson Fisher (who were the executors of his will), wrote to the testatrix to ask her the meaning of the following item appearing in their father's written directions to his executors—namely, 'Legacy on Mrs. H. Press Wright's death as promised by her, say, £2,300.' This inquiry evoked a letter from the testatrix dated Oct. 9, 1911, in which the testatrix in effect stated that in the spring of 1891 she had verbally agreed with her brother that he should give her £80 a year on condition that she would on her death appoint to him or to some of his family the sum of £2,000 out of that part of the trust fund comprised in the settlement of 1881 over which she had a special power of appointment in favour of her blood relations. The testatrix died on July 18, 1917, having by her will, dated Jan. 31, 1917 (as I have already held), exercised her special power of appointment by appointing (inter alia) a legacy of £600 and a

share in the residue to each of her nephews, the defendants Underwood Fisher and Charles Dickinson Fisher. There is no evidence of the bargain which the testatrix says she had made with her brother other than such evidence, if any, as is afforded by the letter of Oct. 9, 1911."

In those circumstances the plaintiffs, who were both the executors of the testatrix Marian Lucy Wright's will and also the trustees of her settlement made in 1881, issued this summons to determine whether and to what extent Marian Lucy Wright by her will duly exercised the power of appointment in favour of her blood relations conferred on her by the settlement, and, if answered in the affirmative as regards the defendants Underwood Fisher and Charles Dickinson Fisher, whether the appointment to them contained in the said will was void as being a fraud on the power. The defendants were Underwood Fisher and Charles Dickinson Fisher claiming as appointees under the will, and a defendant claiming to be one of the next-of-kin, and as such a beneficiary under the settlement, and two other defendants who claimed to be appointees under the will. There were no issue of the marriage of the testatrix.

E. F. Ball for the plaintiffs.

F. C. Watmough for the defendant Herbert Thomas Bloor, one of the next-of-kin.

C. G. Church for the defendant Emily Punch, the sister of the testatrix, one of the next-of-kin and an appointee under the will.

G. M. Hildyard for the defendants the two nephews of the testatrix.

Cur. adv. vult.

July 16, 1919. **P. O. LAWRENCE, J.**, read the following judgment.—This summons raises two questions for determination by the court—viz., first, whether the testatrix has in fact exercised a special power of appointment conferred on her by her marriage settlement; and, secondly, if she has, whether, in so far as she has exercised such power in favour of the defendants Underwood Fisher and Charles Dickinson Fisher, such exercise was a fraud on the power and therefore void. The first question depends upon the construction of the will of the testatrix.

I think that (regard being had on this point to the authorities) it is doubtful how far the fact that the testatrix at the date of her will and of her death had practically no property of her own ought to be taken into consideration in determining whether her will operated as an exercise of the special power. Apart, however, from this fact, I have come to the conclusion that the will of the testatrix did operate as an exercise of the special power, both as to the legacies and as to the residue given by her to her blood relations. The will is divided into two parts. In the first part the testatrix deals with the balance of the £1,000 legacy in favour of persons not being blood relations. In the second part the testatrix makes bequests solely in favour of blood relations. In my opinion, the statement by the testatrix in her will that the balance of the £1,000 legacy was the only part of her money which she could leave to other than blood relations is a sufficient reference to the special power, and sufficient indication that in making the bequests in favour of her blood relations she intended to exercise her special power of appointment. Such statement, in my opinion, also shows that the testatrix had in view the subject-matter of the special power when making the bequests in favour of her blood relations, and sufficiently indicates that she intended such bequests to operate on and to be satisfied out of that part of the trust funds comprised in the settlement of 1881 over which she had the special power. In answer to the first question, therefore, I propose to make a declaration that the will of the testatrix operated as an exercise of the special power of appointment conferred upon her by the settlement of 1881, both as regards the legacies and as regards the residue bequeathed in favour of her blood relations therein named.

The defendants Underwood Fisher and Charles Dickinson Fisher contend that the letter of Oct. 9, 1911, is not admissible in evidence against them, and that the appointment to them is valid. In my opinion the appointees may be right in their contention to this extent, that the letter is not admissible against them as

evidence that the alleged bargain was in fact made. It is argued on their behalf that the statements in the letter amounted at most to admissions by the testatrix which could have been used against her if she had at any time denied the bargain, but that, as such admissions are not admissions against interest, they are not admissible in evidence against them. The next-of-kin have not seriously contended that the letter is admissible on the ground that it contains admissions against interest consequently I prefer not to express any opinion on this point, but propose to deal with the case as if the letter were not admissible on the ground that it contained admissions against interest. The main contention of the next-of-kin, however, is that, in order to invalidate the appointment, it is not essential for them to prove that such a bargain was in fact made. They say that it is sufficient for them to prove an improper motive inducing the appointment, and that the letter contains evidence that the appointer was actuated by an improper motive in making the appointment and is on that ground admissible. In order to determine the question which thus arises, it is, I think, necessary to have clearly in mind what it is that the next-of-kin have to prove in order to establish that the appointment is void as a fraud on the power. The most common case of a fraud on a power is where a donee of a special power of appointment makes an appointment intended to benefit himself or some other person not an object of the power. In such a case the execution of the power is corrupt and void because the power is not exercised bona fide for the end designed. It is, I think, important to bear in mind that in such cases it is not necessary to prove a bargain between the donee of the power and the appointee: see per LORD PARKER in *Vatcher* v. *Paull* (2), [1915] A.C. at p. 378. What the court looks to is the intention or purpose of the appointor in making the appointment, and, if it can be shown that the intention or purpose of the appointor was such that if carried out it would operate as a fraud on the donor of the power, in the sense of benefiting some person not an object of the power, the court will avoid the appointment, although the appointee was no party to and did not know of the corrupt intention or purpose, and although the corrupt intention or purpose in fact fails to take effect. In such cases what has to be proved is the intention of the appointor at the time when the power was exercised, which frequently necessitates evidence being given as to the state of mind of the appointor at that date. It is well established that the words as well as the acts of a person are admissible as evidence of his state of mind: see per LORD MOULTON in *Lloyd* v. *Powell Duffryn Steam Coal Co., Ltd.* (3), [1914] A.C. at p. 75. In the cases to which I have alluded the vice of the appointment consists of the intention or purpose of the appointor that the appointment when made should in some way operate for the benefit of the appointor or for some other person not an object of the power. But there are other cases in which a corrupt or improper motive without any such intention or purpose will undoubtedly vitiate an appointment made in exercise of a special power. In cases where it is not suggested that the donee of a special power has exercised the power with the intention of benefiting himself or some other person not an object of the power the court will not as a rule examine into the motive which may have induced the donee to exercise that power in favour of a particular object of the power. The donee is entitled to prefer one object to another from any motive he pleases, and however capriciously he exercises the power the court will uphold it. But, in my opinion, this rule does not apply where the motive is corrupt or improper, even although the appointment is made in favour of an object of the power and the intention and purpose of the appointor is that the appointee should take the whole of the appointed fund unconditionally for his own benefit.

An example of such a corrupt or improper motive, where the intention and purpose of the appointment itself cannot be said to be otherwise than in accordance with the end designed by the donee of the power, is to be found in the case of a bribe being given or promised to the donee of the power in order to induce him to make an appointment in favour of one of the objects of the power to the exclusion or detriment of the others: see per WOOD, V.-C., in *Rowley* v. *Rowley* (4), Kay

at p. 262. Any such appointment would, in my judgment, be void, even although the bribe were given or promised by a third party, and without the knowledge of the appointee. In such a case, moreover, I do not think that in order to avoid the appointment it is essential to prove that a bribe has in fact been given or promised. In my judgment it is sufficient if it can be shown that the donee of the power has made the appointment in consequence of a bribe which he alleges has been given or promised to him. If it is once proved that the appointment is made in consequence of an alleged bribe, the motive inducing the appointment ought, in my opinion, to be held improper without pausing to inquire whether the allegation by the appointor that the bribe was made or promised is or is not true in fact. Take the case of a testator having a special power to appoint by will and making a will reciting that in consideration of a money payment made to himself he had agreed to appoint the fund to one of the objects of the power to the exclusion of the others, and then making an appointment in favour of that object, expressly stating that it was made in pursuance of the recited agreement. In such a case the court would not, in my opinion, go into the question whether the recited agreement had in fact been made or not, but would hold the appointment to be void, even though it could be shown that no such agreement had in fact been made. If that is the right conclusion in such a case, the further question arises whether it makes any difference if the donee of the power, instead of stating the improper motive in the instrument exercising the power, states it in a separate document, or by word of mouth. In my judgment it does not.

The principle is the same although in such a case evidence dehors the instrument exercising the power will have to be given to prove the improper motive. I have not been referred to, nor have I been able to find, any reported case in which the court has set aside an appointment made in exercise of a special power on proof that it was made in consequence of a bribe where there is no evidence that such a bribe was in fact given or promised. I have come to the conclusion, however, that on principle the court ought to set aside such an appointment if it is satisfied that the appointor made the appointment under the belief that he was bound by a corrupt bargain, or even without any evidence as to his belief, if the appointor states that he had made such a bargain and that he intended to carry it out, and then makes an appointment in accordance with it. If, as I think, the true test of the validity of an appointment made in exercise of a special power is whether the appointor has or has not exercised the power bona fide for the end designed, I am of opinion that evidence of the state of mind of the appointor at the time he made the appointment, going to show his motive and intention in making the appointment, is admissible as well as in a case in which the appointment is challenged on the ground that it is made from a corrupt motive, although intended for the exclusive benefit of an object of the power, as in a case in which the appointment is made with the intention or purpose that the appointor or some person not an object of the power should derive some benefit from the appointment, and, further, that the statements made by the appointor as to his motives and intentions are admissible as well in the one case as in the other. It follows from what I have said that in my opinion, if it is proved that an improper motive is the avowed reason for making the appointment, it vitiates the appointment whether the appointor had or had not good cause to be actuated by such a motive, and whether the appointees knew of the motive or not.

In the result, for the reasons I have stated, I hold that the letter of Oct. 9, 1911, is admissible. Now, when this letter is looked at, it, in my opinion, clearly shows that the writer considered herself bound by a bargain to execute the special power of appointment conferred on her by the settlement of 1881 in favour of her brother or of some members of his family to the extent of £2,000 in consideration of her brother making her an allowance of £80 a year. It also shows her fixed determination at that time to carry out her part of the bargain. There is no evidence to show that her belief in the existence of the bargain was unfounded, and it is not suggested, much less proved, that the payment and bequest by the brother of

the £80 annuity is attributable to any other cause than the alleged bargain. It is argued, however, that, even if that be so, the letter only shows the state of mind of the writer at the time it was written in October, 1911, and that it is not evidence of her state of mind in January, 1917, when she made her will exercising the power. It is further argued that the appointment which she made to the two defendants was not in accordance with the bargain stated in the letter to have been made by her and therefore ought not to be held to have been made in pursuance of it. In my judgment both these points are covered in principle by the decision of the Court of Appeal in *Humphrey* v. *Olver* (1). In that case it was held that if a corrupt intention is shown to have ever been entertained, the burden of showing that it was abandoned previously to the execution of the power lay on those who supported the appointment. It is true that *Humphrey* v. *Olver* (1) was a case in which the corrupt intention said to have been entertained was an intention that the donee of the power should benefit by the appointment, but, as, in my opinion, the state of mind of the appointor when making the appointment is the relevant fact both in such a case and in a case like the present, I think that the principle of that decision applies to the facts of this case. The only fact relied on on behalf of the appointees as showing that the appointor had in 1917 abandoned her improper motive is that the benefits appointed to the members of her brother's family do not amount in value to £2,000.

In my opinion, this, if true, does not afford the requisite proof of an abandonment by the appointor of her corrupt motive. The exact value of the investments representing the trust funds subject to the special power at the date of the appointor's will has not been proved. So far as I can judge, the value of the funds appointed to the members of the brother's family, if the investments had stood at par, would have approximated £2,000. In any event the amounts appointed to the defendants Underwood Fisher and Charles Dickinson Fisher are far greater in value than any sum or share appointed to any of the other blood relations mentioned in the will, and there are a number of blood relations who have been excluded altogether. For the reasons above stated I hold that the appointment as regards the defendants Underwood Fisher and Charles Dickinson Fisher is void as being a fraud on the power, and I propose to make a declaration accordingly. The costs of all parties as between solicitor and client will be retained and paid by the trustees of the settlement out of the unappointed residue of the trust funds.

Solicitors : *Hughes, Hooker & Co.*; *Michael Abrahams, Sons & Co.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

ISAACS *v.* HOBHOUSE

[Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), November 27, 28, 29, December 3, 5, 1918]

[Reported [1919] 1 K.B. 398; 88 L.J.K.B. 668; 120 L.T. 331]

Court of Appeal—New trial—Surprise—Jury action—New issue raised by defendant at trial—No application by plaintiff for adjournment—Continuance of trial some days after knowledge of new issue.

In an action for libel, tried with a jury, questions arose as to what took place at two interviews between the parties. On the pleadings the dates of those interviews were not in issue. On the second or third day of the trial, the plaintiff became aware that the defendant was going to put the date of the first interview some five months earlier than he had thought was the case. The plaintiff had no evidence then available in support of his recollection that the date was the later one. He made no application for an adjournment to procure evidence on the new issue. The trial continued for several days further, ending in a verdict for the defendant. The plaintiff having applied for a new trial on the ground of surprise,

Held: as the plaintiff had not applied for an adjournment to procure fresh evidence, he must be taken in the circumstances to have elected to take his chance of obtaining a verdict on the evidence as it stood, and was not entitled to a new trial.

Notes. As to when a new trial will be granted, see 30 Halsbury's Laws (3rd Edn.) 473 et seq.; and for cases see Digest, Pleading and Practice 592 et seq.

Cases referred to:

(1) *Hippolyte Sohm* v. *Kilsby* (1914), The Times, March 21.

(2) *Harrison* v. *Harrison* (1821), 9 Price 89.

Also referred to in argument:

Shedden v. *Patrick and A.-G.* (1869), L.R. 1 Sc. & Div. 470; 22 L.T. 631, H.L.; Digest (Practice) 603, *2440*.

Nash v. *Rochford Rural Council*, [1917] 1 K.B. 384; 86 L.J.K.B. 370; 116 L.T. 129; 81 J.P. 57; 15 L.G.R. 103, C.A.; Digest (Practice), 603, *2437*.

The Olympic and H.M.S. Hawke, [1913] P. 238; 28 T.L.R. 319, C.A.; Digest (Practice) 776, *3406*.

Tharpe v. *Stallwood* (1843), 1 Dow. & L. 24; 5 Man. & G. 760; 6 Scott, N.R. 715; 12 L.J.C.P. 241; 7 J.P. 400; 7 Jur. 492; 134 E.R. 766; 18 Digest (Repl.) 377, *1283*.

Richards v. *Symes* (1742), 2 Atk. 319.

Application for a new trial of an action for libel.

The plaintiff was the managing director of the Marconi Wireless Telegraph Co., Ltd., and the defendant was at the material dates His Majesty's Postmaster-General. The action arose out of a statement made by the defendant in the House of Commons on Mar. 19, 1918, and which, at the plaintiff's request, he repeated in two letters published in certain newspapers. The statement in the House of Commons was made with regard to a statement made by counsel in opening the case for the Marconi company at the hearing of a petition of right by the company against the Crown, claiming a declaration, in effect, that the company were entitled to damages in consequence of the repudiation of a contract for the construction of certain long-distance imperial wireless stations. Early in 1914 the defendant went to Berlin in connection with wireless telegraphy, and visited the wireless station of the Telefunken company. In July, 1914, he received a letter from that company, signed by two directors, in which it was stated that, when the defendant was in Berlin, he made an offer to the company that they should start in competition in England with the Marconi company. Two interviews took place between

the plaintiff and the defendant, and the statements complained of as libellous related to what took place at those interviews. The plaintiff, in a letter of June 29, 1916, to the then Postmaster-General, stated that he was astonished to hear that the defendant now alleged that there was no foundation for the statement contained in the letter from the two directors of the Telefunken company; that, early in 1915, he met the defendant first at his private house, at his request, when he informed him personally of the contents of the letter, and shortly afterwards, also at his wish, at the Royal Automobile Club; that "on both occasions he (the defendant) admitted that he did make the offer in question to the Telefunken, but said he did so because he thought that competition would be a very good thing for the country, although he had since recognised that as a Minister of the Crown he should not have done so, and he asked me what it was my intention to do. He pointed out that I had my foot on his neck. Did I intend to crush him, which would mean his leaving the Government, or was I disposed to help him?" The defendant in his statement to the House of Commons denied that he had tried to induce the Telefunken company to start a factory in England in competition with the Marconi company. He said that the first meeting with the defendant, which he thought not an unfriendly one, was inconclusive, and he kept no note of it, and he read a note which he made when he returned to his home as to what happened at the second interview with the plaintiff, and said that if his note was accurate the plaintiff's account was a pure fabrication; that the statement in the Telefunken company's letter was entirely and wholly untrue, and that the plaintiff had taken advantage, in the absence of witnesses, to give a wholly untrue and malicious account of the private interview. The defendant pleaded justification.

The action was tried before DARLING, J., and a special jury. The trial began on Tuesday, July 16, 1918, lasted eight days, and ended on Thursday, July 25, in a verdict for the defendant. The plaintiff applied for a new trial on several grounds, including surprise. An affidavit was made by the member of the firm of solicitors who had the conduct of the plaintiff's case, which stated in substance as follows: In preparing the plaintiff's case, it became his duty and the duty of the plaintiff's counsel to consider the issues and side issues which would or might arise at the hearing with particular regard to the evidence which would have to be given at the trial and to the witnesses to be called on behalf of the plaintiff. As appeared from the statement of claim, the plaintiff's case was that he had two interviews with the defendant following one on the other in the early part of 1915, the first at the defendant's house and the second at the Royal Automobile Club. In view of the defendant's statement in the House of Commons, it appeared to be quite clear that the plaintiff's accuracy as to the dates and places of the two interviews was not disputed by the defendant. In the above circumstances, it appeared manifest when preparing for trial that there was no issue between the parties as to the approximate dates of the said interviews. Had it appeared that there was, or was likely to be, an issue as to the dates, he would have taken proofs from, and secured the attendance of, witnesses who were in a position to corroborate the plaintiff on this point. In that case he would have communicated with, obtained proofs from, and secured the attendance at the trial of, among others, Lord Reading, Mr. Marconi, and the plaintiff's former chauffeur, and would have made inquiries which would have resulted in his obtaining further evidence. In view of no such issue being raised, it appeared to him unnecessary to secure the evidence of these witnesses, and he would not have consented to the hearing being fixed for a date when neither Lord Reading nor Mr. Marconi would be in England if he had any ground for supposing that the plaintiff and defendant would be in direct conflict as to the date of the interview at the defendant's private house. During the trial, it transpired for the first time that the defendant's account of the first interview was that it took place, not in February, 1915, but in September, 1914, "and the question then raised for the first time as to which was the true date became, and throughout the hearing continued to be, a prominent issue in the case, and was relied upon by defendant as directly affecting the credibility of the plaintiff." The

sudden introduction of this issue in the then stage of the proceedings took him completely by surprise, and it was too late to communicate with or secure the attendance of Lord Reading, and to make inquiries among various persons who might have been in a position to speak to circumstances relevant to the question of date. He did, however, learn from the plaintiff that, among such persons, there was his former chauffeur, and immediate steps were taken to trace him (the chauffeur having joined the army), but he was unable to see him and take his statement before the plaintiff's case was closed. The position, therefore, was that no witness other than the plaintiff was or could in the then circumstances have been called at the trial on this question of date, whereas, if he had not been misled in the circumstances above set out into believing that their evidence was wholly unnecessary, he would have secured the attendance of witnesses whose evidence he believed would have corroborated that of the plaintiff on this vital issue as to the date of the first interview. An affidavit by Lord Reading and also affidavits by the plaintiff's son and the chauffeur were produced as to the evidence which they could give on the question of date. Lord Reading in his affidavit said that so long a time had elapsed since the happening of the incidents in question that it was difficult to recollect them in detail, more particularly as he had no personal interest in them, and merely intervened at the request of the defendant. He believed it was early in 1915 that the defendant came to see him, but he had no recollection of the date. The defendant came to see him because they had been associated in the Government, and asked him to convey to the plaintiff his assurance of the untruth of a statement in a letter from the Telefunken company, and a day or two later the defendant inquired whether he could tell him (the defendant) whether the plaintiff would be willing to meet him at his private house, and he (Lord Reading) replied that if the defendant telephoned to the plaintiff and personally asked him to call, he believed the plaintiff would do so.

Hawke, *K.C.*, *Stuart Bevan* and *Hildesley* for the plaintiff.

D. M. Hogg, *K.C.*, and *Eustace Hills* for the defendant.

BANKES, L.J., after holding that there was no reason for granting a new trial on the ground of misdirection, continued: As regards the ground of surprise, there is very little authority on the question under what circumstances the court ought to grant a new trial. Probably this is due to the fact that a plaintiff could formerly elect to be nonsuited, and, in case of surprise, he had the remedy in his own hands by so electing and commencing the proceedings de novo. In the case of surprise the court ought to be slow to listen to an application for a new trial because it is very easy to suggest that some fact has taken a party entirely by surprise, and that, after the trial, he discovered material which would have enabled him to meet the point if he had known of it before. Otherwise, it would be very difficult to restrict the number of applications for a new trial on that ground. There may be cases in which the court will grant relief; but the applicant must first establish the existence of surprise, and then that he did not elect to proceed with the materials at his command, and that there is relevant evidence available which will be likely to affect the result if a new trial should be granted. I will assume that there was surprise due to the fact of the defendant withdrawing from the position which he had taken up in the House of Commons, that there were two interviews between himself and the plaintiff in February, 1915. The discovery of that fact and its effect must be borne in mind. The change of case was indicated on the second or possibly the third day of a trial which lasted eight days, and the material effect, I think, of this indication in the first instance must have been to suggest to the plaintiff that this was a strong point in his favour, because the intimation that the defendant had made a mistake of memory as regards the date was, standing by itself, an intimation of a fact likely to tell in the plaintiff's favour. The next matter to be noticed is that, when the defendant admitted the error and put the date in September, the strength of his case on that point only gradually developed. What, then, was the position of the plaintiff? He may have been in

doubt as to the best course to adopt under the circumstances, but, having regard to the time at which the fact first came to the knowledge of his advisers, we are furnished with a very meagre statement as to what their decision was, and I am not prepared to accept the suggestion that there was not an election to proceed with the materials then at their command. That would be sufficient to dispose of the application for a new trial on the ground of surprise. In the absence of sufficient evidence to satisfy me on that point, I am not prepared to grant a new trial on the ground of surprise. Even if I were wrong in that view, I do not think that the evidence which is suggested to be now available is sufficient to be likely to make any difference in the result of a new trial. There are three affidavits, one by Lord Reading, which is an affidavit one would expect from him, stating nothing more than what he absolutely remembers and is able to pledge himself to, another by the plaintiff's son and the third by the chauffeur. [His Lordship referred to the affidavits, and came to the conclusion that a new trial should not be granted.]

WARRINGTON, L.J.—I agree, and for the same reasons.

SCRUTTON, L.J., stated that the question as to the date of the first interview was a minor issue involving the credibility of the witnesses, and continued: I now come to the remaining matter which has given me ground for serious consideration —namely, the question of surprise. Late on the second day of the trial, it became moderately apparent that the defendant was going to say that he was mistaken in stating that there were two interviews in February, and that there was only one. On the morning of the third day, Thursday, it became clear that he was going to say so. The trial lasted until the Thursday in the following week. Therefore, for seven days it was apparent that the defendant was changing his ground. It is said that the plaintiff was surprised by this, and that, in consequence, he lost the opportunity he would otherwise have had of giving evidence relevant to the question whether there were two interviews in February, 1915, or only one. We have seen the affidavits, and, while I am not impressed with the strength of the evidence, it must be borne in mind that they are relevant only to a minor issue. I do not doubt that the change of date came as a surprise to the plaintiff's advisers. Under what circumstances can a party, who has not at the time asked for an adjournment in order to get fresh evidence to meet this new aspect of the case, but who has gone on and taken his chance of getting a verdict on the evidence he had, be allowed to have a new trial on the ground of surprise? A certain time must be allowed for the effect of surprise to wear off. In the first excitement of surprise, the party's advisers may probably not take such a clear view as they do afterwards. In a case that lasts only a day or less there is little time to appreciate the effect of a change of front. In *Hippolyte Sohm* v. *Kilsby* (1) the trial apparently lasted only a day or less. That case was tried with a common jury under Ord. 14 without pleadings, and a new case was set up at the trial of which there was no trace before. The court granted a new trial on the ground of surprise. But if the court thinks that there was time for the effect of the surprise to wear off, so that counsel and solicitors for the party had time to realise the position, and went on, knowing that there was a witness in England who might give evidence—and in this case the chauffeur was in England—and not making any application for an adjournment to call him, the court can draw no other inference than that they elected to take their chance.

I believe that there have been recent cases in which that has been said, but I cannot trace them. There is, however, an old case of *Harrison* v. *Harrison* (2), decided at a time when the remedy was to ask for a nonsuit, in which a new trial was applied for on the ground of surprise. There, the application for a new trial was founded on affidavits stating that the witnesses on the part of the defendant, who had sworn that the plaintiff acknowledged having received the money sued for, had been suborned. The court, on ascertaining that the plaintiff, after he heard

of this, went on without applying to be nonsuited, discharged this rule for a new trial. WOOD, B., said (9 Price at p. 92):

> "The ground of the application was surprise. I have no doubt that the plaintiff was surprised, when the defendant proved his acknowledgment of having received money from him, for which he had not thought proper to account, and was proceeding to recover by this action. If that had not been true, he should have requested to be nonsuited, that he might have become better prepared in another action; but he chose, notwithstanding, to go on and take the chance of a verdict, by letting the case go to the jury, in the hope, perhaps, that they would disbelieve the plaintiff's witnesses. Now suppose we should grant a new trial: the plaintiff might again take the chance of being believed, and if not, he might apply to the court again on the same grounds. It would become a common course on all occasions of failure, if this were to be tolerated, for a plaintiff, instead of choosing to be nonsuited, as he ought to have done in this case, for that is the only proper course, to try first what the jury will do for him, and if he should fail, he will then apply to the court out of which the record issues, for a new trial. It is impossible to grant or listen to such an application."

That expresses what I believe to be the present view, with this difference, that the plaintiff cannot apply for a nonsuit. The party must say, "There is a complete change of front; I can get the evidence to deal with it which I could have got if I had known earlier of the change of front; grant me an adjournment." In my view, allowing a reasonable time for the party to get over the effect of the surprise, if once he appreciates the position and goes on and takes his chance, and loses, he cannot then afterwards apply for a second chance so as to enable him to call those witnesses. For this reason, I think that the application on the ground of surprise fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Coward & Hawksley, Sons & Chance*; *Beaumont & Son.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

ESQUIMALT AND NANAIMO RAIL. CO. *v.* WILSON AND ANOTHER
ESQUIMALT AND NANAIMO RAIL. CO. *v.* DUNLOP

[PRIVY COUNCIL (Lord Birkenhead, L.C., Viscount Haldane, Lord Buckmaster, Lord Atkinson and Duff, J.), July 15, 17, October 23, 1919]

[Reported [1920] A.C. 358; 89 L.J.P.C. 27; 122 L.T. 563; 36 T.L.R. 40; [1919] 3 W.W.R. 961; 50 D.L.R. 371]

Practice—Parties—Attorney-General—Joinder as defendant—Proceedings which may affect Crown rights.

In cases where the action, if successful, would affect the rights claimed by the Crown, the Attorney-General, as representing the interests of the Crown, is a necessary and proper party and may be joined as defendant by the plaintiff.

Notes. Petitions of right were abolished by the Crown Proceedings Act, 1947 (6 HALSBURY'S STATUTES (2nd Edn.) 46), s. 1, and claims which prior to the coming into operation of the Act were enforced subject to the grant of the royal fiat, by petition of right, may from that date be enforced as of right and without a fiat by legal proceedings taken against the Crown. The Act does not affect the law enforced in courts elsewhere than in England and Scotland or the procedure in any such courts (s. 52).

Distinguished: *A.-G. of Ontario* v. *McLean Gold Mines*, [1926] 3 W.R. 193; *Keewatin Power Co.* v. *Keewatin Flour Mills* (1926), 59 O.L.R. 406. Considered: *Tuxedo Holding Co.* v. *University of Manitoba*, [1930] 3 D.L.R. 250. Distinguished: *Royal Trust Co.* v. *A.-G. of Alberta*, [1936] 2 W.W.R. 337. Considered: *Knox* v. *Baker* (1937), 51 B.C.R. 62; *R.* v. *Bradley*, [1941] S.C.R. 270; *Re Flavelle Estate*, [1943] O.R. 167; *Greenlees* v. *A.-G. of Canada*, [1945] O.R. 411; *Gruen Watch Co.* v. *A.-G. of Canada*, [1950] O.R. 429; *Miller* v. *R.*, [1950] S.C.R. 168; *C.P.R.* v. *A.-G. of Saskatchewan*, [1951] 3 D.L.R. 362. Applied: *Deeks Sand and Gravel Co., Ltd.* v. *R.*, [1953] 4 D.L.R. 255. Considered: *Re Todd and Walker*, [1955] 1 D.L.R. 495. Followed: *Re Carnaghan and Ontario Municipal Board*, [1955] O.R. 189. Applied: *Carnaghan* v. *Yates* (1956), 2 D.L.R. (2d.) 651. Considered: *Zucco* v. *Workmen's Compensation Board* (1956), 20 W.W.R. 257.

Cases referred to:

(1) *Ryves* v. *Duke of Wellington* (1846), 9 Beav. 579; 15 L.J.Ch. 461; 8 L.T.O.S. 66; 10 Jur. 697; 50 E.R. 467; 16 Digest 237, *323*.

(2) *Pawlett* v. *A.-G.* (1667), Hard. 465; 145 E.R. 550; 11 Digest (Repl.) 592, *309*.

(3) *Barclay* v. *Russell* (1797), 3 Ves. 424; 30 E.R. 1087, L.C.; 11 Digest (Repl.) 620, *473*.

(4) *Perkins* v. *Bradley* (1842), 1 Hare, 219; 6 Jur. 254; 66 E.R. 1013; 11 Digest (Repl.) 606, *378*.

(5) *Deare* v. *A.-G.* (1835), 1 Y. & C.Ex. 197; 160 E.R. 80, Ex. Ch.; 11 Digest (Repl.) 592, *311*.

(6) *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. 494; 68 L.J.Ch. 289; 80 L.T. 332; 47 W.R. 385; 15 T.L.R. 202; 43 Sol. Jo. 258, C.A.; affirmed sub nom. *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 17 T.L.R. 139, H.L.; 16 Digest 489, *3718*.

(7) *Dyson* v. *A.-G.*, [1911] 1 K.B. 410; 81 L.J.K.B. 217; 105 L.T. 753; 27 T.L.R. 143; 55 Sol. Jo. 168, C.A.; 11 Digest (Repl.) 593, *314*.

Also referred to in argument:

Hodge v. *A.-G.* (1838), 3 Y. & C.Ex. 342; 160 E.R. 734; 11 Digest (Repl.) 593, *312*.

A.-G. v. *Halling* (1846), 15 M. & W. 687; 16 L.J.Ex. 303; 153 E.R. 1027; 39 Digest 302, *793*.

Eastern Trust Co. v. *MacKenzie, Mann & Co., Ltd.*, [1915] A.C. 750; 84 L.J.P.C. 152; 113 L.T. 346, P.C.; 11 Digest (Repl.) 593, *315*.

Taylor v. *A.-G.* (1837), 8 Sim. 413.

Appeals from orders of the Court of Appeal of British Columbia ([1919] 2 W.W.R. 147), allowing an appeal from orders of MACDONALD, J. (41 D.L.R. 737), so far as they ordered that the Attorney-General for British Columbia should be added as a defendant in actions brought by the appellants against the respondents in the Supreme Court of that province.

The facts are set out in the judgment of the Board.

E. P. Davis, K.C., M. Macnaghten, K.C., and *H. B. Robertson* for the appellants.

S. S. Taylor, K.C., for the respondents.

LORD BUCKMASTER.—The question that is raised by these appeals is a question of procedure, technical in its nature, but doubtless of great importance both to the appellants and the respondents. It is simply whether the Attorney-General can and ought to be added as defendant to proceedings in which the appellants are plaintiffs and the respondents are the defendants. Although the merits of these actions are in no way involved in the determination of this point, it is necessary that the facts should be stated in order that it may be clearly understood in what capacity and for what purpose it is sought that the Attorney-General should be brought before the court.

The following facts are taken from the first of the appeals, but, so far as the point for determination before their Lordships is concerned, the appeals are identical and it is unnecessary to state the facts in both. On April 21, 1887, the Crown, in the right of the Dominion of Canada, granted to the appellants, a railway company duly incorporated and having its head office in Victoria, British Columbia, the fee simple of a large tract of land in the island of Vancouver. On Dec. 24, 1890, the company granted the surface rights of part of this land to Joseph Ganner. On Jan. 26, 1904, Ganner died, and the respondents in the first appeal are his executors and trustees. Joseph Ganner was one of the original settlers on the island, and, accordingly, his representatives became entitled to the benefit of the provisions of the Vancouver Island Settlers' Rights Act, No. 54 British Columbia Statutes, 1903–4, which received the Royal Assent on Feb. 10, 1904. Section 3 of that statute is in the following terms:

> "Upon application being made to the Lieutenant Governor-in-Council within twelve (12) months after the coming into force of this Act, showing that any settler occupied or improved land within said railway land belt prior to the enactment of ch. 14 of 47 Victoria, with the bona fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him, or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

Many of the settlers, and among these the representatives of Joseph Ganner, failed to avail themselves of the rights conferred by this statute within the time thereby limited, and the rights conferred would consequently have lapsed but for another statute of the Province of British Columbia passed on May 19, 1917, called the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, which provided that the Act of 1904 should be amended by striking out the words "within twelve months of the coming into force of this Act" and inserting in lieu thereof "on or before the 1st day of Sept., 1917." Pursuant to the power so obtained, the respondents, as executors and trustees under the will of Joseph Ganner, applied for the Crown grant and obtained the same on Feb. 15, 1918, such grant carrying with it the coal rights under the surface. To ascertain the effect of this grant, it is

necessary to examine the provisions of "the Land Act in force at the time when the said land was first so occupied or improved by said settler." This was the Land Act of 1875, and, by its provisions, the grant conveyed the fee simple of the land to the settler or his representatives, according to a form known as Form 9, which contained important reservations in favour of the Crown. These reservations are as follows:

"(a) the right to 'resume any part of the said lands for making roads, canals, bridges, towing paths or other works of public utility, or convenience.'

(b) The right to 'enter into and upon any part of the said lands, and to raise and get thereout any gold or silver ore which may be thereupon or thereunder situate, and to use and enjoy any and every part of the same land.'

(c) The right to authorise any person 'to take and occupy such water privileges and such rights of carrying water over any parts of the lands for mining or agricultural purposes.'

(d) The right to authorise any person 'to take from or upon any such land, without compensation, any gravel, sand, stone, lime, timber or other material, which may be required in the construction, maintenance or repair of any roads, ferries, bridges, or other public works.' "

The effect of the legislation and the effect of the grant, therefore, if nothing more had happened, would have been to defeat the grant previously made by the Crown in favour of the appellants, and to reserve to the Crown certain rights which they could not possess if the grant to the appellants were undisturbed. The appellants allege that the grant to the representatives of Joseph Ganner was inoperative, and instituted the proceedings out of which the first appeal has arisen for the purpose of raising and testing the question.

The action as originally framed claimed a declaration that the Crown grant was null and void so far as it purported to grant to:

"(a) The coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances in, upon, or under the said lands;

(b) That part of the surface of said lands to which or upon which the plaintiff is entitled to exercise acts of ownership, purchase, or rights of easement";

and sought for an injunction to restrain the respondents from working the coal and from attempting to register a title. There was an alternative claim that the grant was null and void in a certain and more limited aspect. In the first instance, the appellants based their claim on the ground that the hearing, which they allege was necessary under s. 3 of the Act of 1904, was improperly held, or, in fact, was never held at all. The respondents, among many other defences, objected that the Crown grant could only be impeached in an action to which the Crown was a party. After the issue of the writ, a petition was presented for disallowance of the statute of 1917. This was disallowed by the Governor-General in Council on May 30, 1918. On June 7, 1918, application was made by the appellants asking that the Attorney-General for the Province of British Columbia might be added as a defendant to the action and that certain amendments should be made in the statement of claim, the most important being that the statute of 1917 had been disallowed. MACDONALD, J., before whom the case was heard, granted the relief sought, but the Court of Appeal overruled his judgment, so far as the addition of the Attorney-General was concerned, and from that judgment these appeals have been brought.

The respondents put forward three grounds on which they say the appeals should fail. First, that there is no need to make the Attorney-General a party. Secondly, if his presence is necessary, a petition of right is, in the circumstances, the only means by which it can be secured; and, thirdly, that, if a petition of right is not applicable, the case does not lie within the ambit of the cases where the Attorney-General can be brought before the court by any means.

With regard to the first of these contentions, their Lordships are clearly of opinion that the Attorney-General ought to be before the court. It is quite true

that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege; but, in the event of the appellants' success, the rights existing in the Crown and consequent on the grant to the respondents will cease. If these interests lay in a third party, he ought certainly to be added as defendant, and that is the best means of testing the necessity of the attendance of the Crown. The learned judges of the Court of Appeal, from whose judgment their Lordships feel compelled to differ on this point, do not refer to the rights of the Crown which may be effected, but base their opinion solely on the ground that the Crown is not affected by the result, and that, consequently, a mere declaratory order against the Crown would be of no value. But for the reservation of the rights already referred to, their Lordships would have agreed with the conclusion. It may further be added that an argument that the Crown ought not to be introduced into the litigation lies strangely on the lips of the respondents, whose definite assertion that the Crown was a necessary party was the real origin of the application that the Attorney-General should be joined.

With regard to the second point, in their Lordships' opinion this is not a case to which procedure by petition of right is properly applicable. Such procedure is adopted for the recovery from the Crown of property to which the applicant has a legal or equitable right, as, for example, by proceedings equivalent to an action of ejectment or the payment of money. In Blackstone's Commentaries (Stewart's Edn., 1841), Book 3, pp. 275–6, it is said that petition of right is of use where the Crown is in full possession of any hereditaments or chattels and the petitioner suggests such a right as controverting the title of the Crown. In the Province of British Columbia, the proceeding is regulated by the Crown Procedure Act of 1897 (R.S.B.C. 1911, c. 63). An examination of this will, in their Lordships' opinion, show that procedure by petition of right is inapplicable. In that statute, the "relief" is defined as a species of relief claimed or prayed for in any petition of right, whether a restitution of any corporal right or a return of lands or chattels or a payment of money or damages or otherwise, following the old principles by which a petition of right has always been regulated. Section 7 shows that, where a petition of right is presented to recover real or personal estate or any right granted away or disposed of on behalf of His Majesty, a copy is to be left at the house of the person last in possession, showing that the main claim is against the Crown, that the person last in possession is not necessarily a proper party to the suit, but that, in order that he may be effected with knowledge, provision is made that he should be served in the manner indicated.

Now, if the appellants were to succeed in this case, no order would be made requiring the Crown to do any act at all. It is due to the peculiar circumstances in which the legislation relating to these lands stands that, if the Crown's grant to the respondents be void, the appellants' estate is complete. All that the Crown could do to perfect the appellants' title has already been done, and it is only through the indirect operation of the grant by the Crown to the settlers that any interest arises in the Crown at all. If the grant fail, the interest fails with it. It may, indeed, be open to argument that the reservations in favour of the Crown cannot be operative where the Crown has already made a grant from which such reservation would derogate. This question was not, however, raised before their Lordships and they express no opinion on it.

There remains the consideration of the question on which much learned argument has been addressed to their Lordships. It is asserted on behalf of the respondents that: "There is no instance of any action in the Court of Chancery or any other court, save the old Court of Exchequer, where the Crown represented by the Attorney-General has ever been defendant, except as a consequence of a petition of right after granting a fiat," and the jurisdiction of the Court of Exchequer is alleged to be due to the application of the statute of 33 Hen. 8, c. 39. Their Lordships cannot accept this contention. The reference to proceedings in Chancery under a fiat confuses two separate methods of procedure. It is, of course, true that proceedings in the Court of Chancery covering such a claim as would

properly be the subject of petition of right cannot be brought except either by the direct medium of such proceedings or by first asking for a fiat that proceedings might be instituted in Chancery; and *Ryves* v. *Duke of Wellington* (1) is an illustration of this fact. But there are many cases in which petition of right is not applicable in which the Crown was brought before the Court of Chancery, and the Attorney-General, as representing the interests of the Crown, made defendant to an action in which the interests of the Crown were concerned, apart altogether from the provisions of the statute of Henry VIII. One of the earliest of such cases was *Pawlett* v. *A.-G.* (2). In that case, the plaintiff had executed a mortgage in favour of a mortgagee; the mortgagee had died, and, his heir being attainted of high treason, the King had seized the lands. The plaintiff thereupon exhibited a bill against the King and the executor, seeking redemption of the mortgage, and the question that arose was whether he could have any remedy against the King for redemption. It was said that he could not, but that he must prefer a petition of grace and favour. It was decided by LORD HALE and ATKYNS, B., that the proceedings would lie, and, though LORD HALE gave as one of his reasons the consideration of the statute of 33 Hen. 8, c. 39, ATKYNS, B., based his judgment on a far broader basis. It was stated in the report that he was strongly of opinion that the party ought in this case to be relieved against the King, because the King was the fountain and head of justice and equity, and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him—a ground of decision which has no relation whatever to the statute of 33 Hen. 8, but is based on general principles. In *Barclay* v. *Russell* (3), the Attorney-General having been made a party to a suit, application was made before LORD THURLOW asking that he might be directed to appear. This, in accordance with practice, he declined to order; but his Lordship asked, when the Attorney-General on behalf of the Crown was a necessary defendant, whether he was served with a subpœna, pointing clearly to the view that the Attorney-General was regarded as being a proper party to proceedings in equity; and *Perkins* v. *Bradley* (4) is another instance of such a case. But it is unnecessary to pursue this matter, for in *Deare* v. *A.-G.* (5), a case on the equity side of the Court of Exchequer, where a bill was brought to obtain discovery against the Attorney-General, the question was examined in some detail by LORD LYNDHURST, then Lord Chief Baron. He stated this (1 Y. & C.Ex. at p. 208):

> "I apprehend that the Crown always appears by the Attorney-General in a court of justice, especially in a court of equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned."

This statement, though made on the equity side of the Court of Exchequer, is certainly not limited to the chancery proceedings that were instituted in that court; it is of wide and general application. It is in entire agreement with the principles enunciated by ATKYNS, B., in the earlier authority, and it is recognised as being the existing practice in courts to-day.

It may be mentioned that, in *Ellis* v. *Duke of Bedford* (6), where the Court of Appeal thought that the rights of the public were involved in the appeal, and that consequently the Crown ought to be represented, judges of such wide experience as LINDLEY, M.R., and RIGBY, L.J., directed that the case should be amended by the addition of the Attorney-General as defendant. The House of Lords thought the amendment unnecessary, but no one questioned that, if necessary, it could be made. Apart, also from statute, the Attorney-General is always added as defendant in chancery proceedings where his presence is necessary on behalf of charities, and their Lordships have not heard of any objection having been taken at any time to his introduction as a defendant in suits so brought. It does not follow from this that procedure by petition of right is in any way infringed. In proceedings for

which a petition of right is the proper course, the courts, as already pointed out, would undoubtedly decline to entertain an action brought against the Attorney-General in the ordinary way; and, indeed, it was this very practice that led to the dispute in *Dyson* v. *A.-G.* (7). In that case, there was no defendant except the Attorney-General, and the claim was for nothing but the declaration that the plaintiff was under no obligation to comply with the provisions of a notice issued by the Commissioners of Inland Revenue on behalf of the Crown. It was there contended that the authorities referred to had no application except in cases in which the rights of the Crown are only incidentally concerned. In all cases where the rights of the Crown are the immediate and sole object of the suit, it was urged that the application must be by petition of right. The question now urged as to the jurisdiction in the Court of Exchequer was raised then before the Court of Appeal, but LINDLEY, M.R., points out that the equity jurisdiction of the Court of Exchequer on the revenue side had nothing peculiar as distinguished from the Court of Chancery. Their Lordships are of opinion that, in making that statement, the learned Master of the Rolls was perfectly accurate, and it is unnecessary to consider, and their Lordships pass no opinion on, whether or no *Dyson* v. *A.-G.* (7) was in other respects properly decided.

Turning back once more to the present case, the claim sought is a declaration not against the Crown, but against grantees from the Crown. If the relief be granted and if the injunction sought be made, there will be nothing directing the Crown to do any act whatever. It is true that, in these circumstances, certain rights which the Crown possesses, if the grant be good, will be interfered with. But, in order to see whether this involves a direct claim against the Crown, it is necessary to see how those rights arose. The position is certainly strange. The original grant by the Crown to the appellants is perfectly good and remains unassailed except to the extent to which it may be defeated by application made by the settlers. If such application be made and granted, there is then reserved to the Crown out of the grant certain powers and rights against the grantee which they would not otherwise possess. In the event of the grant being good, these rights arise; if the grant be bad, they fall with it. But the chief substance of the action is the declaration that the grant is void, and the other result is consequential upon that decree.

Their Lordships, therefore, think that the Crown is affected in this matter, so that the presence of the Attorney-General is proper and necessary for the determination of justice. The conclusion arrived at by their Lordships, though at variance with that of the Court of Appeal, does not, as it appears to them, conflict with the view entertained by the learned judges of the law, but depends entirely on the interpretation which they place on the rights which the Crown possesses unless the grant is overthrown, and this consideration does not appear to have been present to those learned judges' minds. In the result, therefore, they think these appeals succeed, and they will humbly advise His Majesty that the judgment of MACDONALD, J., be restored, and that the costs of the appellants here and in the Court of Appeal be paid by the respondents.

Solicitors: *Linklater & Co.*; *White & Leonard.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

R. *v.* WAKEFIELD

[Court of Criminal Appeal (Darling, A. T. Lawrence and Sankey, JJ.), January 21, 25, 1918]

[Reported [1918] 1 K.B. 216; 87 L.J.K.B. 319; 118 L.T. 576; 82 J.P. 136; 34 T.L.R. 210; 62 Sol. Jo. 309; 26 Cox, C.C. 222; 13 Cr. App. Rep. 56]

Criminal Law—Trial—Juror—Personation—Personation by person not qualified to serve as juror—Venire de novo.

After the appellant had been found Guilty and sentenced on a charge of rape it was discovered that a juror who had been summoned to serve on the jury had not attended at the trial, and that another person, who was not on the panel and was not qualified to serve as a juror, had personated him and had served on the jury to the end.

Held: the appellant having been deprived of his legal right to peremptory challenge and of trial by twelve qualified persons, there had been a mis-trial, and a venire de novo would be awarded.

Notes. Considered: *R.* v. *Bottomley* (1922), 87 J.P. 26; *Ras Behari Lal* v. *King-Emperor*, [1933] All E.R.Rep. 723; *R.* v. *Kelly*, [1950] 1 All E.R. 806. Referred to: *Bannister* v. *Clarke*, [1920] 3 K.B. 598; *Crane* v. *D.P.P.*, [1921] All E.R.Rep. 19; *R.* v. *Cronin* (1940), 162 L.T. 423.

As to the effect of wrong person serving on jury, see 23 Halsbury's Laws (3rd Edn.) 30, 31; and for cases see 30 Digest (Repl.) 265, 266. As to power of Court of Criminal Appeal to order venire de novo, see 10 Halsbury's Laws (3rd Edn.) 540, 541; and for cases see 14 Digest (Repl.) 661 et seq., 679.

Cases referred to:

(1) *R.* v. *Mellor* (1858), Dears. & B. 468; 27 L.J.M.C. 121; 30 L.T.O.S. 309; 22 J.P. 191; 4 Jur.N.S. 214; 6 W.R. 322; 7 Cox, C.C. 454; 169 E.R. 1084, C.C.R.; 30 Digest (Repl.) 265, *287*.

(2) *R.* v. *Baker* (1912), 28 T.L.R. 363; 7 Cr. App. Rep. 217; 76 J.P.Jo. 184, C.C.A.; 14 Digest (Repl.) 661, *6704*.

(3) *R.* v. *Golathan* (1915), 84 L.J.K.B. 758; 112 L.T. 1048; 79 J.P. 270; 31 T.L.R. 177; 24 Cox, C.C. 704; 11 Cr. App. Rep. 79, C.C.A.; 14 Digest (Repl.) 661, *6707*.

Also referred to in argument:

Dovey v. *Hobson* (1816), 6 Taunt. 460; 2 Marsh. 154; 128 E.R. 1113; 30 Digest (Repl.) 265, *289*.

R. v. *Tremearne* (1826), 5 B. & C. 254; 7 Dow. & Ry.K.B. 684; 3 Dow. & Ry.M.C. 528; 4 L.J.O.S.K.B. 157; 108 E.R. 95; 30 Digest (Repl.) 266, *294*.

R. v. *Ingleson*, [1915] 1 K.B. 512; 84 L.J.K.B. 280; 112 L.T. 313; 24 Cox, C.C. 527; 11 Cr. App. Rep. 21; 78 J.P.Jo. 521, C.C.A.; 14 Digest (Repl.) 661, *6706*.

Appeal on a point of law against a conviction of rape before Avory, J., at the Central Criminal Court.

After the conviction and sentence of the accused at the trial it was brought to the notice of the court that one Toley had been summoned to serve on the jury. Toley did not answer to his name, but another man, Clark, who had not been summoned, but was sent to the court by Toley, had answered in Toley's name and served on the jury throughout the case.

St. John Macdonald for the appellant.

A. Bryan for the Crown.

Cur. adv. vult.

Jan. 25, 1918. **DARLING, J.,** read the following judgment of the court.—The appellant was on Dec. 3, 1917, tried at the Central Criminal Court before Avory, J.,

and convicted of rape. He was sentenced to three years' penal servitude. Subsequently it was discovered and brought to the notice of the court that a man named Toley had been summoned to serve on the jury. Toley did not answer to his name, but a man named Clark did and served on the jury to the end. Clark was not qualified to sit on the jury at all. The real question to be determined here is whether this amounted to a mis-trial. We think it did.

A defendant is entitled to be tried before a duly authorised judge and twelve men qualified to be jurors to try him. Many cases have decided that mere irregularity in calling together the jury—mere misnomer of a juryman—is not sufficient to avoid the proceedings. But this case is not of that character, for it is admitted by the Crown that Clark, who presented himself when Toley, a qualified juror, was called, and who served in his place, was not upon the panel and was not qualified to serve as a juror. Our judgment is limited to this case, where all these circumstances apply. But here Toley, a man duly summoned and also qualified to serve, was personated by a man who was in neither case, and so the accused was deprived of his legal right of peremptory challenge and of trial by twelve qualified persons. In *R.* v. *Mellor* (1) are collected practically all the authorities bearing on this question. In this case, as LORD CAMPBELL, C.J., said of that one, "there never were more than eleven jurymen whom the law could recognise." His Lordship added:

> "Upon principle, therefore, there seems to me to have been a mis-trial, as much as if all the twelve jurors who served had been different persons and had different names from the jurors called by the clerk of assize, in which case the prisoner would have been entirely deprived of his right of challenge."

In *R.* v. *Mellor* (1) the majority of the judges composing the court would appear to have been of opinion that venire de novo should have been granted, but to have held that the Court for Crown Cases Reserved had not statutory power to award it, and it does not appear to us that the judges who affirmed the conviction in *Mellor's Case* (1) would not in this one have ordered the case to be tried again had they possessed the powers of this Court of Criminal Appeal. That we have such power has been more than once affirmed in this court (see *R.* v. *Baker* (2) and *R.* v. *Golathan* (3)), and this power has been exercised.

Application was made to us to allow the accused to call evidence not available at the trial and which might put a different complexion on this case. It is not necessary for us to deal with this application now as that evidence can be called at the trial which will be the consequence of this judgment. The conduct of Clark and Toley may well form the subject of investigation by the Director of Public Prosecutions, for personation of a duly summoned juryman may lead to the doing of great harm, and may amount to an attempt to pervert the course of justice and so be punishable as a misdemeanour at common law.

Appeal allowed.

Solicitor: *Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

R. *v.* SMITH

[Court of Criminal Appeal (Darling, Atkin and Shearman, JJ.), June 10, 1918]

[Reported [1918] 2 K.B. 415; 87 L.J.K.B. 1023; 119 L.T. 584; 34 T.L.R. 480; 26 Cox, C.C. 321; 13 Cr. App. Rep. 151]

Criminal Law—Receiving stolen property—Evidence—Finding of other stolen property in possession of accused—Admissibility of evidence of circumstances in which property discovered and statements made by accused in explanation of his possession—Failure of prosecution to prove small portion of property stolen—Effect on conviction—Larceny Act, 1916 (6 *& 7 Geo.* 5, *c.* 50), *s.* 43 (1).

By s. 43 (1) of the Larceny Act, 1916: "Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings—(a) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession . . ."

The evidence which may be given under the above subsection is not limited to the mere fact that other property stolen within the preceding twelve months was found in the possession of the accused, but it includes evidence of the circumstances in which the property was discovered and of statements made by the accused in explanation of his possession of it, as if that property formed the subject-matter of an indictment for receiving it.

On a charge of receiving stolen property evidence that other property not forming the subject-matter of the indictment was found in the possession of the accused may be given by the prosecution before they have proved that the property was stolen property. Should they succeed in proving that a substantial portion of the property was stolen, but fail to prove that a small portion of it was stolen, such failure is not a ground for quashing the conviction.

Notes. As to evidence of possession of other stolen property, see 10 Halsbury's Laws (3rd Edn.) 814, 815; and for cases see 14 Digest (Repl.) 434, 435; 15 Digest (Repl.) 1151 et seq. For the Larceny Act, 1916, see 5 Halsbury's Statutes (2nd Edn.) 1011.

Cases referred to:

(1) *R.* v. *Girod* (1906), 70 J.P. 514; 22 T.L.R. 720; 50 Sol. Jo. 651, C.C.R.; 14 Digest (Repl.) 434, *4220*.

(2) *R.* v. *Ballard* (1916), 12 Cr. App. Rep. 1, C.C.A.; 15 Digest (Repl.) 1151, *11,601*.

Appeal on a point of law against a conviction for receiving stolen property at Birmingham Quarter Sessions.

At the trial the prosecution, in order to prove guilty knowledge, took advantage of the provisions of s. 43 of the Larceny Act, 1916, and gave evidence that other property stolen within the period of twelve months preceding the date of the offence charged was found in the possession of the appellant. They further gave evidence of conversations between a police witness and the appellant both before arrest and afterwards when the police visited the premises of the appellant. The prosecution then proceeded to prove that the larger part of the property found on the premises of the appellant, and which formed the subject of other indictments, was stolen, but with regard to some part of such property they failed to prove that it was in fact stolen.

Hugo Young, K.C., and *Douglas Grierson* for the appellant.
J. G. Hurst, for the Crown, was not called on to argue.

The judgment of the court was delivered by

DARLING, J.—On the trial of this case evidence was properly given that other property stolen within twelve months before the date of the offence charged was found in the possession of the appellant. There was also evidence as to the circumstances under which the stolen property was discovered, and as to the explanations given by the appellant. On behalf of the appellant it has been contended that under s. 43 of the Larceny Act, 1916, the prosecution may give evidence that other property was found in the possession of an accused person, and that it was stolen, but that the prosecution may not give evidence as to the circumstances under which the property was found, nor as to any statements made by the appellant with regard to it, the ground put forward being that the other stolen property is not the subject of the indictment preferred against the accused.

A distinction has been drawn between what is admissible in evidence when stolen property forms the subject of the indictment before the court and when it is merely introduced into the trial to prove guilty knowledge under s. 43 (1) of the Larceny Act, 1916. This court cannot assent to such a distinction. The subsection contains nothing to show that the evidence admissible with regard to other stolen property in order to prove guilty knowledge is to be different from the evidence which would be admissible if an indictment for receiving that other stolen property were being tried. *R.* v. *Girod* (1), which was quoted by counsel for the appellant, is really an authority against him, for in that case statements made by the accused relating to other goods not the subject of the indictment were admitted in evidence in order to show guilty knowledge as to the goods comprised in the indictment. It was never suggested that those statements were not admissible in evidence, or that the prosecution were confined to proving the fact that other stolen property was found in the possession of the accused. The case referred to was alluded to in *R.* v. *Ballard* (2), where LORD READING, C.J., said:

> "If there is evidence that the property was stolen it has to be tendered before the defence has to give an answer. It is impossible for the court to say what answer is going to be made. The point was discussed in *R.* v. *Girod* (1); it is not necessary to examine that case with any care. The court quashed the conviction because the evidence was admitted without any evidence that the property had been stolen."

That shows that *R.* v. *Girod* (1) is not an authority against the prosecution in the present case. We are of opinion that under s. 43 (1) of the Larceny Act, 1916, the same evidence can be given both with regard to statements by the accused and also as to the circumstances under which other stolen goods were found in his possession as if those goods formed the subject-matter of an indictment for receiving those goods.

It was also contended for the appellant that the other stolen property should not have been produced in court, and that no evidence should have been given as to it having been found in the possession of the accused until after it was proved that it had been stolen, and attention was called to the fact that the prosecution failed to prove, in the case of one article, that it had been stolen. It may be that the course suggested by counsel for the appellant is the better one, but it would be difficult to give evidence that goods were stolen without producing them in court, and in any case we do not think that this is a matter on which we could quash the conviction. It is a matter for the discretion of the judge at the trial to adopt whichever course is the most convenient, and this court cannot say that one course is right and the other wrong. If the prosecution give evidence that certain goods not forming the subject of the indictment were found in the possession of the accused, and should then fail, with regard to some of such goods, to prove that

they were stolen, it is open for the judge to point out to the jury this defect in the evidence, and such failure of proof would tell considerably in favour of the accused. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *J. Hall-Wright*, Birmingham; *Philip Baker & Co.*, Birmingham.

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

RHODES *v.* FIELDER, JONES AND HARRISON

[King's Bench Division (Lush and Sankey, JJ.), October 31, 1919]

[Reported 89 L.J.K.B. 15; 148 L.T.Jo. 158]

Solicitor—Agent for country principal—Authority to act in appeal—Fees to counsel for consultations and refreshers properly incurred—Disallowance on taxation—Payment of fees by agent—Authority of principal to revoke authority and right to receive payment of amount expended in fees.

A country solicitor instructed London agents to act for him in an appeal to the House of Lords. The agents instructed counsel and incurred other expenses for consultations and refresher fees. The appeal was successful and costs were awarded to the solicitors' clients, but on taxation as between party and party certain fees to counsel were disallowed. The country solicitor instructed his agents not to pay the fees disallowed, but the agents, who had delivered the briefs, paid the fees out of moneys remaining in their hands. On a claim by the country solicitor against his agents for the amount as money had and received on the ground that he had revoked his authority before the payment of the fees,

Held: the fees having been properly incurred by the London agents, had they refused to pay them they would have been guilty of misconduct, and the country solicitor had no power to revoke his authority.

Notes. As to the relations between London agent and country solicitor, see 31 Halsbury's Laws (2nd Edn.) 290; and for cases see 42 Digest 390, 391.

Case referred to in argument:

Read v. *Anderson* (1884), 13 Q.B.D. 779; 53 L.J.Q.B. 532; 51 L.T. 55; 49 J.P. 4; 32 W.R. 950, C.A.; 12 Digest (Repl.) 86, *475*.

Appeal from a decision of Master Chitty sitting as an arbitrator.

The plaintiff was a country solicitor and had acted for a client in an action in the King's Bench Division in which he had recovered a considerable sum amounting to over £3,000. The Court of Appeal, however, reversed this decision. The plaintiff's client was anxious to appeal to the House of Lords, but was at that time in some difficulty with regard to finding the necessary funds. Eventually after some negotiations the plaintiff arranged with the defendants to act as his London agents, they accordingly instructed counsel to appear on behalf of the appellant, briefs were delivered and certain fees for consultations and refreshers were also incurred. The appeal was heard in the House of Lords where the plaintiff's client was represented by two leading counsel and the appeal was successful, the judgment of the King's Bench Division being restored with costs. On taxation, however, as between party and party certain of the fees to counsel were disallowed. Before the London agents had paid these fees the country solicitor revoked his authority and instructed them not to pay them. The London agents, who had

delivered the briefs felt that there was no course open to them but to pay the fees, and did in fact do so out of the sums which they had received as the proceeds of the successful appeal. The plaintiff thereupon brought this action to recover the amount of the fees so paid as money had and received by the defendants for his use. The action was referred to Master CHITTY. At the trial the plaintiff contended, firstly, that the payment of these fees by the defendants was unauthorised, as he alleged that owing to the financial embarrassment of his client, a verbal agreement had been entered into between the defendants and himself that in the event of the appeal failing the fees to be paid to the two counsel were not to exceed fifty and thirty guineas, and in the event of its proving successful the defendants were not to charge the plaintiff more than the amount allowed on the taxation as between party and party, and secondly that, if this agreement had not been entered into, he had, before the payment of the fees by the defendants, revoked his authority to them as his agents to pay the money to counsel. The master gave judgment for the defendants, on both these points holding that no such agreement as alleged had been entered into, and that the plaintiff had no power under the circumstances to revoke his authority. The plaintiff appealed.

Artemus Jones, *K.C.*, and *G. D. Roberts* for the plaintiff.

Schwabe, *K.C.*, and *Barrington-Ward*, *K.C.*, for the defendants, were not called upon.

LUSH, J., stated the facts, and continued: The plaintiff contends in the first place that the master's decision was against the weight of the evidence, and that he ought to have held that the defendants had no authority to pay these sums as counsel's fees on the ground that there was a verbal agreement between the parties that if the appeal in the House of Lords succeeded the defendants were not to charge the plaintiff for counsel's fees more than the amount allowed on taxation as between party and party. There was a conflict of evidence on this point before the master; he believed the defendants and held that no such agreement had been entered into. [HIS LORDSHIP reviewed the evidence, and continued:] In my opinion, such an agreement is a highly improbable one, and I cannot say that the master's judgment after hearing the evidence was against the weight of that evidence. As to the second point taken by the plaintiff, which was that after the case had been heard in the House of Lords and after consultations had been held with counsel the plaintiff revoked his authority to the defendants to pay these fees; and it was argued that where the country solicitor instructs his London agents to brief counsel, and in the usual way the London agents, without their authority being in any way fettered, have consultations with counsel and incur liabilities towards counsel, the country solicitor can revoke his authority to his London agents and leave them either to default or pay the counsel's fees out of their own pockets. I can only say that, in my opinion, such a position is entirely unsustainable. It is true that the London agents could not be sued by counsel for their fees, but that does not dispose of the question. If the London agents did not pay these fees they would be placing themselves in a very serious position. A solicitor having undertaken to pay fees to counsel and then refusing to pay them, would be guilty of misconduct. It is, therefore, impossible for the country solicitor to say after instructing his London agents that he can revoke his authority. The defendants did what they did at the request of the plaintiff and made themselves responsible as honourable members of their profession for the payment of these fees. I think, therefore, that the master was perfectly right in holding that there was no power to revoke the authority given, and that the appeal must be dismissed with costs.

SANKEY, J., I agree. Counsel for the plaintiff has entirely failed to convince me on the first point that he is right and that the master was wrong. The master after hearing all the oral evidence and reading the correspondence came to the conclusion that no such agreement as was contended for by the plaintiff was in fact

ever come to. In his opinion the plaintiff's story was so improbable that he could not believe it. I think he was perfectly right in coming to that conclusion and that he ought to have come to that conclusion. As to the second point, I so entirely agree with what LUSH, J., has said that I think I should be wasting public time if I added anything further. In my opinion the point is entirely unarguable.

Appeal dismissed.

Solicitors: *E. P. Bastide*; *Thairlwall & Son.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

SMEDLEY *v.* REGISTRAR OF COMPANIES

[KING'S BENCH DIVISION (Darling, Lord Coleridge and Avory, JJ.), November 14, 1918]

[Reported [1919] 1 K.B. 97; 88 L.J.K.B. 345; 120 L.T. 277; 83 J.P. 18; 35 T.L.R. 92; 26 Cox, C.C. 371]

Company—Meeting—Annual general meeting—Default in holding the meeting in calendar year—Time at which offence committed—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 64—*Summary Jurisdiction Act*, 1848 (11 *& 12 Vict.*, *c.* 43), *s.* 11.

By s. 64 (1) of the Companies (Consolidation) Act, 1908 [now s. 131 of the Companies Act, 1948]: "A general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company and every director . . . who is knowingly a party to the default shall be liable to a fine not exceeding £50." By s. 11 of the Summary Jurisdiction Act, 1948 [now s. 104 of the Magistrates Courts Act, 1952] in all cases where no time is specially limited an information must be laid within six months from the time when the matter arose.

The appellant was a director of a limited company which held a general meeting on Mar. 21, 1916, but held no other meeting up to June 18, 1918, on which date an information was preferred against the appellant under s. 64 (1) of the Act of 1908 for that he on Dec. 31, 1917, was knowingly a party to the default of the company in not holding a general meeting in the calendar year 1917.

Held: (by LORD COLERIDGE and DARLING, JJ., AVORY, J., dissenting) section 64 of the Act of 1908 created two offences, that of not holding a meeting in the calendar year and that of not holding it within fifteen months after the last meeting; the offence charged in the information was that of not holding the meeting in the calendar year of 1917; that offence was not committed until Dec. 31 of that year; and, therefore, the information had been laid in time.

Notes. Section 11 of the Summary Jurisdiction Act, 1848, was repealed by the Magistrates Courts Act, 1952, and replaced by s. 104 of that Act [32 HALSBURY'S STATUTES (2nd Edn.) 503]. The Companies (Consolidation) Act, 1908, was repealed and replaced by the Companies Act, 1929, which was itself repealed and replaced by the Companies Act, 1948 [3 HALSBURY'S STATUTES (2nd Edn.) 452], s. 131 of which replaces with substantial amendments s. 64 of the Act of 1908, not, however, affecting the decision in the present case. Section 131 (1) of the 1948 Act for the first time requires the annual general meeting to be convened by that name. The

earlier Acts referred to ordinary and extraordinary meetings. Under the 1908 Act the meeting had to be held within fifteen months of the last preceding general meeting, now it must be held within fifteen months of the last preceding annual general meeting: see also the proviso to s. 131 (1) of the 1948 Act.

As to annual general meetings, see 6 HALSBURY'S LAWS (3rd Edn.) 331, 332; and for cases see 9 DIGEST (Repl.) 598. For the Summary Jurisdiction Act, 1848, see 14 HALSBURY'S STATUTES (2nd Edn.) 768.

Case Stated by a metropolitan magistrate.

At the court of summary jurisdiction, sitting at Marlborough Street on June 18, 1918, an information was preferred by the Solicitor to the Board of Trade on behalf of the respondent, the Registrar of Companies, under s. 64 of the Companies (Consolidation) Act, 1908, against the appellant, Wm. Thos. Smedley, for that he on Dec. 31, 1917, at 128, Piccadilly, W., being a director of the Lyceum Club International, Ltd., a company registered under the Companies Acts, 1862 to 1900, was knowingly a party to the default of the company in not holding a general meeting in the calendar year 1917.

At the hearing of the information it was proved that the company was registered on Feb. 24, 1906. An annual general meeting was held pursuant to s. 64 of the Companies (Consolidation) Act, 1908, on Mar. 21, 1916, and that no such meeting had subsequently been held up to the time of the laying of the information.

For the appellant it was contended that the proceedings were bad in law, as the information was not, in compliance with s. 11 of the Summary Jurisdiction Act, 1848, laid within six calendar months from the time when the matter of such information arose; that the offence, if committed at all, was committed on June 22, 1917, which was more than fifteen months after the holding of the last preceding annual general meeting—viz., Mar. 21, 1916—and that default arose on June 22, 1917, but the information for offence was not laid until June 18, 1918, the interval being, therefore, nearly twelve months. The appellant also contended that the offence was not a continuing one, so that his objection could not be met by that contention, and that s. 64 was the only section of the Act which prescribed a fixed maximum penalty. The appellant further contended that s. 64 must be read as a whole, and that its wording made fifteen months the true test, so long as fifteen months did not carry the date outside a calendar year, and that at the expiration of the fifteen months the subject-matter of the information arose within the meaning of s. 11 of the Summary Jurisdiction Act, 1848, and that therefore the information must be dismissed. It was contended for the respondent: that s. 64 created two several offences, (i) the offence of not holding a meeting within fifteen months from the date of the last preceding meeting, and (ii) the offence of not holding such meeting within each calendar year. That the evidence proved that the second of these two offences had been committed by the appellant. That the year in this case was 1917, so that the offence did not culminate till Dec. 31, 1917, and the information, having been laid on June 18, 1918, was within the statutory limit of six months. That, even if s. 64 did not create two separate offences, it was not open to the appellant to plead that he could not be convicted of an offence in not holding the required meeting in the calendar year 1917 on the ground that he had already committed an offence in not holding such meeting on or before June 21, 1917, because such a defence would rest on an admission that he had committed an unlawful act, and a person charged with an offence could not rely on his own default as an answer to the charge.

The magistrate was of opinion that the information was laid within six months from the matter arising, and being satisfied that the offence had been committed he convicted the appellant.

By the Companies (Consolidation) Act, 1908, s. 64:

> "(1) A general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company and every

director, manager, secretary, and other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds. (2) When default has been made in holding a meeting of the company in accordance with the provisions of this section, the court may, on the application of any member of the company, call or direct the calling of a general meeting of the company."

Patrick Hastings for the appellant.

B. W. Ginsburg (*G. A. H. Branson* with him) for the respondent.

AVORY, J.—I regret that there should be a difference of opinion in this case, but I cannot agree with the majority of the court that the decision of the magistrate was right. I cannot persuade myself that it was right. The decision of the magistrate could only be supported on the ground that the offence was a continuing offence or that s. 64 of the Companies (Consolidation) Act, 1908, creates two offences: (i) default in holding a general meeting in each calendar year, and (ii) default in holding it within fifteen months from the last preceding general meeting. It is admitted for the respondent that the offence is not a continuing offence, and I do not think that the section creates two distinct offences. It is, in my view, important to look at the legislation preceding the Act of 1908. Section 49 of the Companies Act, 1862, provided that "A general meeting of every company under this Act shall be held once at the least in every year," and no doubt the result of that provision was that an interval of two years all but one day might elapse between two successive general meetings of a company, and, moreover, that statute did not provide any penalty for not holding a meeting once at least in every calendar year. The Companies Acts, 1867 and 1900, do not appear to me to touch the point now in question. By s. 24 of the Companies Act, 1907, a provision similar to s. 64 (1) of the Consolidation Act of 1908 was for the first time enacted, and s. 49 of the Act of 1862 was repealed. From the words of s. 64 (1) of the Act of 1908 it appears to me to be clear that the default is made when the company fails to hold its general meeting within fifteen months from the last preceding general meeting and in the calendar year next after that in which that preceding general meeting was held. In the present case the meeting in the year 1916 was held on Mar. 21. In order to comply with this statute it was necessary that a meeting should be held in 1917, and it was further necessary that it should be held within fifteen months from Mar. 21, 1916—i.e., by June 21, 1917. As soon, therefore, as June 21, 1917, had passed there was a default under the statute.

I think it is also useful to look at s. 64 (2) of the Act of 1908. As soon as June 21, 1917, had passed two remedies were open in respect of the default of the company in holding a meeting. A member of the company could make an application to the court to call or direct the calling of a meeting, and any person could take proceedings before justices against the company or against any of its officers who was a party to the default. But, by s. 11 of the Summary Jurisdiction Act, 1848, those proceedings before justices must be taken within six months from the commission of the offence. In my opinion the offence was committed when the default occurred on June 21, 1917, and the proceedings were not taken within six months from that date. The information, which alleged that the offence was committed on Dec. 31, 1917, was not preferred till June 18, 1918. Therefore, if the offence charged was committed on June 21, 1917, it is clear that the proceedings were out of time. The only way to meet that difficulty is to say that the offence is a continuing offence, which is not contended for, or that a separate offence is committed by reason of a meeting not being held in the calendar year 1917. The latter is equivalent to saying that on Dec. 31, 1917, the statute might have been complied with, for, if it is a separate offence not to hold a meeting in the calendar year 1917, then according to that view it would apparently have been a compliance with the statute to hold a meeting on Dec. 31, 1917. But it seems to me impossible to say that there would have been a compliance with the statute by holding a

meeting on Dec. 31, 1917, for the statute expressly requires that the meeting should be held within fifteen months from the preceding meeting. Therefore June 21, 1917, was the latest date on which the statute could be complied with. If the argument for the respondent is sound a person could be prosecuted twice for the same offence. He would be liable in a case like this, to be prosecuted in July, 1917, for not having held a meeting within fifteen months from the last preceding meeting, and he would be liable to be prosecuted again in January, 1918, for not holding a meeting during the calendar year 1917. In my opinion, only one offence is created by the section. It is spoken of as one default. The section does not speak of a default "either in holding a general meeting once in every calendar year or [in the alternative] within fifteen months after the holding of the last preceding general meeting." If the statute had been so framed, the argument for the respondent would have been well founded. But the statute makes it one offence, namely not holding the meeting in the calendar year and within fifteen months from the preceding meeting. The magistrate therefore, in my opinion, ought to have held that the proceedings were out of time as they were taken more than six months after June 21, 1917.

LORD COLERIDGE, J.—The question is whether the magistrate was right in holding that the information was laid within six months from the matter arising. The information was laid on June 18, 1918, and it was in respect of an offence alleged to have been committed on Dec. 31, 1917, against s. 64 (1) of the Companies (Consolidation) Act, 1908. It appears from the facts that the last meeting of the company was held on Mar. 21, 1916, and there is no doubt that if a meeting had been held within fifteen months from Mar. 21, 1916, the Act would have been complied with. But, as no such meeting was held, a summons taken out within six months from June 21, 1917, for not holding a meeting in the calendar year 1917 not more than fifteen months from the preceding meeting would have resulted in a conviction. The question, however, that we have to decide is whether an offence was committed on Dec. 31, 1917. If not, the information was, of course, nugatory as being out of time owing to the lapse of more than six months since the commission of the offence, and if the information had been for not holding a meeting within fifteen months from the last preceding meeting the information would have been out of time. But the question is whether on Dec. 31, 1917, the appellant committed an offence.

It is clear that no meeting was held in the calendar year 1917, and it has been admitted in argument that that was a necessary ingredient in the offence under the section. Therefore on Dec. 31, 1917, the appellant had violated the section as no meeting had been held in that calendar year. It is said that it is not to be held that he had so violated the section, because he had already committed an offence at a previous date. But, without holding that this was a continuing offence from the date of its commission down to Dec. 31, 1917, it is obvious that until Dec. 31, 1917, it was open to the appellant to object that he could not be summoned for not holding a meeting in the calendar year 1917. When, however, Dec. 31, 1917, had passed, it was equally obvious that there had been no meeting in that calendar year. The appellant had thereby committed an offence, possibly a fresh offence, but as a meeting had not been held for many months before 1917 it would not have been open to him to plead that he could hold a meeting within fifteen months from the preceding meeting. Therefore it seems to me that the Act has not been complied with. The date of the offence was alleged in the information, and the evidence showed that on that date there had been no meeting in that year. It was not open to the appellant to plead that he had committed an offence on June 21, 1917, by not holding a meeting within fifteen months from the previous meeting. Therefore the magistrate was right. **DARLING, J.**, asks me to say that he agrees with this judgment. *Appeal dismissed.*

Solicitors: *F. P. Woodcock*; *Solicitor to the Board of Trade.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

SOANES *v.* LONDON AND SOUTH-WESTERN RAIL. CO.

[COURT OF APPEAL (Bankes, Warrington and Duke, L.JJ.), February 20, 1919]

[Reported 88 L.J.K.B. 524; 120 L.T. 598; 35 T.L.R. 267; 63 Sol. Jo. 318]

Carriage of Goods—Railway—Passenger's hand luggage—Loss by porter—Porter employed by company as porter, but not authorised to work at station in question—Holding out of porter by company as authorised servant—Liability of company.

The plaintiff, intending to travel by the defendants' railway, went to the London terminus by taxi. At the station a porter wearing the uniform of the defendant company's porters offered his services to the plaintiff, who entrusted his luggage to him, leaving him in charge of it pending the departure of the train. While the luggage was thus in his possession one of the bags was stolen. The porter was in fact employed by the defendants as porter at one of their other stations and was not authorised to work at the terminus, and at the time in question was off duty. In an action by the plaintiff claiming damages for the loss of the bag,

Held: the defendants had held out the porter as an authorised servant to deal with the luggage, and, therefore, they were liable as common carriers for the loss.

Notes. As to liability of carriers for loss of passenger's luggage, see 4 HALSBURY'S LAWS (3rd Edn.) 168 et seq.; and for cases see 8 DIGEST (Repl.) 133 et seq.

Cases referred to:

(1) *Great Western Rail. Co.* v. *Bunch* (1888), 13 App. Cas. 31; 57 L.J.Q.B. 361; 58 L.T. 128; 82 J.P. 147; 36 W.R. 785; 4 T.L.R. 356, H.L.; 8 Digest (Repl.) 134, *861.*

(2) *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 642; 27 J.P. 147; 11 W.R. 149; 158 E.R. 993; sub nom. *General Omnibus Co., Ltd.* v. *Limpus*, 9 Jur.N.S. 333, Ex. Ch.; 34 Digest 129, *989.*

Appeal from a judgment of the Divisional Court (LORD COLERIDGE and AVORY, JJ.), reversing a judgment of the Southwark County Court.

The plaintiff, who had to use crutches, drove to the defendants' station at Waterloo to catch the 4.50 train. He gave his two bags to a porter who followed him while he took his tickets and then they went to the barrier. The man at the barrier said there was no such train as 4.50. The next was 5.40. The plaintiff then asked the porter to take charge of the luggage while he went to have some tea. He went with a friend to a refreshment room and returned to the barrier in twenty-five minutes and got into a compartment. The porter came running up with one bag and said he had lost the other. The plaintiff took his number, but made no complaint. He did complain, however, on the next Monday that the delay was reasonable in view of the fact that he was a cripple. The county court judge held on the above facts that the plaintiff had not left his luggage in the hands of the porter "for future transit" within the meaning of what LORD WATSON said in *Great Western Rail. Co.* v. *Bunch* (1), but did find that the plaintiff was prosecuting his journey all the time. In the course of his judgment the county court judge said:

"The evidence of the porter was very vague as to the whole matter. He was a porter at Hampton, and he had come up to town to buy a pair of boots. On his way out he was asked by the plaintiff to take his bags. I suppose he was not disinclined to make a little money, so he took them. He was, in fact, not authorised to take in the station work at Waterloo. I am bound to hold

that he was not acting on the scope of his authority and I must give judgment for the defendants."

The plaintiff appealed to the Divisional Court which reversed the judgment of the county court judge on the ground that the porter was a general agent of the defendant company, and, as the company had not prohibited the exercise of his general authority, they were liable. The defendants appealed.

Sir Reginald Acland, K.C., and *S. Henn Collins* for the defendants.

Pitman, for the plaintiff, was not called on to argue.

Feb. 20, 1919. **BANKES, L.J.**—This is an appeal from a decision of the Divisional Court, and, speaking for myself, I certainly do not want to lay down any rule of law which will apply to all porters, or as to the liability of a railway company for the acts of porters generally; and I may say that I do not agree with the view expressed by LORD COLERIDGE, J., that a porter may be taken to be the general servant of the company. I think each case must be decided upon its own particular facts, and all we have to deal with here is a very exceptional and peculiar set of circumstances, and to decide what is the correct conclusion in law upon those facts and circumstances.

The plaintiff was a passenger by the London and South-Western Railway. He was intending to go from Waterloo to Andover, and he arrived in a taxicab with a lady who was accompanying him, and he had two bags in the taxicab. When he arrived at the proper and ordinary place of arrival—I mean thereby the part of the station which is set apart or designed for persons arriving—he was met by a person in the railway company's porter's uniform, who volunteered his assistance, apparently in the ordinary way in which a porter would render assistance who was placed in that particular position for the purpose of assisting passengers, and took this passenger's luggage out of the taxicab. The plaintiff had to walk on crutches, and the porter accompanied him to the place where he took his ticket, and thence to the barrier where tickets are presented to those whose duty it is to see that persons passing through the barrier have tickets, and the porter, as he says, passed through the barrier in the ordinary way, and—I think I am entitled to use my own knowledge on such a matter as that—he passed through the barrier in the ordinary way in which any authorised servant of the company does who is carrying the luggage of a passenger, who himself was entitled to pass through the barrier having shown his ticket. It turned out that the plaintiff had gone to the wrong platform, and that the train which he and his friend were trying to catch was not running, and they consequently had to wait for some considerable time. The plaintiff asked the porter to look after the luggage, and then proceeded to the refreshment room and had some tea. A considerable time appears to have elapsed, and the porter, according to his own account, took the baggage and put it just outside the booking office. He remained with the bags a little time, and then left them. How long he remained and how long he was away we do not know, but he says that when he returned to take the bags to the train, one of them was gone. Meanwhile, the lady and gentleman had passed the barrier and got into the train, which was going to Andover, and they waited there till the porter came, and when he came he said that one bag was missing. It was for the missing bag that this action was brought.

In the county court the learned judge dealt with two points—one was whether or not the fact that the plaintiff had entrusted the baggage to the porter in the circumstances in which he had entrusted them, and left them with him for some considerable time, disentitled him to recover upon the ground that was so much discussed in the cases to which the judge was referred, that he was not prosecuting his journey at that time. The judge found in the plaintiff's favour on that point, and there is no appeal from that, but it appears from his judgment that at some later period in the case the defendants' counsel took the point that even if the plaintiff was right on that other point, still he was not entitled to succeed because the porter was not acting within the scope of his authority, and the learned judge

expresses some regret that the point had been raised so late in the case, because he suggests that, if the plaintiff had been made aware of that earlier, he might have been in the position to bring some evidence which might have displaced the defendants' counsel's suggestion that this man was not acting within the scope of his authority. It is in this sense only that he makes reference to any further evidence being possibly forthcoming, and it may well be that the fact that the point was raised so late in the case is a reason why the point which was obviously material, and became material in the view taken by the county court judge, does not seem to have been insisted upon before, and was raised for the first time, and raised successfully, in the Divisional Court in answer to that part of the defendants' case.

The point whether or not the porter was acting within the scope of his authority arose in consequence of the man's position at the time. It appears that he was a porter employed at Hampton, and that for his own purposes he had come up from Hampton to Waterloo intending to go and buy himself a pair of boots, and, I suppose, return to Hampton the same day. He says that it was by accident and not by design that he found himself where the taxicabs were arriving at Waterloo, and that he happened to be there when the plaintiff's taxi drove up, and he, finding himself there, thought possibly that there was an opportunity of earning some small tip, or possibly it might have been that he was anxious to assist the man, who, he saw, was more or less a cripple; we do not know, but upon those facts the judge found, and there can be no appeal from that question of fact, that the porter was acting outside the scope of his authority. But then the question arises as to whether, even although he was acting outside the scope of his authority, the railway company did not, in the particular circumstances of this case, hold him out to this particular passenger as being a servant of theirs, authorised to take the plaintiff's luggage and to look after it; and I agree with what junior counsel for the defendants said, that any representation relied upon by the plaintiff must be a representation which could have affected the plaintiff in the sense that it either caused him to change his position or was such as to affect his position, and I think therefore that the holding out and the acts of the railway company, or the omissions of the railway company, to be material, must be acts or omissions which could have affected the plaintiff's action in that regard.

The three material things which the evidence discloses to my mind are these: First, that the porter wearing the uniform of the company was allowed to present himself at the place in which authorised porters are usually to be found ready to receive a passenger's luggage. I think myself that that is some evidence to go to the jury of a holding out by the railway company. The next is that the porter was allowed, in the sense that he was not prevented, to accompany the passenger from the taxicab through the booking office across the platform to the barrier. Again, I think that that is some evidence for a jury that the railway company held this man out as authorised to do what he was doing, and then when one comes to the barrier which is the place where any unauthorised person ought to be stopped, one finds this man passing through with the apparent approval of the person who is placed there and whose business it is to let only authorised persons pass the barrier. Again I think that that is evidence upon which a jury might come to the conclusion that the railway company held this man out as an authorised servant.

I think for this purpose one may have a representation by conduct, and that the representation by conduct may include omission to interfere where interference could reasonably be expected, and in my opinion these matters to which I have referred are all matters which could legitimately have been placed before a jury as evidence of a holding out by the company of this man as being authorised on this particular occasion to do what he in fact did. I agree with junior counsel for the defendants' suggestion that what the man did afterwards could not have affected the plaintiff's position, because before any further representation was made to the plaintiff by the railway company the baggage had gone, and therefore there

A is no reason to suppose that anything that happened after the man had passed the barrier caused the plaintiff in any way to alter his position for the worse. If there had been any dispute about the facts the case must, of course, necessarily have gone back for the facts to be ascertained. The judge for the reasons which I have intimated had not his attention called to this matter at all, and had there been any dispute about the facts, the case must have gone back to him for him to B ascertain what the facts really are, but this is a case in which there is no dispute about the facts, and in which apparently no further evidence could usefully be given on either side. Assuming the matters to which I have referred are matters which a jury could properly consider under a proper direction as to whether the railway company held this man out as being authorised on this particular occasion by dealing with the plaintiff's luggage in the way he did, there is no further C material which could assist anybody. In those circumstances I think this court is entitled under Ord. 58, r. 4, to draw any inference of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. There being, therefore, this evidence which I have indicated and no further evidence as far as I can see which is procurable, in my opinion the proper course in this case is to say that the proper D judgment to enter is judgment for the plaintiff upon the ground that, upon the facts which were presented to the learned judge, there was a holding out by the railway company of this man as an authorised servant to deal with the luggage. On those grounds, in my opinion, the appeal fails.

WARRINGTON, L.J.—I am of the same opinion. I need not go through the E facts again in detail. The learned county court judge found that this particular porter was not acting within the scope of his authority, and I accept the finding as I am bound to do, and with all respect I cannot agree with the view expressed by LORD COLERIDGE, J., that the porter was a general agent of the company to deal with passenger's luggage, but the case must in my opinion be decided upon another ground wholly; that the company did by its conduct hold out to the F plaintiff this man as being not only a porter of the company, but a porter authorised to deal, as porters usually do, with passenger's luggage, and, that being so, the plaintiff acted on the representation and employed this man as he would have employed any other porter of the company.

The question is, is there sufficient evidence or rather was there sufficient evidence before the county court judge to support a case that the company by its conduct G did hold out this man as their porter, authorised to deal with the plaintiff's luggage, and that the plaintiff acted on the strength of that holding out. It seems to me that there is evidence of that holding out. In the first place we know that the ordinary practice of railway companies—that which every passenger expects to find when he arrives at the station—is that there shall be porters in uniform at the usual place of arrival, whose business it is to take charge of the passenger's luggage. H This man was in uniform; he was at the usual place. The uniform is given him by the company, and its purpose—possibly with other purposes—but one of the purposes at all events, is to identify him as a person employed by the company, and employed for this particular purpose for which the plaintiff employed him. There is that circumstance. That circumstance induced the plaintiff in the first instance to entrust his luggage to the porter. The next thing that happens is that I the porter, without interference on the part of any official of the company, does what the ordinary porter in the course of his duty would do, he goes with the passenger to the booking office where he takes his ticket, he accompanies him through the booking office and across the platform, with the object of taking the luggage to the train, to the barrier, where an official of the company is stationed to see that unauthorised persons do not go upon the platform. The porter is allowed to go through with the luggage in his possession. Now, I think I may infer that that circumstance induced the plaintiff to allow the luggage to be retained by the porter, and perhaps what is more important, when he found that that was not the

platform upon which he ought to be for his train, induced him to give the luggage again to the porter to take it back and keep it for him until the right train started. The porter then takes the luggage back again through the platform into the space opposite the booking hall, the place many of us are familiar with at Waterloo Station, and deposits the luggage there again without any interference on the part of any inspector, or any person with authority in the employment of the railway company. Of course, he had to pass the reverse way through the barrier through which he had previously passed.

In my opinion those facts are evidence of a holding out by the railway company that this man was a porter acting in the ordinary way, and they were certainly acted upon by the plaintiff who dealt with this man as if he had been one of the ordinary Waterloo porters. On those grounds I think the decision of the Divisional Court is correct, and this appeal ought to be dismissed.

DUKE, L.J.—I agree. I think there is evidence upon which the learned judges might find, as they did find, that the plaintiff was induced, by the absence of action of various servants of the railway company, to suppose that the porter who took charge of his luggage was authorised by the company to take charge of his luggage. Junior counsel for the defendants raised the question whether the fact that the porter was induced to put himself forward by the hope of gain entitled the company to rely upon a distinction which was discussed in *Limpus* v. *London General Omnibus Co.* (2). It seems to me that the inducement which prevailed upon the porter to put himself forward is immaterial in this case. What is material is, whatever was his motive, the company acquiesced in his putting himself forward. This cures any defect of motive on his part, assuming any such motive was his own motive.

Appeal dismissed.

Solicitors: *William Bishop*; *Oldman, Cornwall & Wood Roberts.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

MELACHRINO AND ANOTHER *v.* NICKOLL AND KNIGHT

[KING'S BENCH DIVISION (Bailhache, J.), December 1, 2, 10, 1919]

[Reported [1920] 1 K.B. 693; 89 L.J.K.B. 906; 122 L.T. 545; 36 T.L.R. 143; 25 Com. Cas. 103]

Sale of goods—Contract—Breach—Anticipatory breach—Remedies of buyer on repudiation by seller—Damages for non-delivery—Assessment as at date of delivery under contract.

By a contract of sale of a cargo of cotton seed, to be shipped from Alexandria, payment was to be made in London fourteen days from the seed being ready for delivery. On default by either party the other party had the right of re-sale or re-purchase as the case might be, and, if such right was not exercised, the damages were to be referred to arbitration. Before the ship arrived at London, the sellers repudiated the contract, and the buyers accepted the repudiation. The buyers did not buy against the sellers and claimed arbitration. The arbitrators found that at the date of the breach the market price was above the contract price but that it was below that price during the month within which delivery of the cargo might reasonably have been expected, and as, under the contract, no precise date for delivery could be fixed, damages should be assessed with reference to the date of the breach.

Held: where there was an anticipatory breach by the seller, the buyer, without buying against the seller, might bring his action at once, in which case damages should be assessed with reference to the market price at the time when the goods ought to have been delivered under the contract, in the present case when delivery might reasonably have been expected.

Notes. Referred to: *Millett* v. *Van Heek & Co.*, [1921] All E.R.Rep. 519.

As to remedies of buyer on anticipatory breach of seller, see 34 HALSBURY'S LAWS (3rd Edn.) 153; and for cases see 39 DIGEST 675.

Cases referred to:

(1) *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167; 42 L.J.C.P. 65; 28 L.T. 296; 21 W.R. 384; 39 Digest 676, *2618*.

(2) *Brown* v. *Muller* (1872), L.R. 7 Exch. 319; 41 L.J.Ex. 214; 27 L.T. 272; 21 W.R. 18; 39 Digest 676, *2620*.

Award stated in the form of a Special Case.

By two contracts, each dated Nov. 24, 1916, Messrs. M. Melachrino and C. D. Kaniskeri sold to Messrs. Nickoll and Knight two half cargoes of Egyptian cotton seed per the steamship *Asaos* from Alexandria. The contracts were in similar terms except as to price, Mr. Melachrino's contract being for £19 10s., and Mr. Kaniskeri's for £19 per ton. Payment was to be made in London fourteen days from the seed being ready for delivery. By cl. 11 of the contract it was provided that in default of fulfilment by either party the other party should have the right of re-sale or re-purchase as the case might be, and in the event of that right not being exercised the damages should be referred to arbitration. On Dec. 14, 1916, owing to difficulties of shipment, the sellers repudiated the contract, and the buyers accepted the repudiation and claimed arbitration. There was therefore an anticipatory breach.

The arbitrators found the following facts: that delivery of the cotton seed might reasonably have been expected at any time from Jan. 10 to Feb. 10, 1917; that the market price on Dec. 14, 1916, the date of the breach, was above the contract prices; that the market price began to fall towards the end of December, 1916; that during the whole period within which the cotton seed might have been delivered, namely, from Jan. 10 to Feb. 10, 1917, the market price was below the contract prices; and that no notice in writing of their intention to re-purchase, as provided

by cl. 11 of the contracts, was given by the buyers to the sellers after the breach, and the buyers did not in fact buy against the contracts.

The arbitrators were of opinion that, as the cotton seed might have been delivered at any time between Jan. 10 and Feb. 10, 1917, no precise time could be fixed for delivery, and that the measure of damages should be ascertained by the difference between the contract price and the market price at the time of the sellers' refusal to deliver, namely, Dec. 14, 1916. But in order to raise the question of law as to the proper time at which the damages ought to be assessed, they stated a Special Case for the opinion of the court.

The question for the opinion of the court was whether the damages should be assessed at the time at which delivery of the cotton seed might reasonably have been expected, or at the date of the repudiation of the contract by the sellers, namely, Dec. 14, 1916. If the former date, the arbitrators awarded the buyers merely nominal damages, which they assessed at 1s.; if at the latter date, they awarded the buyers substantial damages amounting to over £1,000 on each contract.

Leck, *K.C.*, and *Claughton Scott* for the sellers.
Neilson, *K.C.*, and *Sir R. Aske* for the buyers.

Cur. adv. vult.

April 1, 1919. **BAILHACHE, J.,** read the following judgment, stated the facts and continued: Upon these facts the question arises: Are the damages to be fixed with reference to the market prices on Dec. 14, 1916, or with reference to the prices ruling at the time when the goods might be expected to be delivered? If the former, the damages are substantial; if the latter, nominal. The arbitrators have assessed the damages as at the date of the anticipatory breach. There was a market for the goods, and in that case the primâ facie rules for the measurement of damages as laid down in s. 51 of the Sale of Goods Act, 1893, vary according to whether there is a fixed time for delivery or not. If there is no fixed time, the measure is the difference between the contract price and the market price at the time of refusal to deliver. The first point to determine, therefore, is whether this was a contract of that kind. In my opinion, it was not. The time was not certain, but it was fixed by reference to the happening of an event, viz., the arrival of the *Asaos* in the United Kingdom. I take it that when s. 51 speaks of no time being fixed for delivery it refers to those contracts in which no mention of time is made, and which therefore are to be performed within the indefinite period known as a reasonable time under the circumstances. In regard to the other cases, of which this is one, the primâ facie measure of damages is said to be the difference between the contract price and the market price at the time the goods ought to have been delivered, in this case the period between Jan. 10 and Feb. 10, 1917. In a constantly fluctuating market, and if the prices during that period had mounted higher than the contract prices, there might have been some difficulty in determining the proper price to be taken; but in this case that point does not arise, as at all times between those dates the market prices were below the contract prices. Section 51 does not in terms deal with an anticipatory breach, and in the case of a breach by effluxion of time it is clear that it makes no difference to the measure of damages whether a buyer goes into the market or is content to take the difference in price without troubling to buy against the defaulting seller. The question to be decided is whether the same rule applies in the case of an anticipatory breach.

An anticipatory breach occurs when the seller refuses to deliver before the contractual time for delivery has arrived and the buyer accepts his refusal as a breach of contract. In such a case the following rules are well established subject, of course, to any express provisions to the contrary in any particular contract. Immediately upon the anticipatory breach the buyer may bring his action whether he buys against the seller or not. It is the duty of the buyer to go into the market and buy against the defaulting seller if a reasonable opportunity offers. This is expressed by the phrase: "It is the buyer's duty to mitigate damages." In that event the damages are assessed with reference to the market price on the date of

the re-purchase. If the buyer does not perform his duty in this respect the seller is none the less entitled to have damages assessed as at the date when a fresh contract might and ought to have been entered into. As a corollary to this rule the buyer may, if he pleases, go into the market and buy against the seller, as he is bound to do to mitigate damages, or he is entitled to do so to cover himself against his commitments or to secure the goods. In that case again the damages are assessed with reference to the market price at the date of the re-purchase. It is also settled law that when default is made by the seller by failure to deliver within the contract time, the buyer is under no duty to buy against him, but may claim the difference between the contract price and the market price at the date when under the contract the goods should have been delivered. Further, in the case of an anticipatory breach the contract is at an end, and the defaulting seller cannot take advantage of any subsequent circumstances which would have afforded him a justification for non-performance of his contract had his repudiation not been accepted. In logical strictness it would appear to follow that equally the defaulting seller cannot take advantage of a fall in the market before the due date for delivery to escape liability for damage.

It looks, therefore, at first sight, as though the date at which the difference between the contract price and the market price ought to be taken for the assessment of damages when the buyer does not buy against the seller, should follow by analogy the rule adopted where the buyer goes into the market and buys, or where the breach is failure to deliver at the due date, and should be at or about the date when the buyer intimates his acceptance of the repudiation though he does not actually go into the market against him. If so, in this case, the date would be about Dec. 14, when the buyer claimed arbitration, and so the arbitrators have found. As against this line of reasoning it must be remembered that the object of damages is to place a man whose contract is broken in as nearly as possible the same position as if it had been performed. This result is secured by measuring damages either at the date of the re-purchase in the case of re-purchase on an anticipatory breach, or at the date when the goods sought to have been delivered when there is no anticipatory breach whether there is a re-purchase or not. In these cases the buyer gets a new contract as nearly as may be like the broken contract, and the defaulting seller pays the extra expense incurred by the buyer in restoring his position. Where, however, there is an anticipatory breach, but no buying against the defaulting seller, and the price falls below the contract price between the date of the anticipatory breach and the date when the goods ought to have been delivered, the adoption of the date of the anticipatory breach as the date at which the market price ought to have been taken would put the buyer in a better position than if his contract had been duly performed. He would, if that date were adopted, be given a profit and retain his money wherewith to buy the goods if so minded on the fall of the market. It would be in effect, to use a homely phrase, to allow him to eat his cake and have it. Perhaps it is better to avoid figures of speech, however picturesque, and to say, to make a profit from the anticipatory breach while the contract if duly performed would have shown a loss, a position which is, I think, irreconcilable with the principles upon which damages are awarded as between buyer and seller.

In my opinion, the true rule is that where there is an anticipatory breach by a seller to deliver goods, for which there is a market, at a fixed date the buyer, without buying against the seller, may bring his action at once, but that, if he does so, his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived, the court must arrive at that price as best it can. To this rule there is one exception for the benefit of the defaulting seller—viz., that if he can show that the buyer acted unreasonably in not buying against him the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages. I have discussed the position on principles apart from authority, because, in my limited

experience, I do not remember a case precisely like this. I might, perhaps, have contented myself with basing my judgment upon the authority of *Roper* v. *Johnson* (1), and I should have done so but for the fact that I am not sure that when that case was decided one year after *Brown* v. *Muller* (2), the distinction between an accepted and unaccepted repudiation was as well established as it has since become. There are some observations in the judgments in that case which would not, I venture to think, now be supported, and the case turned largely on where the burden of proof lay. Subject, however, to these criticisms, *Roper* v. *Johnson* (1) seems to me to support the conclusion at which I have arrived. The result in this case is that the damages are nominal.

Judgment accordingly.

Solicitors: *Thomas Cooper & Co.*; *Botterell & Roche.*

[*Reported by* L. H. Barnes, Esq., *Barrister-at-Law.*]

BALFOUR *v.* BALFOUR

[Court of Appeal (Warrington, Duke and Atkin, L.JJ.), January 24, 25, 1919]

[Reported [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 35 T.L.R. 609; 63 Sol. Jo. 661]

Contract—Consideration—Nudum pactum—Agreement by wife not to claim further maintenance—Husband and wife—Promise by husband to pay monthly allowance—Agreement by wife to make no further claim on husband —Enforceability of promise.

After their marriage in August, 1900, the parties went to Ceylon, where the husband had a government post. In November, 1915, the wife came to England together with the husband, who was on leave. They both intended to return to Ceylon. In August, 1916, the husband's leave expired and he had to return to Ceylon, but the wife, on the advice of her doctor, was to remain in England. On Aug. 8, 1916, when the husband was about to sail, the wife alleged that the parties entered into an oral contract whereby the husband agreed to make the wife an allowance of £30 a month. The parties had not at that time agreed to live apart, but did so subsequently when differences arose between them. In an action by the wife against the husband to recover money which she claimed was due to her under the agreement, the alleged consideration for that agreement being a promise by her to support herself without calling upon him,

Held: there was no contract in the legal sense; the alleged parol contract made on Aug. 8, 1916, was no more than a mere arrangement between husband and wife living together in friendly intercourse, and the parties never intended to make a bargain which could be enforced at law.

Notes. Considered: *Hoddinott* v. *Hoddinott*, [1949] 2 K.B. 406. Referred to: *Rose and Frank Co.* v. *Crompton*, [1923] 2 K.B. 261; *Fribance* v. *Fribance*, [1957] 1 All E.R. 357; *Gottlieb* v. *Gleiser*, [1957] 3 All E.R. 715; *Ewart* v. *Ewart*, [1958] 3 All E.R. 561; *Diwell* v. *Farnes*, [1959] 2 All E.R. 379.

As to contracts between husband and wife, see 19 Halsbury's Laws (3rd Edn.) 871, 872; and for cases see 27 Digest (Repl.) 201, 202. For the requirement of consideration, see 8 Halsbury's Laws (3rd Edn.) 113 et seq.; and for cases see 12 Digest (Repl.) 230. For the definition of a contract, see 8 Halsbury's Laws (3rd Edn.) 54 et seq.; and for cases see 12 Digest (Repl.) 21 et seq.

Cases referred to:

(1) *Eastland* v. *Burchell* (1878), 3 Q.B.D. 432; 47 L.J.Q.B. 500; 38 L.T. 563; 42 J.P. 502; 27 W.R. 290; 27 Digest (Repl.) 187, *1438*.

(2) *Jolly* v. *Rees* (1864), 15 C.B.N.S. 628; 3 New Rep. 473; 33 L.J.C.P. 177; 10 L.T. 298; 28 J.P. 534; 10 Jur.N.S. 319; 12 W.R. 473; 143 E.R. 931; 27 Digest (Repl.) 184, *1390*.

(3) *Debenham* v. *Mellon* (1880), 6 App. Cas. 24; 50 L.J.Q.B. 155; 43 L.T. 673; 45 J.P. 252; 29 W.R. 141, H.L.; 27 Digest (Repl.) 182, *1363*.

Appeal by the husband from the decision of SARGANT, J., sitting as an additional judge of the King's Bench Division.

The facts appear in the headnote and the judgment of WARRINGTON, L.J.

Barrington-Ward, K.C., and *du Parcq* for the husband.

Hawke, K.C., and *H. L. Tebbs* for the wife.

WARRINGTON, L.J.—The wife in this case sues her husband for money which she claims to be due to her from her husband as an agreed allowance of £30 a month, the wife agreeing to support herself throughout without calling upon her husband for any maintenance and support. The wife therefore sets out to prove a binding legal contract between herself and her husband, that the husband shall in consideration of a promise by the wife pay her the sum of £30 a month.

The learned judge in the court below has found in these terms:

> "It seems to me on these letters that there was a definite bargain between the husband and the wife under which, while the husband was in India and in a sufficient position and the wife was in England living separate from him, she should be paid a definite sum of £30 a month, and that agreement was made when the husband returned to Ceylon, and was re-affirmed on at least two occasions after unhappy differences had shown themselves, at any rate on the part of the husband, and when it was probable that their separation might last for some time."

Then he proceeded, having found that there was this definite agreement. With all respect to him it was not a definite agreement at all because it continued under the circumstances arising. But, having found on the facts that there was such an agreement, he proceeded to show that that agreement could be supported as a legal contract because there was sufficient consideration in the promise made by the wife.

We have now to determine whether there was in the first place a contract in the legal sense between the husband and the wife under which the husband was bound to pay this £30 a month. There really is no dispute about the facts. The parties were married in August, 1900. The husband had a post under the Government of Ceylon as director of irrigation, and after the marriage they went to Ceylon and lived there together until the year 1915, except that for a short time in 1906 they together paid a visit to this country, and in 1908 the wife came home to this country in order to submit to an operation. In November, 1915, the wife came to this country, the husband coming home on leave, they came together intending to return. They remained in England until August, 1916, when the husband's leave had expired and he had to return. The wife, however, on the doctor's advice, was to remain in England. On Aug. 8, 1916, the husband was about to sail, and it is on that day that it is alleged that the agreement sued upon was made by parol between the husband and wife. The wife gave evidence of what took place, and I think that I cannot do better than refer to the learned judge's note for the account of what she said took place. She said: "In August, 1916, my husband's leave was up. I was suffering from rheumatoid arthritis. My doctor advised my staying in England for some months, and not to go out till Nov. 4. I booked a passage for next sailing day in September. On Aug. 8 my husband sailed. He gave me a cheque from Aug. 8 to Aug. 31 for £24, and promised to give me £30

per month till I joined him in Ceylon." There were certain letters read as to which I shall have to say a word or two presently, and then the wife said later on: "My husband and I wrote the figures together on Aug. 8 and £34 was shown. Afterwards he said £30." That means that the husband jotted down on a bit of paper certain figures which showed that the ordinary monthly expenses of the wife, at least, that is what I infer the sheet of paper showed, would amount to £22 a month, and then they added a round sum of £12, which brought it up to £34, but, after some discussion, the amount was taken to be the round sum of £30. In cross-examination the wife said that they had not agreed to live apart until subsequent differences arose between them, and that in August, 1916, such agreement as might be made by a couple living in amity was made, the husband assessing the wife's needs and saying that he would send £30 per month. That is really all the evidence as to what took place between the parties. The agreement, if made at all, was a parol agreement made on Aug. 8, 1916. The letters which have been referred to really throw no light at all upon the legal position between the parties. Perhaps the most important thing in the course of these letters is that on one occasion the wife appears to have incurred some extra expense through entertaining some friends of the husband. She asked for some more money and he sent it. That comes to nothing.

Those being the facts, what is really the position? We have to say whether on these facts there is a legal contract between these parties. In other words, we have to decide whether what took place between the parties was in the nature of a legal contract, or whether it was merely an arrangement made between the husband and the wife of the same nature as a domestic arrangement which may be made every day between any ordinary husband and wife who are living together in friendly intercourse. It may be, and I do not for a moment say that it is not, possible nowadays for such a contract as is alleged in the present case to be made between the husband and the wife. The question is whether such a contract was made. That can only be established either by proving that it was made in express terms, or that there is a necessary implication from the circumstances of the parties and the transaction generally that such a contract was made. It is quite plain that no such contract was made in express terms, and there was no bargain on the part of the wife at all. All that took place was this; the two parties met in a friendly way and discussed what would be necessary for the support of the wife while she was detained in England, the husband being in Ceylon, and they came to the conclusion that the sum of £30 per month would be about right; but there is no evidence at all of any express bargain by the wife that she would in all the circumstances treat that as compensation for or in satisfaction of the obligations of the husband towards her to maintain her. Can we find a contract from the position of the parties? It seems to me it is quite impossible. If we were to imply such a contract as that in this case we should be implying on the part of the wife that, whatever happened and whatever might be the change of circumstances while the husband was away, she should be content with the sum of £30 per month, and fetter herself by an obligation which would be binding upon her in law not to require him to pay anything more. On the other hand, we should be implying on the part of the husband a bargain on his part to pay £30 per month for some indefinite period whatever might be his circumstances. There again, it seems to me that it would be impossible to make any such implication. Really the matter reduces itself to an absurdity when one considers it, because, if we were to hold that there was a contract in this case, we should have to hold that with regard to all the more or less trivial concerns of life, where a wife at the request of her husband makes a promise to him, that is a promise which can be enforced in law. All I can say is that there is no such contract here. These two people never intended to make this a bargain which could be enforced in law. The husband expressed his intention to make this payment, and he promised to make this payment, and he was bound in honour to continue it so long as he was in a position to do so. The wife, on the other hand, as far as I can see, made no

bargain at all. That is, in my judgment, sufficient to dispose of this case. It is unnecessary to consider whether if the husband failed to make the payments the wife could pledge his credit, or whether if he failed to make the payments the wife could have made some other arrangements. The only question that we have to consider is whether the wife has made out a contract which she has set out to do. In my judgment she has not. I think, therefore, that the judgment of SARGANT, J., cannot stand. The appeal ought to be allowed, and judgment ought to be entered for the husband.

DUKE, L.J.—I agree. This case is in some respects an important case, and, as we differ from the judgment of the learned judge in the court below, I propose to state my views of the case concisely and state the grounds which have led me to the conclusion at which I have arrived. Substantially the question in the case is whether the promise of the husband to the wife, that while she is living absent from him he will make her a periodical allowance, is a promise which involves in law consideration on the part of the wife sufficient to convert the promise into an agreement. In my opinion it does not. I do not dissent, as at present advised, from the proposition that the spouses in this case might have made an agreement which might have given the wife a cause of action. I am inclined to think that the promise of the wife in respect of her separate estate would have founded an action on contract within the principles of the Married Women's Property Act, 1882.

The real question is whether there is evidence of any such exchange of promises as would make the promise of the husband the basis of an agreement. It was strongly urged by counsel for the wife that the promise, being absolute in form, ought to be construed as one of the mutual promises which make an agreement. It was said that a promise and an implied undertaking between strangers, such as the promise and implied undertaking alleged in this case, would have founded an action on contract. That may be so, but it is impossible to disregard in this case what was the basis of the whole communications between the parties under which the alleged contract is said to have been formed. The basis of their communications was their relationship of husband and wife, a relationship which creates obligations. There was a discussion between the parties while they were absent from one another as to whether they should agree upon separation. There was a very short cross-examination, but in the court below the wife conceded in the most definite form that down to the time of her suing in the Divorce Division there was no separation, and that the period of absence was a period of absence as between husband and wife living in amity. The agreement for separation would have involved mutual considerations. That was why in *Eastland* v. *Burchell* (1) the agreement for separation was found by the learned judge to have been of decisive consequence. In the present case there was no agreement at all. The parties were husband and wife with, in point of law, that relationship. Is it possible to say that where there is that relationship of husband and wife, and promises are exchanged, they are deemed to be promises of a contractual nature? In the view which I take I think that there ought to be something more than mere mutual promises with regard to the relationship of the parties as husband and wife. It is required that the obligations arising out of the relationship shall be discharged before either of the parties can found a contract upon those promises. The formula which was stated in the present case to support the claim of the wife was this: "In consideration that you will agree to give me £30 per month I will agree to forgo my right to pledge your credit." In the judgment of the majority of the Court of Common Pleas in *Jolly* v. *Rees* (2), which was affirmed in the decision of *Debenham* v. *Mellon* (3), ERLE, C.J., states this proposition (15 C.B.N.S. at p. 641):

> "But taking the law to be that the power of the wife to charge her husband is in the capacity of his agent, it is a solecism in reasoning to say that she derives her authority from his will, and at the same time to say that the

relation of wife creates the authority against his will, by a praesumptio juris et de jure from marriage."

What is said on the part of the wife in the present case is that her arrangement with her husband that she should assent to that which was in his discretion to do or not was the consideration moving from her to her husband. The giving up of that which was not a right was not a consideration. The proposition that the mutual promises made in the ordinary domestic relationship of husband and wife of necessity give cause for action on a contract seems to me to go to the very root of the relationship and to be a possible fruitful source of dissension and quarrelling. I cannot see that any benefit would result from it to either of the parties, but, on the other hand, it would lead to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind. I think, therefore, that in point of principle there is no foundation for the claim which is made here, and I am satisfied on the question of fact that there was no consideration moving from the husband to the wife or promise by the husband to the wife which was sufficient to sustain this action founded merely on contract. In my view, the appeal must be allowed.

ATKIN, L.J.—The defence to this action on the alleged contract is that the husband says he entered into no contract with his wife, and for the determination of that it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make agreements between themselves, agreements such as are in dispute in this action, agreements for allowances by which the husband agrees that he will pay to his wife a certain sum of money per week or per month or per year to cover either her own expenses or the necessary expenses of the household and of the children, and in which the wife promises either expressly or impliedly to apply the allowance for the purpose for which it is given.

To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. The consideration, as we know, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. That is a well-known definition, and it constantly happens, I think, that such arrangements made between husband and wife are arrangements in which there are mutual promises, or in which there is consideration in form within the definition that I have mentioned. Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. It would be the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the courts. It would mean that when a husband made his wife a promise to give her an allowance of 30s. or £2 per week, whatever he could afford to give her for the maintenance of the household and children, and she promised so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. The small courts of this country would have to be multiplied one hundredfold if these arrangements did result in fact in legal obligations. They are not sued upon, and the reason that they are not sued upon is not because the parties are reluctant to enforce their legal rights when the agreement is broken, but they are not sued upon because the

parties in the inception of the arrangement never intended that they should be sued upon. Agreements such as these, as I say, are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold courts. The terms may be repudiated, varied, or renewed as performance proceeds, or as the disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted.

The only question in the present case is whether or not this promise was of such a class or not. For the reasons given by my brethren it appears to me to be plain. I think it is plainly established that the promise here was not intended by either party to be attended by legal consequences. I think the onus was upon the wife, and that the wife has not established any contract. The parties were living together, the wife intending to return to Ceylon. The suggestion is that she bound herself to accept, as he bound himself to pay £30 per month under all circumstances, and that she bound herself to be satisfied with that sum under all circumstances, and, although she was in ill-health and in this country, that out of that sum she undertook to defray the whole of the medical expenses that might fall upon her whatever might be the development of her illness, and in whatever expenses it might involve her. To my mind neither party contemplated such a result. I think that the parol evidence upon which the contract turns does not establish a contract. I think that the written evidence, the letters to which alone, oddly enough, the learned judge in the court below in his judgment refers, do not evidence such a contract, or apply, as they should be applied, to the oral evidence which was given by the wife which is not in dispute. For these reasons I think that the judgment of the learned judge in the court below was wrong, and that this appeal should be allowed.

Appeal allowed.

Solicitors: *Lewis & Lewis*; *C. R. Sawyer & Withall*, for *John C. Buckwell*, Brighton.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re DAWSON. SWAINSON *v.* DAWSON

[CHANCERY DIVISION (Sargant, J.), July 10, 1918]

[Reported [1919] 1 Ch. 102; 88 L.J.Ch. 73; 120 L.T. 189; 63 Sol. Jo. 25]

Will—Double portions—Enforcement of doctrine against stranger—Grandfather—Gifts to children and grandchildren—Rights of unadvanced grandchildren.

The doctrine of double portions cannot be acted on by a stranger, and a grandfather, in the absence of evidence that he has placed himself in loco parentis as regards grandchildren, is in the position of a stranger.

Notes. As to the presumption against double portions, see 14 HALSBURY'S LAWS (3rd Edn.) 601 et seq.; and for cases see 20 DIGEST 453 et seq.

Cases referred to:

(1) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; 34 E.R. 271; 20 Digest 463, *1886.*

(2) *Powel* v. *Cleaver* (1789), 2 Bro.C.C. 499; 29 E.R. 274; 20 Digest 461, *1868.*

(3) *Meinertzagen* v. *Walters* (1872), 7 Ch. App. 670; 41 L.J.Ch. 801; 27 L.T. 326; 20 W.R. 918, C.A.; 20 Digest 455, *1785.*

(4) *Montefiore* v. *Guedalla* (1859), 1 De G.F. & J. 93; 29 L.J.Ch. 65; 1 L.T. 251; 6 Jur.N.S. 329; 8 W.R. 53; 45 E.R. 294, L.C. & L.JJ.; 20 Digest 455, *1782.*

(5) *Pym* v. *Lockyer* (1841), 5 My. & Cr. 29; 10 L.J.Ch. 153; 5 Jur. 620; 41 E.R. 283, L.C.; 20 Digest 453, *1769.*

(6) *Roome* v. *Roome* (1744), 3 Atk. 181; 26 E.R. 906; 20 Digest 457, *1809.*

(7) *Re Lacon, Lacon* v. *Lacon*, [1891] 2 Ch. 482; 60 L.J.Ch. 403; 64 L.T. 429; 39 W.R. 514; 7 T.L.R. 457, C.A.; 20 Digest 453, *1770.*

Also referred to in argument:

Earl of Durham v. *Wharton* (1836), 10 Bli.N.S. 526; 3 Cl. & Fin. 146; 6 E.R. 194; sub nom. *Wharton* v. *Earl of Durham*, 3 My. & K. 698; 6 L.J.Ch. 15, H.L.; 20 Digest 477, *2021.*

Kirk v. *Eddowes* (1844), 3 Hare, 509; 13 L.J.Ch. 402; 8 Jur. 530; 67 E.R. 482; 20 Digest 455, *1781.*

Edwards v. *Freeman* (1727), 2 P.Wms. 435; 1 Eq. Cas. Abr. 249; 24 E.R. 803, L.C.; 20 Digest 458, *1824.*

Fowkes v. *Pascoe* (1875), 10 Ch. App. 343; 44 L.J.Ch. 367; 32 L.T. 545; 23 W.R. 538, C.A.; 20 Digest 462, *1878.*

Re Heather, Pumfrey v. *Fryer*, [1906] 2 Ch. 230; 75 L.J.Ch. 568; 95 L.T. 352; 54 W.R. 625; 20 Digest 455, *1786.*

Re Smythies, Weyman v. *Smythies*, [1903] 1 Ch. 259; 72 L.J.Ch. 216; 87 L.T. 742; 51 W.R. 284; 20 Digest 457, *1815.*

Re Scott, Langton v. *Scott*, [1903] 1 Ch. 1; 72 L.J.Ch. 20; 87 L.T. 574; 51 W.R. 182; 47 Sol. Jo. 70, C.A.; 20 Digest 459, *1840.*

Rose v. *Rogers* (1870), 39 L.J.Ch. 791; 20 Digest 474, *2006.*

Originating Summons.

The testator by his will, after appointing executors and making sundry bequests, said:

". . . all the rest of my personal property I desire to be divided into five equal parts and one of such parts I give and bequeath to each of my said daughters [naming them], their executors, administrators, and assigns. One other such part I give and bequeath to my granddaughter [naming her], the same to be retained in trust for her until she attains twenty-one years of age, when it shall be transferred and assigned to her with the securities in which it may be then invested and also the accumulations thereto of income till she reaches that age,"

There was a similar gift for the children of another daughter. In January, 1916, the testator transferred into the name of each of his three surviving daughters shares of the value of £1,640 and died in May, 1916. An originating summons was taken out by one of the executors against the daughters and granddaughters raising the question whether, in the distribution of the residuary estate, the gifts made by the testator to his three surviving daughters in his lifetime were to be brought into account and taken as a satisfaction pro tanto of the shares of the daughters in the residuary personalty, and also the question of fact whether or not the testator had placed himself in loco parentis to his granddaughters. The judge, having heard the evidence on the question of fact, decided that the testator had not placed himself in loco parentis to his grandchildren, and the question of law as to the application of the rule against double portions was argued.

Mark L. Romer, K.C., and *Dighton Pollock* for the daughters.
Ashworth James for one granddaughter.
Alexander Grant, K.C., and *Wilfrid Hunt* for other grandchildren.

SARGANT, J. (after reading the will and stating the facts as to the advances).—As regards the main question on the summons, the question whether the grandchildren are entitled at all to the benefit of the doctrine against double portions, Miss Catherine Mary Howard Dawson stands in exactly the same position as her first cousins, the children of Mrs. Harris; but those children have also a separate and independent claim, on the ground that the testator placed himself as towards them in loco parentis. The two daughters of the testator who did not receive the debenture stock of the Mansfield Railway Co. make no claim, as against Mrs. Leeder, to have the stock received by her brought into account for their benefit as against her share of the residue. They are satisfied that she should have that sum of stock in addition to her share of the residue; and, therefore, I can deal with the case practically on the same footing as if there had only been gifts to each of the three daughters of the shares in the other company.

On the question, which is a pure question of fact, whether the grandfather, the testator, had placed himself in loco parentis as regards the children of Mrs. Harris, I see no reason whatever for coming to the conclusion that he ever did so.

I have, therefore, to deal solely with the question whether, as a matter of general law, the grandchildren of the testator, to whom a share of the residue has been left corresponding with the share which their parent would probably have taken had the parent survived, are entitled to enforce the equitable rule against double portions which their parents could have enforced if those parents had been given the share of the residue in question and had survived the testator. I have first to see what is meant by "portion" for this purpose, and what is the origin of the rule. In *Ex parte Pye* (1), LORD ELDON, L.C., said (18 Ves. at p. 151):

> "I may state, as the unquestionable doctrine of the court, that, where a parent gives a legacy to a child, not stating the purpose, with reference to which he gives it, the court understands him as giving a portion; and by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion, that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is satisfaction of the whole, or in part."

It has been held since then that the advance of a smaller sum would only be satisfaction pro tanto, but that is immaterial for the present purpose. In a later part of the judgment, LORD ELDON, after referring to *Powel* v. *Cleaver* (2), says this (18 Ves. at p. 153):

> "If that is right, it comes to this; that, where a father gives a legacy to a child, the legacy, coming from a father to his child, must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion for that child, though there may be slight circumstances of difference

between that advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is therefore an ademption of the legacy; but a stranger, giving a legacy, is understood as giving a bounty, not as paying a debt: he must therefore be proved to mean it as a portion, or provision, either upon the face of the will, or, if it may be, and it seems that it may, by evidence, applying directly to the gift, proposed by that will."

Later he says (ibid. at p. 154):

"Upon the authority of *Powel* v. *Cleaver* (2), unless you can show, that at the time of making the will the testator meant to give a portion as parent, or as standing in loco parentis, and meant to satisfy that in the whole or in part by the subsequent advance, the court is not authorised by the artificial rules of equity to hold it a satisfaction."

In this case, counsel for the daughters conceded—and I think the contrary is unarguable—that, if the parents of the grandchildren had been living at the date of the will, and had survived the testator, and had been left a share of residue, what was left to the three daughters would have been in the nature of a portion left to them by their parent, and the rule would have applied. But it has been held in *Meinertzagen* v. *Walters* (3) that the rule is one to be applied only for the benefit of the persons as against whom the rule would itself be applied—that is to say, persons who are themselves in the position of taking a portion. And, therefore, I have still to see whether the grandchildren are within the category of persons for whom the testator is in the position of having a moral duty to provide a portion, and would, had they received the subsequent advance, have had to bring the sums advanced to them into account as against their shares of residue. It is to be noticed that Lord Eldon in his judgment carefully limits the relationship of which he is speaking to parents and persons who stand in loco parentis; and, on the ground that a person in that category is paying a debt of nature, he applies the doctrine against double portions only where that relationship exists. The same view was expressed by Turner, L.J., in *Montefiore* v. *Guedalla* (4), where he spoke about the intention of the father "twice to discharge the same obligation of providing for his child." And, again, Lord Cottenham, L.C., in *Pym* v. *Lockyer* (5), spoke of the "duty which the relative situation of the parties imposes upon the parent."

Does that relationship, which seems to me to be essential for the purpose of raising this doctrine against double portions, exist between a grandfather and a grandchild whose parent is dead? It appears to me that such authority as there is is all against that view. In *Roome* v. *Roome* (6) it is said that a grandfather is not in loco parentis to his grandchild, the child of a deceased son; and, though the statement was not necessary for the purpose of the actual decision, because there had been a codicil to the will subsequent to the date of the advance, and, therefore, the will was revived, it is at least a clear dictum. Then, again, it was said in *Powel* v. *Cleaver* (2) that a gift by a grandfather was not a portion. And in all the text-books, or those of the text-books that have been cited to me (Jarman on Wills (6th Edn.), p. 1160; and White and Tudor's Leading Cases (8th Edn.), vol. 2, p. 394), the rule is most carefully limited, in the way that Lord Eldon limited it originally, to cases where the relationship between the parties is that of father and child, or where a person has placed himself in loco parentis. It has often been recognised that the rule in *Ex parte Pye* (1) nearly as often defeats the intention as it gives effect to it, and Bowen, L.J., in *Re Lacon* (7), said the rule was not to be extended; and I can see that great difficulties might arise if one were to depart from the recognised rule in the matter and attempt to extend the rule to all persons whom one might consider to be in such a position that the testator would naturally provide for them in the same way in which he would have provided for his child, as, indeed, he has provided for these persons by his testamentary dispositions here.

I think I ought to add that, apart from the cases to which I have referred, it is impossible to suppose that, if the rule had applied to the grandchildren as distinguished from children, there would not have been examples of it in the books. It is not at all unlikely that a grandparent who is providing for his grandchild by his will should subsequently make some additional provision in his lifetime for that grandchild. The case must have occurred over and over again, and no one has been bold enough hitherto, as far as I can see, to set up that the rule has the wider application now contended for. In my judgment, therefore, the question asked by the summons must be answered in the negative.

Solicitors: *Robinson & Bradley*, for *W. H. Satterthwaite*, Lancaster; *Janson, Cobb, Pearson & Co.*; *Curwen & Carter.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

FROST AND OTHERS *v.* KING EDWARD VII WELSH NATIONAL MEMORIAL ASSOCIATION FOR PREVENTION, TREATMENT AND ABOLITION OF TUBERCULOSIS AND ANOTHER

[CHANCERY DIVISION (Eve, J.), April 24, 25, 26, 29, 30, May 1, 15, 1918]

[Reported [1918] 2 Ch. 180; 87 L.J.Ch. 561; 119 L.T. 220; 82 J.P. 249; 34 T.L.R. 450; 62 Sol. Jo. 584]

Landlord and Tenant—Restrictive covenant—Prohibition of use of premises for "noisy, noisome, or offensive trade" or any "noisome or injurious thing" —Use for hospital for surgical treatment of tuberculosis—Nuisance—Merger of lease—Increase of restrictions on tenant.

By a lease of a house and grounds, dated Feb. 18, 1887, for a term of ninety-nine years from Dec. 25, 1880, the second defendant, the tenant, covenanted with the lessor not to carry on or permit to be carried on upon the demised premises any "noisy, noisome, or offensive trade or business," or during the term "do or suffer to be done anything which might be hazardous or noisome, or injurious" to the lessor or his property, tenants, or undertenants. In 1889 the reversion in the property was conveyed to H.A.W. who covenanted that she would not permit the premises to be used for any trade or business "or otherwise than as a private dwelling-house" or do or suffer to be done any thing upon the premises which might be or grow to the annoyance or damage of the freeholder or the owners of adjoining houses. In 1893 H.A.W. conveyed the reversion to the second defendant, the conveyance containing a provision purporting to merge the term in the lease in the reversion, and the defendant covenanted with H.A.W. to observe the restrictive covenants in the indenture of 1889 and to keep her indemnified in respect thereof. In 1915 the second defendant gave the property to the defendant association for use as a hospital for children needing surgical treatment for tuberculosis, and in 1917 it was opened for that purpose. In an action by the lessor under the lease of 1887, who was the owner of a house in the vicinity, another such owner, and tenants of neighbouring houses under long leases for an injunction to restrain the defendants from using the premises as a hospital,

Held: (i) the conduct of a properly equipped and carefully managed establishment for the relief of pain and suffering was not per se a "noisy, noisome, or offensive trade or business"; on the evidence, neither anything seen at the

hospital, nor any noise, nor any smell of disinfectants or the burning of swabs or dressings, amounted to something "noisome or injurious"; and, therefore, there was no breach of the second defendant's covenants in the lease of 1887; the facts proved did not constitute a common law nuisance; but the effect of the declaration of merger in the deed of 1893 was that the second defendant at once became bound, by covenant enforceable by the lessor under the lease of 1887 and his assigns, not to use the property otherwise than as a dwelling-house, and, therefore, the plaintiffs were entitled to an injunction to restrain a breach of that covenant.

Notes. As to covenants restricting the user of premises, and as to merger, see 23 HALSBURY'S LAWS (3rd Edn.) 620–625, 690, 691; and as to nuisances between neighbouring properties, see ibid., vol. 28, pp. 131–142. For cases see 31 DIGEST (Repl.) 160 et seq., and 36 DIGEST (Repl.) 281 et seq.

Cases referred to in argument:

A.-G. v. *Manchester Corpn.*, [1893] 2 Ch. 87; 62 L.J.Ch. 459; 68 L.T. 608; 41 W.R. 459; 9 T.L.R. 315; 37 Sol. Jo. 325; 3 R. 427; sub nom. *Crofton* v. *Manchester Corpn.*, *Withington Local Board* v. *Same*, *A.-G.* v. *Same*, 57 J.P. 340; 36 Digest (Repl.) 330, *745*.

Reid v. *Bickerstaff*, [1909] 2 Ch. 305; 78 L.J.Ch. 753; 100 L.T. 952, C.A.; 40 Digest (Repl.) 341, *2770*.

Re Finley, *Ex parte Clothworkers' Co.* (1888), 21 Q.B.D. 475; 57 L.J.Q.B. 626; 60 L.T. 134; 37 W.R. 6; 4 T.L.R. 745; sub nom. *Re Finley*, *Ex parte Hanbury*, 5 Morr. 248, C.A.; 5 Digest (Repl.) 1023, *8280*.

German v. *Chapman* (1877), 7 Ch.D. 271; 47 L.J.Ch. 250; 37 L.T. 685; 42 J.P. 358; 26 W.R. 149, C.A.; 40 Digest (Repl.) 350, *2822*.

Bramwell v. *Lacy* (1879), 10 Ch.D. 691; 48 L.J.Ch. 339; 40 L.T. 361; 43 J.P. 446; 27 W.R. 463; 31 Digest (Repl.) 170, *3043*.

Rolls v. *Miller* (1884), 27 Ch.D. 71; 53 L.J.Ch. 682; 50 L.T. 597; 32 W.R. 806, C.A.; 31 Digest (Repl.) 170, *3045*.

Walter v. *Selfe* (1851), 4 De G. & Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; 36 Digest (Repl.) 247, *1*.

Tod-Heatly v. *Benham* (1888), 40 Ch.D. 80; 58 L.J.Ch. 83; 60 L.T. 241; 37 W.R. 38; 5 T.L.R. 9, C.A.; 31 Digest (Repl.) 175, *3088*.

Shelfer v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; 43 W.R. 238; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112, C.A.; 28 Digest (Repl.) 792, *418*.

Harris v. *Boots, Cash Chemists (Southern), Ltd.*, [1904] 2 Ch. 376; 73 L.J.Ch. 708; 52 W.R. 668; 20 T.L.R. 623; 48 Sol. Jo. 622; 31 Digest (Repl.) 460, *5879*.

Whiteley v. *Delaney*, [1914] A.C. 132; 83 L.J.Ch. 349; 110 L.T. 434; 58 Sol. Jo. 218, H.L.; 38 Digest (Repl.) 879, *909*.

Rogers v. *Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest 340, *2769*.

Renals v. *Cowlishaw* (1878), 9 Ch. 125; 48 L.J.Ch. 33; 38 L.T. 503; 26 W.R. 754; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest 346, *2796*.

Bainbridge v. *Chertsey Urban Council* (1914), 84 L.J.Ch. 626; 79 J.P. 134; 13 L.G.R. 935; 36 Digest (Repl.) 262, *120*.

Action for an injunction.

By an indenture of settlement executed on Mar. 1, 1870, the Clytha estate was assured and limited to trustees for the term of ninety-nine years from the date of the indenture to the use of William Herbert, who died on May 20, 1885, and his assigns during his life without impeachment of waste, and after the decease of William Herbert to the use of the plaintiff, William Reginald Herbert and his assigns during his life, with divers remainders over. In 1880 lands in the borough

of Newport, Monmouthshire, forming part of the Clytha estate, about forty acres in extent and adjoining other lands of the estate already built on, were laid out for residential building of a superior class. The leases of land on the Clytha estate were in a printed form and intending lessees were told that plots were let on the same terms except as to price. By an indenture dated Feb. 18, 1887, and made between the plaintiff, William R. Herbert, of the one part, and the defendant, Sir Abraham Garrod Thomas, knight, of the other part, all that piece or parcel of land situate in Clytha Park Road, in the parish of St. Woolos and borough of Newport, in the county of Monmouth, which piece of land contained 2,420 square yards, was demised to the defendant, Abraham G. Thomas, for a term of ninety-nine years from Dec. 25, 1880, and the defendant, Abraham G. Thomas, for himself, his heirs, executors, administrators, and assigns, covenanted with the plaintiff, William R. Herbert (among other things), that he would not at any time during the term use, exercise, or carry on, or permit to be used, exercised, or carried on upon the demised premises any noisy, noisome, or offensive trade or business, or at any time during the term to or suffer to be done anything which might be hazardous or noisome or injurious or offensive to the lessor or his property or to any of his tenants or undertenants. By an indenture dated Aug. 2, 1889, and made between the grantees to uses under the indenture of Mar. 1, 1870, of the first part, the plaintiff William R. Herbert, of the second part, and Harriet Anna Wilson, of the third part, all that piece or parcel of land situate in Clytha Park Road, in the parish of St. Woolos and borough of Newport, subject to the lease of Feb. 18, 1887, together with all and singular the rights, members, and appurtenances to the same premises belonging and appertaining, and the reversion of the said premises was conveyed so that the said premises should thenceforth go, remain, and be to the use of the said Harriet A. Wilson, her heirs and assigns, for ever, and the said Harriet A. Wilson thereby for herself, her heirs, executors, administrators, and assigns, covenanted with the plaintiff William R. Herbert, his heirs and assigns, and also separately with every person who under or by virtue of the limitations and provisions contained in the indenture of settlement of Mar. 1, 1870, or any limitations or provisions which under any power in that behalf should be substituted therefor should thereafter be seised of or entitled to any estate or interest in any hereditaments subject to such limitations and provisions and their respective assigns;

> "To the intent that the burden of the covenants might run with the premises therein expressed to be thereby granted and every part thereof, and that the benefit thereof might run not only with the land for the time being subject to the said limitations and provisions of the said indenture of settlement, but also with the rest of the land in the same neighbourhood, which is at present subject to the same limitations and provisions, but which might thereafter be sold and conveyed away under the powers in that behalf in the said indenture contained in manner following (that is to say) that the said Harriet A. Wilson, her heirs and assigns . . . should not at any time thereafter use the said premises specified in the first schedule thereto or any part thereof or any messuage or dwelling-house then erected or thereafter to be erected thereon, or permit the same to be used for the purpose of any art, trade, or business or otherwise than as a private dwelling-house, nor do or suffer to be done any act or thing upon the said premises which might be or grow to the annoyance or damage of the said William R. Herbert or other the person or persons aforesaid or of the owners or tenants of lands or houses adjoining thereto."

By an indenture dated April 14, 1893, and made between Harriet A. Wilson, of the one part, and the defendant, Abraham Thomas, as purchaser, of the other part, Harriet Anna Wilson granted and released unto Abraham G. Thomas the piece or parcel of land comprised in and demised by the lease of Feb. 18, 1887, together with the messuage or dwelling-house with outbuildings erected and built thereon and known as Cardigan House, to hold the same unto and to the use of the

purchaser, his heirs, and assigns, subject to the thereinbefore recited indenture of lease and to the term thereby created, but to the intent that the term might be thenceforth absolutely merged in and consolidated with the reversion or inheritance in fee simple of the said premises expectant on the determination of the said term, and the purchaser thereby covenanted with the vendor, her heirs, executors, administrators, and assigns that he, the purchaser, his heirs and assigns would at all times thereafter duly observe and perform the covenants by the vendor and restrictive provisions in the thereinbefore recited indenture of Aug. 2, 1889, contained so far as the same related to the premises thereby assured, and would at all times keep the vendor, her heirs, executors, administrators, and assigns effectually indemnified against all actions, proceedings, costs, charges, claims, and demands whatsoever in respect of the said covenants and restrictive provisions relating to the premises or any of them.

The plaintiff, Alfred Frost, was the assignee of an original lease for the term of ninety-nine years from Dec. 28, 1880, of a piece of land situate in Clytha Park Road, upon which a dwelling-house, known as Portugal House, was afterwards erected, from William Herbert, which lease contained covenants (except as to the names and amount of rent) identical with those contained in the lease of Feb. 18, 1887. By an indenture dated April 10, 1894, Portugal House was conveyed, subject to this lease, which bore date Nov. 3, 1884, to one William Graham, who entered into restrictive covenants similar to those contained in the indenture of Aug. 2, 1889, and by an indenture dated May 12, 1906, William Graham conveyed the premises with Portugal House to the plaintiff Alfred Frost, who thereby covenanted for himself, his heirs, and assigns thenceforth, to observe and perform the covenants contained in this indenture of April 10, 1894, so far as the same related to the hereditaments thereby conveyed, and to keep William Graham, his heirs and assigns indemnified in respect of the same. The second plaintiff, Arthur Joseph Gould, and the third plaintiff, George Ernest Gwyther, were respectively as to Arthur J. Gould, assignee of a lease dated June 13, 1893, from the plaintiff, William R. Herbert, of land situate in Llanthewy Road, in the borough of Newport, and as to George E. Gwyther, the owner of land in the parish of St. Woolos and borough of Newport abutting on Faulkner Road, and leased on Oct. 20, 1890, by the plaintiff William R. Herbert, who had subsequently conveyed the freehold reversion to one Gait, who, by an indenture dated April 26, 1911, had conveyed the premises to the plaintiff George E. Gwyther, subject to the covenants in the conveyance to her of the reversion. In January, 1915, the defendant, Sir Abraham G. Thomas, offered Cardigan House to the council of the defendant association for the purpose of a hospital for tuberculosis. Adjoining owners and tenants protested, but the house was opened as a hospital on June 25, 1917. The plaintiffs claimed an injunction restraining the defendants from using or permitting to be used Cardigan House or any premises formerly subject to the provisions of the settlement of Mar. 1, 1870, so as to cause a nuisance to the plaintiffs as owners and occupiers of adjacent premises, or using or permitting the premises to be used for any art, trade, or business or otherwise than as a private dwelling-house, or from doing or suffering acts to the annoyance or damage of adjoining owners in breach of the covenants contained in the indenture of Aug. 2, 1889. The plaintiffs also claimed an injunction restraining the defendants from using the premises as a hospital for tuberculosis or any other noisome or offensive trade or business, and using and suffering to be done anything hazardous, or noisome, or injurious, or offensive to the plaintiff, William R. Herbert, or his property or to his tenants or undertenants, also damages and costs.

Edward Clayton, K.C., and *G. Baldwin Hamilton* for the plaintiffs.
Maugham, K.C., and *Sheldon* for the defendants.

Cur. adv. vult.

May 15, 1918. **EVE, J.**, read the following judgment.—On June 25, 1917, Cardigan House, situate on the Clytha estate, Newport, Monmouth, was opened as

a hospital for the admission of children suffering from tubercular disease requiring surgical treatment. On the 16th of the next month the writ in this action was issued claiming an injunction to restrain the defendants from using the house or permitting the same to be used for the purpose of a hospital for tuberculosis or otherwise than as a private dwelling-house and from doing or suffering to be done any act or thing upon the said premises which might be or grow to the annoyance or damage of the plaintiffs or other owners or tenants of lands or houses adjoining thereto. The writ was amended in August and re-amended in November by the addition of parties and by raising in more precise terms the relief claimed at the hearing. Of the four plaintiffs, Messrs. Frost and Gwyther are owners and Mr. Gould is tenant under a long lease of houses in the immediate vicinity of Cardigan House. The aims of the first defendants are sufficiently disclosed by their title. The second defendant, Sir Abraham Thomas, is the owner of Cardigan House, who early in 1915 generously offered it as a gift to the association "in the hope that they might be able to utilise it for the purpose of receiving children needing surgical treatment." No conveyance of the property to the association has yet been executed. Upon the proposal becoming known, strong opposition to its being given effect to was raised by some of the neighbouring owners and residents, among whom were the plaintiffs, who, in common with most of the witnesses they called at the trial, took a more or less active part in trying to get the proposal abandoned on the ground that the institution would be a source of danger and a nuisance to the neighbourhood. These efforts failed, and, as I have already stated, the institution was opened on June 25, 1917.

The part of the Clytha estate to which the action relates is subject to a building scheme; it was laid out for residential buildings of a superior class, adapted for occupation by persons of substantial means, and the then tenant for life in person, the plaintiff William R. Herbert, developed it by means of building leases for terms of ninety-nine years, each containing identical covenants for the maintenance of the character of the estate. Among the covenants in the lease of Cardigan House granted to the defendant, Sir Abraham G. Thomas, on Feb. 18, 1887, is a covenant not to use, exercise or carry on or permit to be used, exercised or carried on upon the demised premises any noisy, noisome or offensive trade or business, or do or suffer to be done anything which may be noisome or injurious or offensive to the lessor or his property or to any of his tenants or undertenants. The plaintiffs allege that the present use of the house is a breach of both branches of this covenant, or if not of both branches, then at least of the second branch. They also allege that apart from covenant the carrying on of the hospital constitutes an actionable nuisance, but concede that if they have to fall back on this alternative cause of action the relief to which they are entitled may be restricted to an injunction to restrain the carrying on of the hospital so as to occasion a nuisance, relief which would fall short of that which they are admittedly seeking—namely, the removal of the hospital altogether.

The hospital is used only for the surgical treatment of tubercular joints and glands in children up to the age of twelve. It is arranged to accommodate thirty-one patients—is exceedingly well equipped and staffed, and enjoys the gratuitous services of the most eminent surgeons. No cases of chest or pulmonary tuberculosis are admitted: the institution is a surgical hospital, not a sanatorium, and the patients are sent away to different sanatoria belonging to the association as soon as they can be moved from the hospital. Some cases are satisfactorily treated and overcome in a few weeks, in others tubercular joints have to be splinted in wood, iron, or plaster, and put into a position of rest for more or less lengthy periods, and in others again glands have to be removed and abscesses and other distressing accompaniments of the disease to be reduced by cutting, scraping, or other less drastic means. Rather less than half the operations involve a wound. The evidence is overwhelming that all this treatment is carried out with skill and care, and under the most approved modern conditions, with a minimum of pain to the patients, a remarkably small consumption of almost inodorous disinfectants

(samples of all were produced at the trial), and suitable receptacles for the removal of soiled dressings and bandages, which are forthwith burned. When the weather is suitable the patients are carried out into the garden and there laid out on mattresses or couches to get the benefit of the air and sunshine. The house and the garden are to a certain extent overlooked by some of the surrounding houses, and from these and their gardens the nurses and sometimes the patients passing to and fro in Cardigan House and the children lying outside in the garden can be seen.

The first question is: Does this use of Cardigan House amount to the exercise therein of a noisy, noisome, or offensive trade or business? I do not think that it does; to hold that the carrying on of such an institution must involve a breach of that part of covenant would, I think, be enlarging the operation of such a covenant beyond reasonable limits. I am not saying that there may not be many persons to whom the proximity of pain and suffering and the obtrusion before their eyes of its victims may not be annoying and even distressing, but I cannot bring myself to hold that a properly equipped and carefully managed establishment for the relief of such pain and suffering is per se a noisy, noisome, or offensive business.

The second breach of the covenant on which the plaintiffs rely is of a more far-reaching operation. It extends to everything which can be noisome or injurious or offensive, even though the business is not per se a noisy, noisome, or offensive one within the first branch of the covenant, and I now have to consider whether the plaintiffs have established the allegations on which they rely as disclosing breaches of this part of the covenant. The allegations in the statement of claim were supplemented at the trial by some evidence of an occasional discharge of smoke from one of the chimneys of Cardigan House charged with an unpleasant smell attributed to the burning of swabs, bandages, and dressings. The alleged grounds of complaint fell under four heads—that is to say, sights, noise, smells, and risk of infection, and with this I will deal separately. The house and garden, as I have already said, are overlooked. This is a drawback, but it does not render them unsuitable for the particular use to which they are being put. For the treatment of pulmonary consumption and for the convalescence of surgically treated tubercular patients a high altitude and abundance of sun and fresh air are desiderata, but when surgical treatment has to be resorted to it is necessary to have the operating institution within easy reach of those who generously give their skilful services to the inmates if satisfactory results are to follow. It has been proved that neighbours, especially if they happen to be passing along the roads on which the hospital abuts, see the children being brought to and sometimes carried into the hospital—that from some points in the gardens of adjoining houses the patients can be seen lying in the hospital garden, and that—as I have already noticed—nurses and occasionally patients (the latter with surgical bandages on heads and necks) can be seen from some parts of neighbouring houses and gardens moving about in Cardigan House—looking out of the windows and sometimes near the gate in the front of the house, but no evidence has proved that "every detail of the dressing of the patients is visible to inhabitants of neighbouring houses and all who walk down Oakfield Road" or anything like it. That some noise must emanate from any dwelling in which thirty-one children are congregated is inevitable, but the plaintiff's evidence has not, in my opinion, established that "the children are continually crying." The conclusion I arrive at on the point of the alleged "continued crying" is that it has been much exaggerated, and like the sights complained of cannot reasonably be said to amount to anything that is noisome or offensive, though I can well understand it may now and again be distressing and even annoying. The smells stand on rather a different footing. The allegation in the claim is that "there is a noticeable smell of disinfectants," and, although it must, I think, be admitted that there are somewhat emasculated terms in which to allege an actionable nuisance, I am not sure that the caution of the pleader was not fully justified, for when competent deponents were asked to identify the origin of the objectionable smells they indicated chloride of lime and tar, Jeyes' Fluid,

and carbolic acid, of which the first named is not used in the hospital at all, but is used by the corporation authorities for disinfecting the gullies and drains in the adjoining roads—while of the second 5 gallons and of the third 1 lb and no more have been used in the ten months since the hospital was open, and in the case of the carbolic acid exclusively for disinfecting instruments, and, therefore, in very small quantities. An experiment made with the Jeyes' Fluid which is used (a few pints at a time) for cleansing pails, pans, lavatories, and other similar domestic purposes satisfied Dr. Johnson that it could not be smelt outside the house. The case on the disinfectants, in my opinion, came to nothing, and, as the alleged smell from the burning of dressings and bandages was not mentioned until the trial when the defendants had no opportunity of investigating the matter, I should not allow that to be substituted for the complaints in the pleading.

I have now dealt with three of the grounds in which the carrying on of the hospital is said to be noisome or offensive to the plaintiffs and other owners and tenants. In disposing of these points I have, generally speaking, stated what I held to be the result of the evidence on both sides, but in listening to the various witnesses it was impossible not to appreciate that many of those who supported the plaintiffs' case regarded the facts to which they were deposing as a sort of vindication of the opinions they had from time to time expressed during the two years immediately preceding the opening of the hospital. Long before this event they had quite made up their minds that certain injuries and offensive results would at once follow, and when after the event incidents occurred which may have been annoying and distasteful to them, what more natural than that they should associate all such incidents with the hospital and magnify them into noisome, injurious, and offensive occurrences? No one impugns their good faith; it is the competency of such witnesses to shake themselves free from preconceived prejudices which is questioned.

I pass now to the real and substantial objection which is summed up in the allegation "tuberculosis is an endemic and infectious disease, and the hospital is a source of danger to the neighbourhood." The first part of that allegation is not disputed, though the defendants have proved that the risk of infection from pulmonary tuberculosis is very much greater than from surgical cases, and that surgical tuberculosis is not generally derived from another person, but from an animal—as, for example, from drinking infected cow's milk. The second part of the allegation raises an issue of fact, and on this the evidence I have heard, and on which alone I have to decide the issue, is all one way. I have heard the testimony of a succession of eminent physicians, all of great experience on the subject of tuberculosis, and some of whom have been in charge of the largest and most important hospitals and institutions for its treatment, and their opinion is unanimous and unshaken that this hospital is not a source of danger to the neighbourhood, and that there is no risk of infection from it to those in its immediate vicinity. It would be impossible in the face of this unanimity for any court to hold that the plaintiffs have established the second part of their allegation, or that there is any longer any reasonable ground for the fear of infection which they and several of their supporters have entertained. I am quite satisfied on the evidence that such fears are wholly groundless. It comes, therefore, to this, that the hospital is no source of danger to the neighbourhood, and that there is nothing in the way in which it is conducted which can properly be said to be noisome or offensive. No evidence was called by the plaintiffs to prove that it is injurious, they asked me to infer that its advent must have depreciated the surrounding property, and expressed the opinion—unsupported by any data—that it had in fact depreciated the value of their own houses. The defendants, on the other hand, called an auctioneer and estate agent with forty-four years' experience in business at Newport, and he gave evidence that, in his opinion, the value of the property in the vicinity has not been affected by the opening of the hospital. In this state of the evidence I can but hold that the plaintiffs have failed to establish that it has been injurious. The conclusions at which I have arrived in considering the

matters relied upon as constituting breaches of the second branch of the covenant in the lease dispose of any case which might otherwise have been raised in the allegation that the business of the hospital has been so conducted as to occasion a nuisance to the neighbourhood by noise, smell, or unsightly publicity. So far, therefore, as the action is based on alleged breaches of the covenant contained in the lease of Feb. 18, 1887, or on common law nuisance, I hold that it fails.

The plaintiffs, however, have raised another and more difficult case. After the building estate had been developed in the manner I have already indicated, the plaintiff William R. Herbert was minded to dispose of his freehold reversion, and on Aug. 2, 1889, he and his trustees conveyed to Miss Harriet Anna Wilson (inter alia) the side of Cardigan House, subject to the subsisting lease to the defendant Thomas, and Miss Wilson thereby for herself, her heirs, executors, administrators, and assigns covenanted that she would not permit the house to be used otherwise than as a private dwelling-house. On April 14, 1893, Miss Wilson conveyed and released the side of Cardigan House and the house and outbuildings to the defendant Thomas, subject to the lease of Feb. 18, 1887, and the term thereby created, but to the intent that the said term might be thenceforth absolutely merged in and consolidated with the reversion or inheritance in fee simple of the premises expectant on the determination of the said term, and Sir Abraham covenanted to indemnify the vendor against the covenants and restrictions contained in the conveyance of 1889. In these circumstances the plaintiffs, two of whom are owners in fee simple by virtue of conveyances containing similar restrictive covenants to those in the conveyance of 1889 and executed subsequent thereto, allege that Cardigan House is now subjected to the more stringent restrictions imposed by the conveyance of 1889, and that the defendants can no longer successfully assert that its user is regulated by the less burdensome covenant contained in the lease of February, 1887. In answer to this the defendants urge that the premises assured by the deed of Aug. 2, 1889, were the reversions expectant on the determination of the several leasehold terms therein mentioned, that by these leases a building scheme establishing a local code for the duration of the terms had been set on foot, and that in the light of this knowledge Miss Wilson's covenants ought to be construed as becoming effective only when the building scheme and the code regulating it comes to an end on the determination of the terms by effluxion of time. Further, it is argued that, even if this is not so, the merger brought about by the conveyance and release of 1893 ought not to be construed as operating to increase the restrictions theretofore imposed on the lessee.

I do not see my way to accede to these arguments. It may well be that no arrangement between the reversioners of a leaseholder would have released the latter as against third parties from any restrictions constituting part of the code regulating the user of the land subject to the building scheme, but it does not by any means follow that the lessee could not submit his property to a more stringent code as between himself and the reversioner and persons claiming as freeholders under him. I think the construction of the conveyance to Miss Wilson—in which, be it observed, are contained covenants obviously intended to come into immediate operation framed in language identically the same mutatis mutandis as the one under consideration—is too clear to be controlled by inferences as to what must have been the intention of the parties founded on the existence of what I may perhaps call the leasehold building scheme, and as regards the qualified effect which it is suggested ought to be given to the merger. The correspondence leading up to the execution of the deed of 1893 demonstrates that the matter of the restrictive covenants to which Sir Abraham was about to be subjected was present to the mind of his advisers. I cannot, therefore, hold that any qualification can properly be engrafted on the declaration of merger in this deed. It follows, therefore, that from 1893 onwards Sir Abraham Thomas was, in my opinion, bound, by covenant enforceable by the plaintiff Herbert and his assigns, not to use Cardigan House otherwise than as a private dwelling-house. The present user admittedly involves a breach of this covenant, and I propose to grant an injunction in the terms of the

covenant down to the words "private dwelling-house." Such an injunction will, I think, give the plaintiffs all the relief to which they have proved themselves to be entitled.

Evidence has been given from which it appears that in the present condition of general hospitals, taxed as they are to their utmost capacity, the closing of this hospital would involve the return of the patients to their homes, not infrequently to surroundings calculated to aggravate their sufferings, and effectually to eradicate any chance of a cure. I am satisfied that no one of the plaintiffs would willingly precipitate so great a catastrophe, and I, therefore, propose to suspend the operation of the injunction for six months from to-day, and to give the defendants liberty to apply for a further suspension should the present conditions continue to prevail at the end of the six months. The plaintiffs will have the general costs of the action, but, as they have failed so far as the action claims relief for breaches of the covenant in the lease, I cannot give them these costs. I do not, however, order them to pay any costs, as, although I cannot help thinking they were somewhat hasty in launching the action when the hospital had only been open three weeks and when it could hardly have got into working order, I think perhaps the apprehension of infection was not altogether unreasonable. Accordingly, the order for costs will be an order for payment by the defendants of the costs of the action except in so far as they have been increased by the claim for an injunction based on the alleged breaches of the covenant contained in the lease of Feb. 18, 1887. There will be no order as to such increased costs.

Solicitors: *Gamlen, Bowerman & Forward*, for *Hunter & White*, Newport, Mon.; *Ellis Davies, Roberts & Co.*, for *D. W. Evans*, Cardiff.

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

YORKE *v.* YORKSHIRE INSURANCE CO.

[King's Bench Division (McCardie, J.), March 26, April 10, 1918]

[Reported [1918] 1 K.B. 662; 87 L.J.K.B. 881; 119 L.T. 27; 34 T.L.R. 353; 62 Sol. Jo. 605]

Insurance—Life assurance—Proposal—Statement that assured had not suffered from any illness of consequence—Prior illness due to overdose of drug—Death from further overdose.

A life assurance policy was based on a proposal form dated Dec. 12, 1916, which contained the question: "What illnesses have you suffered?" to which the insured answered: "None of consequence." The truth of the answers on the proposal form was the basis of the policy. Three months after its date the insured died from an overdose of veronal. On a claim by the plaintiff, the assignee of the policy, the insurance company disclaimed liability on the ground that the above answer and certain others were untrue, and that the insured had concealed material facts. The jury found that the insured had suffered from an illness of consequence prior to the date of the policy, i.e., one in 1911, caused by an overdose of veronal.

Held: the question: "What illnesses have you suffered?", was not ambiguous; the answer of the insured was not an expression of opinion, but was an incorrect statement; and, therefore, the policy was void.

Insurance—Life assurance—Proposal—Non-disclosure by assured of material facts —Expert evidence—Medical witnesses.

The expert testimony of medical men is admissible on the materiality of facts not disclosed by the assured in an action on a life insurance policy.

Insurance—Life assurance—Proposal—Statement by insured that he had always been of sober and temperate habits—Addiction to drug.

The words "sober and temperate" in a life assurance policy **held** to refer only to the use or abuse of alcohol and not to be applicable to the use of drugs.

Notes. As to non-disclosure and misrepresentation in an insurance policy, see 22 HALSBURY'S LAWS (3rd Edn.) 185 et seq.; and for cases see 29 DIGEST 350 et seq.

Cases referred to:

(1) *Lindenau* v. *Desborough* (1828), 8 B. & C. 586; 108 E.R. 1160; sub nom. *Von Lindenau* v. *Desborough*, 3 C. & P. 353; 3 Man. & Ry.K.B. 45; 7 L.J.O.S.K.B. 42; 29 Digest 352, *2855*.

(2) *Wheelton* v. *Hardisty* (1858), 8 E. & B. 232, 285; 27 L.J.Q.B. 241; 31 L.T.O.S. 303; 5 Jur.N.S. 14; 6 W.R. 539; 120 E.R. 106, Ex. Ch.; 29 Digest 351, *2845*.

(3) *Joel* v. *Law Union and Crown Insurance Co.*, [1908] 2 K.B. 863; 77 L.J.K.B. 1108; 99 L.T. 712; 24 T.L.R. 898; 52 Sol. Jo. 740, C.A.; 29 Digest 353, *2858*.

(4) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, H.L.; 29 Digest 37, *8*.

(5) *Moens* v. *Heyworth* (1842), 10 M. & W. 147; H. & W. 138; 10 L.J.Ex. 177; 35 Digest 17, *96*.

(6) *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q.B. 782; 68 L.J.Q.B. 631; 80 L.T. 579; 47 W.R. 487; 15 T.L.R. 297; 4 Com. Cas. 193, C.A.; on appeal sub nom. *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A.C. 135; 69 L.J.Q.B. 409; 82 L.T. 205; 5 Com. Cas. 198; 16 T.L.R. 232; 29 Digest 49, *117*.

(7) *Burton* v. *Eyden* (1873), L.R. 8 Q.B. 295; 42 L.J.M.C. 115; 28 L.T. 408; 37 J.P. 693; 21 W.R. 593; 25 Digest 304, *116*.

(8) *Thomson* v. *Weems* (1884), 9 App. Cas. 671, H.L.; 29 Digest 36, *1*.

(9) *Hutchinson* v. *National Loan Fund Life Assurance Co.* (1845), 7 Dunl. (Ct. of Sess.) 467; 17 Sc. Jur. 253; 29 Digest 353, *2855v*.

(10) *Carter* v. *Boehm* (1766), 3 Burr. 1905; 1 Wm. Bl. 593; 97 E.R. 1162; 29 Digest 36, *3*.

(11) *Herring* v. *Janson* (1895), 1 Com. Cas. 177; 29 Digest 163, *1192*.

(12) *Scottish Shire Line, Ltd.* v. *London and Provincial Marine and General Insurance Co., Ltd.*, [1912] 3 K.B. 51; 81 L.J.K.B. 1066; 107 L.T. 46; 56 Sol. Jo. 551; 12 Asp.M.L.C. 253; 17 Com. Cas. 240; 29 Digest 173, *1300*.

(13) *Associated Oil Carriers, Ltd.* v. *Union Insurance Society of Canton, Ltd.*, [1917] 2 K.B. 184; 86 L.J.K.B. 1068; 116 L.T. 503; 33 T.L.R. 327; 14 Asp.M.L.C. 48; 22 Com. Cas. 346; 29 Digest 259, *2093*.

Further consideration of an action tried by MCCARDIE, J., and a special jury.

The plaintiff claimed £1,000 as assignee of a policy of insurance dated Jan. 4, 1917, upon the life of one R. Smith for the period of one year, granted by the defendant company to the said R. Smith. The policy was assigned to the plaintiff on Feb. 28, 1917. The assured died on Mar. 25, 1917. The material facts are fully stated in the judgment.

Tindal Atkinson, K.C., and *Haydon* for the plaintiff.
Sir Ernest Pollock, K.C., and *Shakespeare*.

Cur. adv. vult.

April 10, 1918. **McCARDIE, J.**, read the following judgment.—This action raises several points of general interest and legal importance. The plaintiff claims £1,000 as the assignee of a life policy issued by the defendants on Jan. 4, 1917, upon the

life of one R. Smith. Within three months of the date of the policy Smith died from an overdose of veronal. The policy was for one year. The premium was £11 4s. 2d. The defendants assert the invalidity of the policy. Hence this action by the plaintiff. This is the only policy which has been disputed by the plaintiff within the past twenty-five years, and I desire to say that, in my view, they were amply justified in referring the question of liability to be determined in a court of justice. The policy provided that the proposal and declaration should form the basis of the contract. The proposal form, dated Dec. 12, 1916, contained (inter alia) the following questions: What illnesses have you suffered?—Answer: None of consequence. Do you ordinarily enjoy good health?—Answer: Yes. Are you now, and have you always been of sober and temperate habits?—Answer: Yes. The declaration was as follows:

> "I (the person whose life is proposed for insurance) do hereby declare that I am at present in good health, that the foregoing statements are true, and that I have not concealed or withheld any information affecting the risk of an insurance on my life, and I, the person in whose favour the policy is to be granted, do hereby agree that this proposal and declaration shall be the basis of the contract between me and the Yorkshire Insurance Co., Ltd., and that if any material information has been withheld or any of the statements made above have not been truly and fairly set forth then all moneys which have been paid in consequence thereof shall be forfeited and the insurance itself shall be absolutely null and void."

The defence relied (in substance) on two main points—viz.: (a) that the answers to the above questions were untrue, and (b) that Smith had failed to disclose that he suffered from heart trouble and from insomnia, and that he was addicted to the veronal habit. It was not specifically pleaded that Smith had suffered from a serious illness in 1911. The facts as to such illness were not then known to the defendants. Prior to the hearing before me, a trial had taken place before Darling, J., and a special jury. The jury could not agree. In the course of that trial the circumstances with respect to the illness in 1911 became known to the defendants. Thereupon an amendment of the pleadings was granted by Darling, J., whereby the defendants were allowed to rely on such illness as a part of their defence. I concur with Darling, J., in thinking that the amendment could properly be allowed. With the pleadings so amended, the second trial took place before me.

The questions left to the jury and their answers thereto were as follows: (i) Had Smith suffered from any illness of consequence prior to Dec. 12, 1916?—Answer: Yes, in 1911. (ii) Was Smith on Dec. 12, 1916, in good health?—Answer: Yes. (iii) Had Smith prior to Dec. 12, 1916, suffered from insomnia?—Answer: Yes, occasionally. (iv) If yes, was it material for the defendants to know that fact?—Answer: No. (v) Had he prior to Dec. 12, 1916, been in the habit of using veronal?—Answer: Occasionally, but there is not enough evidence to prove habit. (vi) If yes, was it material for the defendants to know that fact?—No answer. (vii) Was Smith on and prior to Dec. 12, 1916, of sober and temperate habits with respect to veronal?—Answer: Yes. (viii) Was Smith on or prior to Dec. 12, 1916, suffering from heart trouble?—Answer: No. (ix) If yes, was he aware of the fact?—No answer. (x) If yes, was it material to the defendants to know such fact?—No answer. (xi) Was it material for the defendants to know the substance of the information contained in Sir James Mackenzie's letter of Oct. 20, 1916?—Answer: No. I allowed the seventh question at the express request of counsel for the defendants. In my opinion, however, such question was of no juristic relevance, for I think that the words "sober and temperate" must receive such an interpretation as would be placed upon them by ordinary men of normal intelligence and average knowledge of the world. So interpreted I can entertain no real doubt that they refer only to the use or abuse of alcohol. They are not applicable to the use of veronal or other soporific or narcotic drugs. They are inappropriate to what are known as "drug habits." If, in the future, an insurance company desires express

information with respect to such habits, then a further question of a direct character should be added to the proposal form. But it may be well not to add further to the stringent requirements already existing. Unless such question be expressly asked, insurance companies must, with respect to the use of drugs by a proposer, rely on the rule of law which requires the disclosure of all material facts known to the proposer which might lead the insurer to refuse the risk or demand a higher premium: see per BAYLEY, J., and LITTEDALE, J., in *Lindenau* v. *Desborough* (1), 8 B. & C. at pp. 592, 593; see also per LORD CAMPBELL, C.J., in *Wheelton* v. *Hardisty* (2), 8 E. & B. at p. 270; per curiam in *Joel* v. *Law Union and Crown Insurance Co.* (3).

I may refer to ss. 17 and 18 of the Marine Insurance Act, 1906. This Act, I point out, may frequently be considered with advantage in cases of insurance, though they do not relate to marine risks. For, in certain important respects (e.g., the requirement of uberrima fides) the law is the same, whether the insurance be life, fire, or marine: see e.g., per LORD BLACKBURN in *Brownlie* v. *Campbell* (4), 5 App. Cas. at p. 954; per PARKE, B., in *Moens* v. *Heyworth* (5), 10 M. & W. at p. 157; MACGILLIVRAY ON INSURANCE, p. 301; *Seaton* v. *Heath*, *Seaton* v. *Burnand* (6).

The effect of the answers given by the jury in the present case is to negative the plea of the defendants that Smith failed to disclose material facts with respect to (a) insomnia, (b) the use of veronal, (c) heart trouble. The jury have found in favour of the plaintiff on such points. They tried the case with great care and patience, and although I myself might not have arrived at the same conclusion with respect to the veronal and insomnia questions, I am bound, of course, to recognise their findings. The defendants, however, claim judgment by reason of the answer of the jury to the first question. But counsel for the plaintiffs submitted an able and ingenious argument in support of the contention that the plaintiff was entitled to judgment in spite of that answer. They contended (in substance) that the question in the proposal form: "What illnesses have you suffered?" was ambiguous, and that the answer of Smith could not be relied upon by the defendants, inasmuch as it expressed an opinion only in reply to a question alleged to be obscurely framed. But, in my view, the contention fails. The word "illness" has not been judicially defined. *Burton* v. *Eyden* (7), in which it was held by the court that sickness may include insanity, throws no real light on the matter. The word illness must be construed in a fair business manner. It must always be a question of degree. A man may be ill without being nigh unto death. On the other hand, a man may suffer from an ailment which does not amount to an "illness." Physical or serious disorder varies in nature and gravity. One set of facts may obviously amount to illness; another set of facts may obviously amount to a mere indisposition. An intermediate state of things may give rise to question. But a like difficulty occurs upon many questions of fact which come before the courts—e.g., as to a reasonable time or as to criminal negligence—and equally, too, does the difficulty arise in the application to an insurance case of the uberrima fides rule as to the disclosure of material facts. Materiality may well be said to be a mixture of fact and opinion. But in the actual affairs of life and in the ordinary work of the courts these difficulties are solved each day. The plainest doctrine of law might be subverted if studied refinement and astute illustrative argument were allowed to negative the instincts and conclusion of everyday good sense.

The argument based on the ambiguity of the question, "What illnesses have you suffered?" bears a close resemblance to the argument presented to the House of Lords in the well-known case of *Thomson* v. *Weems* (8). There the proposal form contained (inter alia) the following questions: "(vii) Are you temperate in your habits? And have you always been strictly so?" It was submitted to the House of Lords that the questions were uncertain, and that the answers to be given raised matters of opinion rather than of fact. But such submission was decisively rejected by the House of Lords: see per LORD BLACKBURN, 9 App. Cas. at p. 684; and per LORD WATSON, pp. 687, 688, and 690. Hence, the plaintiff in *Thomson* v. *Weems*

(8) failed by reason of the incorrectness of answers, the truth of which had been warranted. It may be that such questions also as "are you in good health" admit of discussions, if one embarks on subtle analogies. "Good health" is a phrase difficult to define. Yet an effort was made by Lord Fullerton, in the Scottish case of *Hutchinson* v. *National Loan Fund Life Assurance Co.* (9) (7 Dunl. (Ct. of Sess.) at p. 478), where he described good health in language of graceful balance as

> "the perfect conscious enjoyment of all one's faculties and functions and the freedom from any ailment affecting them, or any symptom of ailment."

But I venture to think that a man may be in good health, although he lacks the full possession of that exultant and joyous vitality indicated by Lord Fullerton. Even a pessimist may, I conceive, be a fit subject of life insurance.

A jury can be relied on to know the meaning of the phrase "good health" as employed in the usual affairs of life, just as they will know the meaning of the words "sober" and "temperate" as used by the ordinary man in an omnibus, the office, or restaurant. A question may be a question of fact, although the element of opinion is involved therein. In the present case, I think that the jury were amply justified in forming the view that the illness from which Smith suffered in 1911 was an illness of consequence. In November of that year he lay in a critical condition through an overdose of veronal. His relatives were sent for. Dr. Ealer attended him for about a fortnight. He then recuperated at Bournemouth for about ten days. These facts were proved by Dr. Ealer, a witness for the plaintiff, who stated that he regarded Smith's illness as serious. The jury clearly accepted his view of the matter. I agree with the jury. It, therefore, follows, that the proposal form contained a statement which was substantially incorrect, and hence as the warranty of truth was broken, the policy became void. Judgment must, therefore, be entered for the defendants.

I desire to say a few words on an evidential point of general importance which arose in the course of the medical testimony, both in the cross-examination of the plaintiff's doctors and also in the examination-in-chief of their own witnesses. The defendants' counsel asked questions (which I allowed) directed to two points—viz., (a) whether it was material for an insurance company to know of a veronal habit or of insomnia trouble on the part of the proposer; and (b) whether or not the illness of 1911 should be regarded as one of consequence. Counsel for the plaintiff objected to these questions. But in my opinion they were admissible. The view of the courts as to expert evidence in insurance cases seems to have developed. In the days of Lord Mansfield such evidence was apparently regarded as irrelevant: see, e.g., *Carter* v. *Boehm* (10). But the views of 150 years ago have been modified by the broader outlook of later judges and by a clearer realisation of the utility of expert testimony as an aid to the administration of justice, and *Carter* v. *Boehm* (10) was a case of the insurance of a port in Sumatra. But Lord Mansfield dealt with it on the same footing as a marine insurance. In marine insurance cases the law to-day is not as it apparently was in 1766. Expert evidence with respect to the materiality of a fact has been freely admitted in recent years by the experienced judges who have administered and are now administering justice in the Commercial Court. The practice I conceive is settled: see per Mathew, J., in *Herring* v. *Janson* (11), 1 Com. Cas. at p. 179; Arnould on Marine Insurance (9th Edn.) s. 626; per Hamilton, J., in *Scottish Shire Line* v. *London and Provincial Marine and General Insurance Co., Ltd.* (12), [1912] 3 K.B. at p. 70; see also *Associated Oil Carriers, Ltd.* v. *Union Insurance Society of Canton, Ltd.* (13), [1917] 2 K.B. at p. 189, per Atkin, J., also well reported as to the evidence 33 T.L.R. at p. 328. I conceive that no sound distinction can be drawn between cases of marine insurance as distinguished from life, fire, or other heads of insurance business: see, e.g., Macgillivray on Insurance, p. 315; Smith's Leading Cases (notes to *Carter* v. *Boehm* (10), 12th Edn., vol. 1, pp. 570 et seq.). Expert evidence may frequently afford great assistance to the court upon questions of novelty or doubt. If excluded it would deprive the court of the power of ascertaining

those considerations and views which a tribunal may well require to know and the insurance witness would be stricken with absolute silence upon matters of vital importance. Judges are always free to test and revise any form of expert testimony. It may be said, however, that in the marine insurance cases referred to the expert evidence has usually been given by those actually engaged in the occupation of insurers. I agree that this is so. But it must be pointed out that in questions of life insurance the matters at issue are usually physiological, medical, or neuropathic. The directors of insurance companies, however, are but rarely medical men. Seldom (if at all) do they personally see the proposer. They rely to a great extent on the reports and advice of medical men. The importance or otherwise of that which should be disclosed to a life insurance company may well be appreciated only by doctors or surgeons. Medical men may, therefore, often give a more useful opinion than the directors themselves as to what is or is not material and important. Hence, the admission of a medical opinion by LORD TENTERDEN in the life insurance case of *Lindenau* v. *Desborough* (1). Upon consideration, therefore, I am confirmed in the view I took at the trial that the evidence in question was admissible. I may add that I am satisfied that the jury would have given the same answer to the first question even if the evidence objected to by counsel for the plaintiff had been excluded. Judgment will therefore be entered for the defendants with costs.

Solicitors: *Penman & Brown*, for *Thomas Dodds*, Newcastle-upon-Tyne; *Gray & Dodsworth*.

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

HOLLAND *v.* HOLLAND

[COURT OF APPEAL (Swinfen Eady, M.R., Bankes, L.J., and Eve, J.), May 6, 7, 15, 1918]

[Reported [1918] P. 273; 87 L.J.P. 142; 119 L.T. 266; 34 T.L.R. 450]

Divorce—Appeal—Court of Appeal—Appeal from exercise of discretion.

No appeal lies from the discretion of the trial judge under s. 31 of the Matrimonial Causes Act, 1857 [now s. 4 (2) of the Matrimonial Causes Act, 1950], to grant a divorce to a party who has been guilty of adultery unless his judgment was erroneous in point of law.

Notes. In *Blunt* v. *Blunt* ([1943] 2 All E.R. 76) VISCOUNT SIMON, L.C., in the House of Lords laid down principles relating to the exercise by the court of the discretion conferred on it [Matrimonial Causes Act, 1950, s. 4 (2): 29 HALSBURY'S STATUTES (2nd Edn.) 394] to grant a decree of divorce to a guilty party.

Considered: *Hines* v. *Hines and Burdett*, [1918] P. 364. Referred to: *Wickins* v. *Wickins*, [1918] P. 265; *Pullen* v. *Pullen and Holding* (1920), 123 L.T. 203; *Apted* v. *Apted and Bliss*, [1930] P. 246; *Bainbridge* v. *Bainbridge*, [1934] P. 66; *Blunt* v. *Blunt*, [1943] 2 All E.R. 76.

As to discretion of court to grant a decree of divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 311 et seq.; and for cases see 27 DIGEST (Repl.) 427 et seq., 584 et seq.

Case referred to:

(1) *Brooke* v. *Brooke*, [1912] P. 205, n.; 81 L.J.P. 147, n.; 107 L.T. 202; 28 T.L.R. 577; 27 Digest (Repl.) 413, *3412*.

Also referred to in argument:

Symons v. *Symons*, [1897] P. 167; 66 L.J.P. 81; 77 L.T. 142; 13 T.L.R. 353; 27 Digest (Repl.) 434, *3637*.

Wyke v. *Wyke*, [1904] P. 149; 73 L.J.P. 38; 90 L.T. 172; 20 T.L.R. 193; 27 Digest (Repl.) 435, *3640*.

Tulk v. *Tulk* (1906), 23 T.L.R. 120; 27 Digest (Repl.) 435, *3642*.

Shaw v. *Shaw* (1904), 20 T.L.R. 795; 27 Digest (Repl.) 435, *3641*.

Pretty v. *Pretty*, [1911] P. 83; 80 L.J.P. 19; 104 L.T. 79; 27 T.L.R. 169; 27 Digest (Repl.) 430, *3602*.

Cleland v. *Cleland*, *Cleland* v. *McLeod* (1913), 109 L.T. 744; 30 T.L.R. 169; 58 Sol. Jo. 221; 27 Digest (Repl.) 436, *3661*.

Burdon v. *Burdon*, [1901] P. 52; 69 L.J.P. 118; 27 Digest (Repl.) 435, *3645*.

Constantinidi v. *Constantinidi and Lance*, [1903] P. 246; 72 L.J.P. 82; 89 L.T. 340; 52 W.R. 190; 19 T.L.R. 699; 47 Sol. Jo. 739; subsequent proceedings, [1905] P. 253; 74 L.J.P. 122; 93 L.T. 651; 54 W.R. 121; 21 T.L.R. 651, C.A.; 27 Digest (Repl.) 435, *3638*.

Schofield v. *Schofield*, [1915] P. 207; 84 L.J.P. 186; 112 L.T. 1000; 31 T.L.R. 236; 27 Digest (Repl.) 432, *3607*.

Appeal by the petitioner wife from an order of HILL, J., in which the learned judge refused to exercise the discretion of the court under s. 31 of the Matrimonial Causes Act, 1857, in her favour.

T. Cox Meech and *D. Carswell* for the wife.

Hollis Walker, *K.C.*, and *Talbot Ponsonby*, for the King's Proctor, were not called on to argue.

Cur. adv. vult.

May 15, 1918. **SWINFEN EADY, M.R.,** read the following judgment of the court.—This is the wife's appeal. She petitioned for a divorce, and on June 8, 1916, obtained a decree nisi on the ground of adultery and desertion. The King's Proctor intervened, to show cause why the decree should not be made absolute, on the ground that material facts had not been brought to the knowledge of the court, and that the wife herself had been guilty of adultery. The King's Proctor alleged that the wife had been guilty of adultery with one James Orgee, and that on June 8, 1916—the same day as that on which the decree nisi was pronounced—she gave birth to an illegitimate child, of which James Orgee was the father. These allegations are admitted by the wife. But she urged that the husband's misconduct and neglect conduced to her adultery, and that James Orgee was willing to marry her if she obtained a divorce. The wife was married in the year 1900, at the age of eighteen, when she was already pregnant by the husband. There have been four children. The husband is or was a clerk in a wine merchant's office. The marriage was not a happy one, and in the year 1911 the husband left the wife for good. He deserted her and made no provision for her. Since then the wife and one of her children have lived with her mother and stepfather, a farmer named Samuel Orgee, and the wife has worked on the farm and lived as one of the family. The said James Orgee is the son of her stepfather, and works with the wife on his father's farm. The learned judge in the court below considered the circumstances of the case, and did not see his way to exercise his discretion in favour of granting a decree to the wife.

The question for consideration by this court is whether that decision is erroneous, and not whether we should have exercised the discretion in the same manner as the judge below did. There is no appeal from his discretion to our discretion, and the appeal is not entitled to succeed unless the judgment is erroneous. We concur in the view expressed by the judge as to the true construction and effect of s. 31 of the Matrimonial Causes Act, 1857. Under that section the court has an unfettered discretion. The judge most properly considered the facts to which he referred in his judgment. Taking all the circumstances into account, it is impossible to say that the judgment is erroneous, or that the judge was judicially bound

to exercise his discretion in favour of the wife, or that in the judgment delivered he fell into any error in law. He states that in the exercise of his discretion he endeavoured to follow the rule to act "cautiously and carefully, and as far as possible consistently, not only in regard to the parties themselves, but also with reference to the interests of public morality": see *Brooke* v. *Brooke* (1). No better rule can be laid down. The appeal fails.

Appeal dismissed.

Solicitors: *T. H. Horwood*; *King's Proctor.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

RODRIGUEZ *v.* SPEYER BROS.

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Atkinson, Lord Sumner and Lord Parmoor), July 17, 18, 20, 21, 24, August 2, 1918]

[Reported [1919] A.C. 59; 88 L.J.K.B. 147; 119 L.T. 409; 34 T.L.R. 628; 62 Sol. Jo. 765]

Alien—Enemy alien—Partnership with British subjects and friendly alien—Recovery of debt due to partnership—Action in name of partnership—Joinder of enemy alien as plaintiff.

The rule that an enemy alien cannot bring an action in the courts of this country during the continuance of a war between the country of which he is a subject or a citizen and England does not apply to prevent British subjects or friendly aliens from recovering during the war a debt incurred by a debtor before the outbreak of war and due to them jointly on a joint contract with one who has since become an enemy, and for that purpose joining their enemy associate as plaintiff or defendant in an action against the debtor. To hold that the doctrine of disability applied to a case in which an enemy alien could not, during the war, reap any benefit from the action, and where the action was really for the benefit of British subjects or friendly aliens would involve a misconception of the principle and the extent of the rule, and would ignore the real mischief, to guard against which the rule was originally introduced, namely, the conferring on the enemy of some advantage.

So, where a partnership consisting of six partners, four of whom were English subjects, one an American citizen, and one a German subject, was dissolved by the outbreak of war between Great Britain and Germany in August, 1914, whereby also the German partner became an enemy alien, and the five other partners, to wind-up the partnership, sought to recover from a debtor in an action brought in the name of a firm (i.e., of all the partners) a debt incurred by him to the partnership in February, 1914, and for that purpose to join the German partner as a plaintiff,

Held by Lord Finlay, L.C., Viscount Haldane and Lord Parmoor, Lord Atkinson and Lord Sumner dissenting: they were entitled to do so, and to proceed with the action as so constituted.

Notes. Referred to: *The Glenroy*, [1943] P. 109; *V/O Sovfracht* v. *Gebr. Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] 1 All E.R. 76.

As to the position of an enemy alien as regards English courts, see Halsbury's Laws (3rd Edn.), tit. War and Emergency; and for cases see 2 Digest (Repl.) 241 et seq.

Cases referred to:

(1) *Cullen* v. *Knowles*, [1898] 2 Q.B. 380; 67 L.J.Q.B. 821; 12 Digest (Repl.) 39, *157*.

(2) *Whitehead* v. *Hughes* (1834), 2 Cr. & M. 318; 2 Dowl. 258; 4 Tyr. 92; 149 E.R. 782; 4 Digest (Repl.) 256, *2316*.

(3) *Tomlinson* v. *Broadsmith*, [1896] 1 Q.B. 386; 65 L.J.Q.B. 308; 74 L.T. 265; 44 W.R. 471; 12 T.L.R. 216; 40 Sol. Jo. 318, C.A.; 36 Digest (Repl.) 473, *434*.

(4) *Brandon* v. *Nesbitt* (1794), 6 Term Rep. 23; 101 E.R. 415; 2 Digest (Repl.) 254, *548*.

(5) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 241, *435*.

(6) *M'Connell* v. *Hector* (1802), 3 Bos. & P. 113; 127 E.R. 61; 2 Digest (Repl.) 249, *496*.

(7) *Flindt* v. *Waters* (1812), 15 East, 260; 104 E.R. 842; 2 Digest (Repl.) 250, *509*.

(8) *Porter* v. *Freudenberg*, *Kreglinger* v. *S. Samuel and Rosenfeld*, *Re Merten's Patents*, [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R.P.C. 109, C.A.; 2 Digest (Repl.) 213, *270*.

(9) *Mercedes Daimler Motor Co., Ltd., and Daimler Motoren Gesellschaft* v. *Maudslay Motor Co., Ltd.* (1915), 31 T.L.R. 178; 32 R.P.C. 149; 2 Digest (Repl.) 249, *502*.

(10) *Rombach Baden Clock Co.* v. *Gent & Son* (1915), 84 L.J.K.B. 1558; 31 T.L.R. 492; 2 Digest (Repl.) 240, *429*.

(11) *Ex parte Boussmaker* (1806), 13 Ves. 71; 33 E.R. 221; 2 Digest (Repl.) 243, *457*.

(12) *Act. für Anilin-Fabrikation and Mersey Chemical Works, Ltd.* v. *Levinstein, Ltd.* (1915), 84 L.J.Ch. 842; 112 L.T. 963; 31 T.L.R. 225; 32 R.P.C. 140, C.A.; 2 Digest (Repl.) 249, *501*.

(13) *Candilis & Sons* v. *Victor & Co.* (1916), 33 T.L.R. 20, C.A.; 2 Digest (Repl.) 249, *497*.

(14) *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372; 10 Bing. 140; 7 Bli.N.S. 202; 3 Moo. & S. 571; 6 E.R. 956, H.L.; 37 Digest 65, *74*.

(15) *Egerton* v. *Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 25 Digest 397, *26*.

(16) *Gilbert* v. *Sykes* (1812), 16 East, 150; 104 E.R. 1045; 25 Digest 397, *24*.

(17) *Eltham* v. *Kingsman* (1818), 1 B. & Ald. 683; 106 E.R. 251; 25 Digest 405, *81*.

(18) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 255, *553*.

(19) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 12 Digest (Repl.) 270, *2074*.

(20) *Horner* v. *Graves* (1831), 7 Bing. 735; 5 Moo. & P. 768; 9 L.J.O.S.C.P. 192; 131 E.R. 284; 43 Digest 26, *181*.

(21) *Brocks* v. *Phillips* (1599), Cro. Eliz. 684; 78 E.R. 920; 2 Digest (Repl.) 247, *482*.

(22) *Anon.* (1589), Cro. Eliz. 142; Owen, 45; 78 E.R. 399; 2 Digest (Repl.) 246, *479*.

(23) *Daubigny* v. *Davallon* (1794), 2 Anst. 462; 145 E.R. 936; 2 Digest (Repl.) 250, *514*.

(24) *Albretcht* v. *Sussmann* (1813), 2 Ves. & B. 323; 35 E.R. 342; 2 Digest (Repl.) 250, *504*.

(25) *Le Bret* v. *Papillon* (1804), 4 East, 502; 102 E.R. 923; 2 Digest (Repl.) 250, *508*.

(26) *Daubuz* v. *Moishead* (1815), 6 Taunt. 332; 128 E.R. 1062; 2 Digest (Repl.) 222, *337*.

(27) *Alcinous* v. *Nigreu* (*Nygrew*, *Nygren*) (1854), 4 E. & B. 217; 24 L.J.Q.B. 19; 24 L.T.O.S. 92; 1 Jur.N.S. 16; 3 W.R. 25; 119 E.R. 84; 2 Digest (Repl.) 251, *516*.

(28) *Beak* v. *Beak* (1675), Cas. temp. Finch, 190; 3 Swan. 627; 23 E.R. 104; 36 Digest (Repl.) 578, *1371*.

(29) *Wood* v. *Braddick* (1808), 1 Taunt. 104; 127 E.R. 771; 32 Digest 353, *366*.

(30) *Richardson* v. *Bank of England* (1838), 4 My. & Cr. 165; 8 L.J.Ch. 1; 2 Jur. 911; 41 E.R. 65, L.C.; 36 Digest (Repl.) 424, *11*.

(31) *Cassels* v. *Stewart* (1881), 6 App. Cas. 64; 29 W.R. 636, H.L.; 36 Digest (Repl.) 547, *1084*.

(32) *Hugh Stevenson & Sons* v. *Akt. für Cartonnagen-Industrie*, ante, p. 600; [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 34 T.L.R. 206; 62 Sol. Jo. 290, H.L.; 2 Digest (Repl.) 274, *637*.

(33) *Knox* v. *Gye* (1872), L.R. 5 H.L. 656; 42 L.J.Ch. 234, H.L.; 43 Digest 664, *966*.

(34) *Piddocke* v. *Burt*, [1894] 1 Ch. 343; 63 L.J.Ch. 246; 70 L.T. 553; 42 W.R. 248; 38 Sol. Jo. 141; 8 R. 104; 36 Digest (Repl.) 424, *12*.

(35) *Trimble* v. *Goldberg*, [1906] A.C. 494; 75 L.J.P.C. 92; 95 L.T. 163; 22 T.L.R. 717, P.C.; 36 Digest (Repl.) 529, *928*.

(36) *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.* v. *Daimler Co., Ltd.*, [1915] 1 K.B. 893; 84 L.J.K.B. 926; 112 L.T. 324; 31 T.L.R. 159, C.A.; reversed sub nom. *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 9 Digest (Repl.) 573, *3780*.

(37) *Sylvester's Case* (1703), 7 Mod. Rep. 150; 87 E.R. 1157; 2 Digest (Repl.) 250, *507*.

(38) *Anon.* (1514), 1 Dyer, 2 b; 73 E.R. 6; 2 Digest (Repl.) 171, *14*.

(39) *Sparenburgh* v. *Bannatyne* (1797), 1 Bos. & P. 163; 2 Esp. 580; 126 E.R. 837; 2 Digest (Repl.) 250, *512*.

(40) *Anthon* v. *Fisher* (1795), 3 Doug.K.B. 166; 99 E.R. 594; 2 Digest (Repl.) 243, *455*.

(41) *Ricord* v. *Bettenham* (1765), 3 Burr. 1734; 1 Wm. Bl. 564; 97 E.R. 1071; 2 Digest (Repl.) 243, *453*.

(42) *Roberts* v. *Hardy* (1815), 3 M. & S. 533; 2 Rose, 457; 105 E.R. 710; 2 Digest (Repl.) 212, *267*.

(43) *O'Mealey* v. *Wilson* (1808), 1 Camp. 482; 2 Digest (Repl.) 218, *311*.

(44) *De Wahl* v. *Braune* (1856), 1 H. & N. 178; 25 L.J.Ex. 343; 27 L.T.O.S. 188; 4 W.R. 646; 156 E.R. 1166; 2 Digest (Repl.) 222, *329*.

(45) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 241, *435*.

(46) *Halsey* v. *Lowenfeld*, [1916] 2 K.B. 707; 85 L.J.K.B. 1498; 115 L.T. 617; 32 T.L.R. 709, C.A.; 2 Digest (Repl.) 274, *635*.

(47) *Shepeler* (*Schepeler*) v. *Durant* (1854), 14 C.B. 582; 23 L.J.C.P. 140; 2 W.R. 467; 2 C.L.R. 729; 139 E.R. 240; sub nom. *Chepeler* v. *Durant*, 23 L.T.O.S. 79; 2 Digest (Repl.) 250, *506*.

(48) *Cabell* v. *Vaughan* (1669), 1 Wms. Saund. 288; 2 Keb. 525; 1 Vent. 34; 85 E.R. 386; sub nom. *Chappel* v. *Vaughan*, 1 Sid. 420; 12 Digest (Repl.) 39, *158*.

(49) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 12 Digest (Repl.) 29, *55*.

(50) *Jell* v. *Douglas* (1821), 4 B. & Ald. 374; 106 E.R. 974; 12 Digest (Repl.) 37, *141*.

(51) *Mitchel* v. *Reynolds* (1713), 1 P.Wms. 181; 10 Mod. Rep. 130; 24 E.R. 347; 36 Digest (Repl.) 654, *92*.

(52) *Hitchcock* v. *Coker* (1837), 6 Ad. & El. 438; 1 Nev. & P.K.B. 796; 2 Har. & W. 464; 6 L.J.Ex. 266; 1 J.P. 215; 112 E.R. 167, Ex. Ch.; 43 Digest 36, *326*.

(53) *Tingley* v. *Müller*, [1917] 2 Ch. 144; 86 L.J.Ch. 625; 116 L.T. 482; 33 T.L.R. 369; 61 Sol. Jo. 478, C.A.; 2 Digest (Repl.) 214, *281*.

(54) *Dive* v. *Maningham* (1550), 1 Plowd. 60; 75 E.R. 96; 15 Digest (Repl.) 806, *7656*.

(55) *Vanbrynen* v. *Wilson* (1808), 9 East, 321; 103 E.R. 596; 2 Digest (Repl.) 244, *466*.

(56) *Shombeck* v. *De la Cour* (1808), 10 East, 326; 103 E.R. 799; 2 Digest (Repl.) 251, *521*.

(57) *Thyatt* v. *Young* (1800), 2 Bos. & P. 72; 126 E.R. 1163; 2 Digest (Repl.) 251, *518*.

(58) *Simeon* v. *Thompson* (1798), 8 Term Rep. 71; 101 E.R. 1272; 2 Digest (Repl.) 250, *505*.

(59) *Kensington* v. *Inglis* (1807), 8 East, 273; 103 E.R. 346; 2 Digest (Repl.) 255, *552*.

(60) *W. L. Ingle, Ltd.* v. *Mannheim Continental Insurance Co.*, [1915] 1 K.B. 227; 84 L.J.K.B. 491; 112 L.T. 510; 31 T.L.R. 41; 59 Sol. Jo. 59; 2 Digest (Repl.) 213, *269*.

(61) *Orenstein and Koppel* v. *Egyptian Phosphate Co., Ltd.*, 1915 S.C. 55; 52 Sc.L.R. 54; [1914] 2 S.L.T. 293; 2 Digest (Repl.) 262, **413*.

(62) *The Möwe*, [1915] P. 1; 84 L.J.P. 57; 112 L.T. 261; 31 T.L.R. 46; 59 Sol. Jo. 76; 13 Asp.M.L.C. 17; 37 Digest 592, *289*.

(63) *The Pindos, The Helgoland, The Rostock*, [1916] 2 A.C. 193; 85 L.J.P.C. 209; 114 L.T. 960; 32 T.L.R. 489; 13 Asp.M.L.C. 353; 2 P.Cas. 146, P.C.; 37 Digest 591, *282*.

(64) *Re Sacker, Ex parte Sacker* (1888), 22 Q.B.D. 179; 58 L.J.Q.B. 4; 60 L.T. 344; 37 W.R. 204; 5 T.L.R. 112, C.A.; 39 Digest 65, *759*.

(65) *R.* v. *Kupfer*, [1915] 2 K.B. 321; 84 L.J.K.B. 1021; 112 L.T. 1138; 79 J.P. 270; 31 T.L.R. 223; 24 Cox, C.C. 705; 11 Cr. App. Cas. 91, C.C.A.; 2 Digest (Repl.) 259, *579*.

(66) *Watford* v. *Masham* (1597), Moore, K.B. 431; 72 E.R. 676; 2 Digest (Repl.) 247, *480*.

(67) *Richfeild* v. *Udal* (1667), Cart. 48, 191; 124 E.R. 817, 909; 2 Digest (Repl.) 246, *473*.

(68) *Calvin's Case* (1608), 7 Co. Rep. 1 a; 2 State Tr. 559; Moore, K.B. 790; Jenk. 306; 77 E.R. 377; 2 Digest (Repl.) 241, *432*.

(69) *Jevens* v. *Harridge* (1678), 1 Wms. Saund. 1.

(70) *Hix* v. *Harrison* (1616), 3 Bulst. 210.

(71) *Bristow* v. *Towers* (1794), 6 Term Rep. 35; 101 E.R. 422; 2 Digest (Repl.) 254, *549*.

(72) *Cornu* v. *Blackburne* (1781), 2 Doug.K.B. 641; 99 E.R. 406; 2 Digest (Repl.) 243, *454*.

(73) *Antoine* v. *Morshead* (1815), 6 Taunt. 237; 1 Marsh. 558; 128 E.R. 1025; 2 Digest (Repl.) 254, *544*.

(74) *Bell* v. *Gilson* (1798), 1 Bos. & P. 345; 126 E.R. 942; 2 Digest (Repl.) 256, *556*.

(75) *Wells* v. *Williams* (1697), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E.R. 18; 2 Digest (Repl.) 171, *12*.

(76) *Tirlot* (*Tuerloote*) v. *Morris* (*Morrison*) (1611), 1 Bulst. 134; Yelv. 198; 80 E.R. 828; 2 Digest (Repl.) 171, *18*.

(77) *The Indian Chief* (1801), 3 Ch. Rob. 12; 2 Digest (Repl.) 253, *539*.

(78) *The Portland* (1800), 3 Ch. Rob. 41; 2 Digest (Repl.) 216, *294*.

(79) *The Jonge Klassina* (1804), 5 Ch. Rob. 296; 2 Digest (Repl.) 281, *683*.

(80) *Ex parte Lee* (1806), 13 Ves. 64; 33 E.R. 218, L.C.; 29 Digest 156, *1115*.

(81) *Robinson & Co.* v. *Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155; 84 L.J.K.B. 238; 112 L.T. 125; 31 T.L.R. 20; 59 Sol. Jo. 7; 12 Asp.M.L.C. 574; 20 Com. Cas. 125; 2 Digest (Repl.) 247, *483*.

Appeal by the defendant in the action, Manuel Antonio Rodriguez, from an order of the Court of Appeal (BANKES, L.J., and SARGANT, J., PICKFORD, L.J., dissentiente (117 L.T. 775)), holding that the plaintiffs, a firm consisting of six partners, one of whom was a German, were entitled to enforce a judgment signed in default of appearance against the defendant.

Douglas Hogg, K.C., and *Giveen* for the appellant.
Romer, K.C., and *M. M. Macnaghten* for the respondent plaintiffs.

The House took time for consideration.

Aug. 3, 1918. The following opinions were read.

LORD FINLAY, L.C.—The question in this case is whether a judgment signed against the appellant in default of appearance should be set aside on the ground that one of the plaintiffs is an alien enemy. The majority of the Court of Appeal have held, reversing the master and judge, that it should not be set aside on this ground, but should be remitted to the court below for inquiry whether it should be set aside on the merits. The respondents (the plaintiffs in the action) carried on business as bankers in London until the outbreak of the war, when the partnership was ipso facto dissolved, as one member of the firm—Eduard Beit von Speyer—was a German resident in Germany, who on the outbreak of the war became and is now an enemy alien. There were five other members of the firm, the leading member, Sir Edgar Speyer, and H. Oppenheimer, both naturalised British subjects; H. W. Brown and H. Gordon Leith, both British subjects; and James Speyer, an American citizen.

The action was commenced in the name of Speyer Bros. by a writ dated Jan. 18, 1916, for the recovery of a debt which is alleged to have accrued due before the war—on Feb. 19, 1914. The appellant was the defendant in the action. He resides at Buenos Aires, where he was served pursuant to leave to effect service out of the jurisdiction. The appellant failed to enter an appearance, and judgment was signed by plaintiffs (the respondents) for £29,772 9s. On Mar. 29, 1917, the respondents obtained an order nisi charging the appellant's interest in certain shares, and also an order giving leave to serve notice of an application for the appointment of a receiver of certain property of the appellant. Notice was served on the plaintiffs to declare the names and places of residence of the members of the plaintiff firm, and on Oct. 6, 1917, a statement was delivered setting out the names of the members of the firm, which I have already mentioned, one of them being that of Mr. Eduard Beit von Speyer. It appears from the articles of partnership that his interest is 2½ per cent. in profits and losses, and he is indebted in a large sum to the firm. On an application to set aside the judgment and the orders under it, the master on Aug. 1, 1917, made an order setting them aside, and he was affirmed on Aug. 7, 1917, by PETERSON, J. The respondents appealed to the Court of Appeal, which by a majority reversed the decision and restored the judgment and orders, remitting the summons to the master to be re-heard on the merits. The defendant brings this appeal to your Lordships' House asking that the judgment and orders under it should be set aside as directed by the master and PETERSON, J.

On the dissolution of the firm on the outbreak of the war, the affairs of the partnership had to be liquidated, and this, of course, involved getting in the assets. For the purpose of the liquidation, the firm still existed, and the other partners had the right to use the name of Eduard Beit von Speyer in any litigation necessary for the purpose of getting in the assets. The writ was in the name of the firm, which had the same effect as if the names of the individual partners had been set out. It was contended for the appellant that the respondents' action is incompetent on the ground that Eduard Beit von Speyer is a co-plaintiff and that

an enemy alien cannot sue in the King's courts. This contention depends on the proposition that there is an inflexible rule of law against any action in the King's courts by an alien enemy suing either alone or together with others. PETERSON, J., at chambers and PICKFORD, L.J., in the Court of Appeal held that there is a settled rule of law to this effect, while BANKES, L.J., and SARGANT, J., held that the rule does not apply in such a case as the present.

There is no doubt that, as a general rule, an alien enemy cannot bring an action in the King's courts as plaintiff, though he may, of course, be made a defendant. The rule seems to have its origin in two considerations. First, that the subject of a country then at war with the King is in this country, unless he be here with the King's permission, ex lege, and that he cannot come into the King's courts to sue any more than could an outlaw; and, secondly, that the King's courts will give no assistance to proceedings which, if successful, would lead to the enrichment of an alien enemy, and, therefore, would tend to provide his country with the sinews of war. The rule is one founded on public policy, but any such rule of law must be observed even if there are circumstances in any particular case which make its enforcement contrary to public policy, and indeed detrimental to the interests of this country. If, however, there may be a state of circumstances in which to prevent an alien enemy from being a party to an action as plaintiff would do much more harm to British subjects or to friendly neutrals than to the enemy, this is a consideration most material to be taken into account in determining whether such a case falls within the true scope and extent of the rule. If the particular case is outside the rule, to apply it might be not merely contrary to public policy, but also a mistake in law. It was urged in support of the decision of the Court of Appeal in the present case that where there is a firm consisting of British subjects and an alien who becomes an enemy on the outbreak of war, the partnership is ipso facto dissolved, and that to apply the supposed rule to such a case would cause great inconvenience and possibly most serious loss to the British members of the firm, by making it impossible for them to get in the firm's assets. The question raised is one of great interest and involves a close inquiry into the precise nature and extent of the rule of law on the point. One answer given to the argument ab inconvenienti was that the Trading with the Enemy Amendment Act, 1916, has by s. 4 provided machinery by which this inconvenience may be obviated by vesting the interest of the enemy alien in the Custodian appointed under the earlier statute, Aliens Restriction Act, 1914, who might join as a co-plaintiff so as to get in the assets. The question, however, must be considered apart from the effect of this Act, as the rule of law on the subject must have come into existence long before the passing of these Acts for the custody of enemy property, which have had the incidental effect of providing a method by which the difficulty in question might be got over. If the Act of 1916 had been passed specifically with the object of removing this difficulty, it would, of course, have afforded most cogent ground for the conclusion that the difficulty existed, but no such conclusion can be drawn from the fact that legislation of a general nature for the custody of enemy property may incidentally have this effect. I, therefore, propose to consider the question, what the rule of law is apart from the legislation of 1915 and 1916.

The proposition that an alien enemy cannot bring an action in this country has been often laid down. The question which now for the first time falls to be determined is whether the rule forbidding such an action during the continuance of the war is unqualified, and, in particular, whether it applies to a case in which for the winding-up of the affairs of a partnership dissolved by the outbreak of war there is joined as a co-plaintiff one who, having been a partner when war broke out, thereupon became an enemy alien. There is no doubt that, as a general rule, an action by an alien enemy might be met by a plea in abatement, while a contract made with an alien enemy during the war was void and might be met by a plea in bar. But the general terms in which the rule has been laid down do not carry us very far in dealing with the special circumstances of the present

case. The question is whether the rule applies so as to prevent British subjects during the war from recovering a debt which had been contracted in their favour jointly with one who has since become an enemy. It is obvious that, if the rule does extend to such a case, British partners could not get in their assets until the war was over. They would be non-suited for not having joined their co-contractor as a plaintiff if they left him out, and the action would be stopped by a plea in abatement or on summons, if they put him in.

There is another consideration to be taken into account if the co-contractors were partners. When a debt due to the firm is got in, no partner has any definite share or interest in that debt; his right is merely to have the money so received applied together with the other assets in discharging the liabilities of the firm and to receive his share of any surplus there may be when the liquidation has been completed. Eduard Beit von Speyer has no right to any part of the £29,772 said to be due from the appellant, if that sum should be recovered. His interest can only be finally ascertained when the liquidation has been completed, and it consists of his share of the surplus. He may be benefited as a consequence of the action by the reduction of his indebtedness to the firm as a whole, or conceivably by his getting some part of any surplus when the winding-up has been completed. But he has no right to any part of the sum recovered.

In the present case the action has been brought in the name of the firm—that is, in the name of all the partners. It would, I think, have been open to the five partners who are not enemies to bring the action in their own names as plaintiffs, joining Eduard Beit von Speyer as a defendant. The rule laid down by BIGHAM, J., in *Oullen* v. *Knowles* (1) that one of two joint promisees can maintain an action on the contract, making the other joint promisee defendant if after the tender of an indemnity against costs he refuses to be joined as a co-plaintiff, would be just as applicable in the case of the supposed disability of a co-contractor as an alien enemy as it is in the case of such a refusal of a co-contractor to join in suing. Such an action would result in judgment for the five non-enemy partners and Eduard Beit von Speyer, the co-defendant, against the other defendant in the action, but no part of the money would reach the hands of Eduard Beit von Speyer, who would have no right to it, and, indeed, to pay it over to him during the war would amount to a crime. There would be no infraction in such a case of any rule that an alien enemy cannot be a plaintiff. The enemy has been made a party as defendant merely because his presence is necessary for enforcing the rights of the other members. In the present case the other five partners had, as between themselves and Eduard Beit von Speyer, the right of joining him as a co-plaintiff: *Whitehead* v. *Hughes* (2); and per RIGBY, L.J., in *Tomlinson* v. *Broadsmith* (3), [1896] 1 Q.B. at p. 392. No rule against suits by enemy aliens could prevent his being joined as defendant with the result I have described, and to say that under such circumstances he could not be made a co-plaintiff would be to convert a rule of public policy into a mere technicality of procedure. The truth is that the rule was one directed against alien enemies and not against British subjects or friendly neutrals. Eduard Beit von Speyer is not in point of law a trustee, but he is under the obligation to concur in getting in the assets for the benefit of the firm, and there is no case in which the rule against enemies being allowed to sue has been applied to a case in which he is suing, not in his own interest, but because his concurrence is necessary for the protection of the interests of the firm. He is not in point of law suing en autre droit, but he is under a legal obligation to concur as a necessary party to an action which must be brought in the interests of the firm, and in these circumstances, in my opinion, his presence either as plaintiff or defendant gives rise to none of the objections which have been raised to suits by alien enemies.

A great deal of the argument at the Bar of your Lordships' House has been directed to the question whether an alien enemy might sue as executor or administrator. The fact that an alien enemy might sue as executor or administrator could not be put as decisive of the present case, but it would have, I think,

some bearing on the question whether he can be joined as a plaintiff in such a case as the present. A good many authorities were cited to your Lordships on the subject of alien enemies as executors and administrators. I have examined all of them, but for the present purpose it is enough to say that I agree with the opinion expressed by the very learned author of WILLIAMS ON EXECUTORS (SIR EDWARD VAUGHAN WILLIAMS) in the edition of that work published in 1832 (in a note at pp. 114 and 115), that the weight of authority is not in favour of the view that an alien enemy executor is unable to sue. Some further support is given to the view that an alien enemy can sue as executor or administrator by the fact that it appears always to have been held that persons attainted or outlawed may sue as executors because they sue en autre droit and for the benefit of the estate: see WILLIAMS ON EXECUTORS, 1832 edition, p. 119, and 10th Edn., vol. 1, p. 161.

Of course, it is possible that the law of England is such that until s. 4 of the Trading with the Enemy Amendment Act, 1916, was passed a debt due to a firm could not be got in by adding the enemy alien either as co-plaintiff or as co-defendant. It appears to me, however, that none of the reasons for the rule of law against actions by alien enemies apply in such a case, and that there is no authority for saying that it does. It would, indeed, be utterly unreasonable that the law should be that the debt could be got in by making the alien enemy a co-defendant, but that he could not be a co-plaintiff. The debtor to the firm may be himself an alien enemy, and, according to the doctrine contended for by the appellant, he might by English law, until 1916, have avoided during the existence of a state of war the payment of a debt due to a firm in which the partners all but one were British, on the ground that one necessary co-plaintiff was, like himself, an alien enemy, and that the firm could not sue either with him or without him. One would be slow to come to the conclusion that any system of law brought about a result so whimsical. Any personal disability on the part of an alien enemy can hardly apply to a case where he is brought in as a party for the benefit of the other partners, British or neutral, and there is no danger of the alien enemy's being enriched by the proceedings as none of the assets of the firm can be handed over to him during the war. To apply the rule against suing to such a case would be to inflict hardship, not on the enemy, but on British and neutral partners. Of course, if a definite and inflexible rule of law has been established, though based on considerations of public policy, that rule must be applied even in cases where its application is mischievous and against public policy. But the question is whether the rule does exist in a class of cases manifestly not within the mischief at which the rule is aimed.

The citation of the numerous passages in which the disability of an alien enemy to sue has been laid down is not much to the purpose. It has never before been applied to such a case as the present, and all such passages must be read with reference to the question under discussion in the case in which the judgment was pronounced. A great many cases decided during the eighteenth and nineteenth centuries were quoted in argument at your Lordships' Bar. I have prepared an abstract of these authorities, but I shall not lengthen this judgment by setting it out. I desire only to make a few observations upon three of these cases—namely, *Brandon* v. *Nesbitt* (4), *The Hoop* (5), and *M'Connell* v. *Hector* (6).

A great deal was said in argument as to *Brandon* v. *Nesbitt* (4), but that case does not appear to me to throw light upon the point now under consideration. As was pointed out by LORD ELLENBOROUGH in *Flindt* v. *Waters* (7) (15 East, at p. 264), in *Brandon* v. *Nesbitt* (4) the parties interested had become alien enemies before the voyage insured was performed and the loss happened, and what was there decided was that this might be pleaded in bar. The voyage insured was illegal, as was said by BAYLEY, J., in the same case. What we are here concerned with is the effect of the plaintiff having become an alien enemy after the liability had accrued, and this could have been raised only by plea in abatement.

In none of the older cases cited did the question now before your Lordships present itself for decision, but in the course of the present war there have been

several cases relating to disability of enemy aliens to sue, some of which are in point. The subject of actions by enemy aliens was discussed generally by LORD READING, C.J., in his judgment in a group of cases which are reported together: *Porter* v. *Freudenberg* (8). He affirmed the propositions that a person voluntarily resident in, or carrying on business in, an enemy country is an alien enemy; that an alien enemy, while he cannot sue, may be sued; that an alien enemy who is plaintiff in an action commenced before the outbreak of war has no right of appeal pending the war; and that an alien enemy who is defendant has the right to appeal against any decision that may have been given against him. The question of the right of an alien enemy to sue en autre droit did not arise, and is not dealt with in the judgment of the Lord Chief Justice. Nor is the question which arises in the present case—how far an alien enemy, who has ceased to be a partner owing to the outbreak of war, can be made a co-plaintiff for the purpose of getting in the assets of the firm for the benefit of British or neutral partners.

LORD READING'S judgment in these actions was delivered on Jan. 19, 1915. On the 26th of the same month *Mercedes Daimler Motor Co., Ltd., and Daimler Motoren Gesellschaft* v. *Maudslay Motor Co., Ltd.* (9) came before WARRINGTON, J. The plaintiffs were an English company and a German company, and the action was brought for the infringement of a patent of which they were the joint owners under a deed which contained the following clause:

> "The British company shall have the sole right of bringing actions or other proceedings to restrain the infringement of or otherwise protecting the rights granted by all or any of the letters patent . . . and for such purpose may, upon first giving to the German company twenty-one days' notice of its intention so to do, join the German company as co-plaintiffs with the British company in any such proceedings, and the British company shall have the sole conduct and control of any such actions."

When the case was called on, the objection was taken that the plaintiff German company had become an alien enemy, and that the action ought to be suspended. The judgment of the learned judge is reported as follows:

> "WARRINGTON, J., said that this was a somewhat peculiar case. Clause 9 of the deed of May 1, 1908, showed that as between the English company and the German company the proceedings, though brought formally in the names of the two companies, were really brought by the English company. The German company had nothing to do with bringing the action; they might have objected to the actions being brought, but they had not done so. The important point was that, although the patent was in the names of the two companies, the person to protect the patent was the English company. To deny the English company the right to prosecute this action would be to deny the right to a British subject to bring an action for his own protection."

This judgment seems to me to have been right. The learned judge allowed the action to proceed in the name of the English company and of the German company as co-plaintiffs, on the ground that the action was for the protection of the English company, and that to deny the English company the right to prosecute it would be to deny the right of a British subject to bring an action for his own protection. To hold that the doctrine of disability applies to a case in which an enemy alien cannot during the war reap any benefit from the action, and where the action is really for the benefit of the other partners, would, I think, involve a misconception of the principle and the extent of the rule, and, before the Trading with the Enemy Amendment Act, 1916, might have inflicted very serious loss upon British subjects. In these cases the substance of the matter must be looked at.

On June 15 in the same year (1915) *Rombach Baden Clock Co.* v. *Gent & Son* (10) was decided by LUSH, J. Mr. J. B. Rombach was a German residing in Germany, who up to May, 1914, had carried on business in England under the name of "The J. B. Rombach Baden Clock Co," the business being managed by

his two sons. It was proved that in May, 1914, a deed was entered into by which the English business became the property of a firm consisting of J. B. Rombach and his two sons. The action comprised a claim for goods sold to the defendant since the creation of this partnership. It was proved that since the war one of the sons, Mr. Theophil Rombach, had brought an action claiming a dissolution of the partnership, and that an order of court had been made appointing him the receiver of the partnership business. Lush, J., in giving judgment said that the *Mercedes Daimler Case* (9) was analogous to the case before him:

> "The receiver brought the action under the protection of the court. It was true that he had to join his two partners, but it was the receiver's action in substance, and it was impossible to say that it was brought for the benefit of a firm, one of which was an alien enemy."

Lush, J., also referred to *Ex parte Boussmaker* (11):

> "On these grounds, looking at the substance and not at the form of the case, his Lordship thought that the action was maintainable."

His Lordship referred to the fact that the money when recovered would be subject to the order appointing the receiver. This is a direct decision that the rule of the disability of an alien enemy to sue has no application to a case where the firm has been dissolved by the outbreak of war, and that the name of the alien enemy ex-partner might be used as a co-plaintiff for the purpose of getting in the assets. In the judgment as reported, I think undue stress is laid on the fact of the existence of the order appointing Mr. Theophil Rombach receiver. That order, of course, showed that there was no danger of the proceeds of the judgment finding their way to an alien enemy during the war. But this would have been prevented by the ordinary criminal law. I think that the decision was right on the ground that the law does not prohibit the use of the name of an alien enemy, who has been a partner with British subjects, when it is necessary for getting in the assets of the firm.

During the present war there have been two cases in the Court of Appeal, both of which were referred to in argument. The first is *Act. für Anilin-Fabrikation and Mersey Chemical Works, Ltd.* v. *Levinstein, Ltd.* (12). The action was brought by a German company and an English company, alleging infringement of patents which had been vested in the German company and had been assigned to the English company. The court had dismissed the action, and the co-plaintiffs, before the declaration of war, had given notice of appeal. The Court of Appeal refused to allow the appeal to proceed in the name of the co-plaintiffs, one of whom was an alien enemy. The second of these cases is *Candilis & Sons* v. *Victor & Co.* (13), and was very much relied upon by the appellant's counsel in argument at the Bar of your Lordships' House. The action was brought by a firm at Manchester consisting of three partners, one a British subject and two Turkish subjects who had become alien enemies on the outbreak of war with Turkey on Nov. 5, 1914. The action was brought after the outbreak of war for detention and conversion of goods and for breach of a contract made before the war. The defendant applied by summons in the district registry for a dismissal or stay of the action on the ground that two of the plaintiffs were alien enemies. This was refused by the registrar and by the judge on appeal. The Court of Appeal granted the stay on the ground that the two alien enemies could not sue and that the action was on behalf of the three. In this case, as in *M'Connell* v. *Hector* (6), the majority of the firm consisted of alien enemies, and the action was being prosecuted by them. The considerations which led the majority of the Court of Appeal to their conclusion in the present case are not adverted to in *Candilis & Sons* v. *Victor & Co.* (13), as is pointed out by Sargant, J., in the present case, and, indeed, it does not appear that they arose upon the facts of that case. Upon the whole, my opinion is that the judgment of the Court of Appeal was right and that this appeal should be dismissed with costs.

VISCOUNT HALDANE.—I think that the answer to the question raised by this appeal turns on a broad issue of principle. Is the rule which prevents an enemy alien from suing in the King's courts a crystallised proposition forming part of the ordinary common law so definite that it must be applied without reference to whether a particular case involves the real mischief to guard against which the rule was originally introduced? Or is the rule one of what is called public policy, which does not apply to a particular instance if that instance discloses no mischief from the point of view of public policy? There are many illustrations of both kinds of rule. Since, for example, this House in 1833 gave its decision in *Cadell* v. *Palmer* (14) it has been clear that private property cannot for any reason, however good, be rendered inalienable for private ends beyond a period of lives in being and twenty-one years afterwards. And yet at one time this period was not defined, and the motive which led to its prescription in a definite form was that restraint on alienation was considered to be required by public policy. That this was the genesis of the restriction is shown by the fact that it has not been applied to charitable trusts where the public itself benefits by inalienability. Yet the rule has in other cases become a hard-and-fast one, to which no exception is tolerated to-day for however excellent a reason. On the other hand, there are cases of other kinds on which decisions have been given based merely on public policy accepted as matter of fact and not on really legal principle in a fashion which has always been made to depend on the particular circumstances of each case. Such were the cases on wagers in the days when they were enforced, cases in which, as was said by PARKE, B., in advising this House in *Egerton* v. *Earl Brownlow* (15) (4 H.L.Cas. at p. 124):

> "Courts have been anxious to discountenance all wagers in which the parties have had no interest, and have been astute, even to an extent bordering on the ridiculous, to find reasons for refusing to enforce them."

Thus a wager on the duration of the life of Napoleon was held void because it might give the plaintiff an interest in keeping the King's enemy alive, and also because it might give the defendant an interest in compassing his death by means other than lawful warfare: *Gilbert* v. *Sykes* (16). Again, when a proprietor of carriages for hire in a town had made a bet that a particular person would go to the assembly rooms in his own carriage and not in another's, it was considered that the bet was void as possibly tending to hamper the freedom of a member of the public in choosing his own conveyance, and to exposing him to the inconvenience of being importuned by rival coachmen: *Eltham* v. *Kingsman* (17). It was true that in such cases the judges were, as the Lord Chief Baron said in advising in *Egerton* v. *Earl Brownlow* (15) (4 H.L.Cas. at p. 151),

> "no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question and declining to decide upon it."

Nevertheless, it happens that the question to be so decided is not one of law as distinguished from ethics, and, therefore, in *Egerton* v. *Earl Brownlow* (15) the majority of the Law Lords, including notably LORD ST. LEONARDS, laid down that limitations in a devise under which the estates settled were to go over if the possessor for the time being did not acquire a dukedom were bad, simply because of a mischievous tendency which might result in improper attempts to influence the discretion of the Sovereign as the fountain of honour. It was certainly the opinions of men of the world, as distinguished from opinions based on legal learning, which guided this House to its conclusion in that appeal. It may in a qualified sense be true, as LORD HALSBURY observed in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (18) ([1902] A.C. at p. 491), that the courts cannot invent new heads of public policy, and that, when it is said that things are unlawful because they are contrary to public policy, it is meant that they have either been enacted or assumed to be unlawful by the common law, and not because a court

has any right to declare them to be so. But the observation must be taken with the qualification that what the law recognises as contrary to public policy turns out to vary greatly from time to time. Since, for example, HULL, J., as quoted in *Egerton* v. *Earl Brownlow* (15) (4 H.L.Cas. at p. 238), was moved to anger at a bond with a condition that if the grantor did not for six months exercise his craft as a dyer within the town where he carried on business the bond should be void, and is reported to have said: "Per Dieu, if he were here to prison he should go," the law must have altered much in the interval if LORD HALSBURY'S statement is to be taken literally.

I think that there are many things of which the judges are bound to take judicial notice which lie outside the law properly so called, and among those things are what is called public policy and the changes which take place in it. The law itself may become modified by this obligation of the judges. In *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (19) the appellant had covenanted that he would not for twenty-five years engage, except on behalf of the respondents, to whom he had sold his business, in the manufacture of guns or ammunition. It was held by this House that, although the covenant was unrestricted as to space, it was not wider than was required for the protection of the company, and was not injurious to the public interest. As LORD HERSCHELL pointed out, in early times all agreements in restraint of trade, whether general or restricted to a particular area, used to be held bad. Later on there grew up a distinction between covenants in general restraint and those in which the restraint was only partial. That attempts at general restraint were at one time regarded, under all circumstances, as void, in accordance with a rule which had been recognised as part of the law, he thought was true. But means of communication had so changed that the reason for the distinction was gone, and the proper view seemed to be that what was once a settled principle was no longer applicable in altered conditions. LORD WATSON agreed and said ([1894] A.C. at pp. 553, 554):

> "A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. . . . In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to be the rule of policy 100 or 150 years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time."

LORD MACNAGHTEN put the same view in his own words, and cites the well-known judgment of TINDALL, C.J., in *Horner* v. *Graves* (20) as showing that the real foundation of the distinction between partial and general restraints is the desire to illustrate a rule which can only be at last what is a reasonable restraint with reference to the particular case. When the possibilities of communication became extended it was thus only a legitimate development—it was hardly even an extension—of the principle in which exceptions were just allowed to admit unlimited restraints into the class of allowable exceptions to the general rule. I think that the change in the view taken of the law as to covenants in restraint of trade and the illustration it affords of the fashion in which decisions which were right in their time may cease to be of valid application is highly instructive. For it shows that between the class of cases in which, as in the instance of the rule against perpetuities, the law, although originally based on public policy, has become so crystallised that only a statute can alter it, and the different class, such as that of the cases relating to wagers, in which the principle of public policy has never crystallised into a definite or exhaustive set of propositions, there lies an intermediate class. Under this third category fall the instances in which public policy has partially precipitated itself into recognised rules which belong to law properly so called, but where these rules have remained subject to the moulding influence

of the real reasons of public policy from which they proceeded. And I think that the decisive question before us is whether the doctrine of law which the Court of Appeal has dealt with in the present instance belongs to the first class or to the third. This is a point on which, in LORD WATSON's language, the bare fact that decisions were given a long time ago cannot be conclusive. Before considering the question to which class the principle applied in the judgments before belongs, I turn to the record to see what was actually decided in the case under appeal.

[HIS LORDSHIP stated the facts and continued:] It will be observed that all that has been decided is that the action may proceed. Nothing has been settled as to what is to be done with the money if recovered, and it may still be directed to be paid into court or to the custodian. The question which goes to the root of the controversy is whether under these circumstances the Court of Appeal was right in deciding even as much as this. It is said that, unless the action is allowed to proceed, the liquidation of the partnership affairs cannot be concluded, as a substantial asset cannot be got in, and that the interests of British subjects and others unquestionably entitled to sue will be prejudiced. It is also said that the action is really brought as a mere step in the liquidation as much as if it had been brought by a receiver in the name of the partners and for the purpose of realisation out of the assets. As against this it is said that the action is no more than one by six joint contractors to recover a debt due to them jointly, and that, as the alien enemy, being one of those, was bound to be a party, the action is not maintainable.

If the question were one of mere convenience and to be decided by the test whether the allowance of the action would result in injury to the public interests, I should have little hesitation in saying that it ought to be allowed. The legislation which has established the office and duties of the Custodian of Enemy Property provide ample means for insuring that the enemy partner should not enrich himself during the war if any balance from the sum sought to be recovered were to be adjudged recoverable, and it is not desirable that money due from a defendant who is living abroad should be delayed in recovery. But whether the question is one of convenience is irrelevant if the case belongs to the first of the classes to which I have referred—that in which the principle is so definitely crystallised as part of the common law that it is inadmissible, notwithstanding that the original foundation of the principle may have been the convenience of the State, to go behind the rule to see whether the reason for it applies in a particular case. In order to determine how the law stands on the point, it is necessary to examine the authorities, for, if these lay down the principle consistently and clearly as one of mere law, it would not be legitimate to act on the footing that LORD WATSON did in the *Maxim Nordenfelt Case* (19) in regard to covenants in restraint of trade when he said that decisions based on grounds of public policy have not the same binding authority as decisions which "formulate principles which are purely legal." We know that when it was said in COKE UPON LITTLETON (129b) that an "alien shall maintain neither real nor personal action," public policy had qualified the harshness of the rule, although through the medium of a different tribunal. For in the time of LITTLETON it had already been laid down as to aliens who had come into England under the King's safe conduct that their proper court was that of Chancery, for there they were not bound to sue according to the law of the land nor to abide the trial by twelve men, and other solemnities of the law of the land, but "shall sue in the Chancery, and the matter shall be determined by the law of nature": see POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, vol. 1, p. 465. As law and equity tended to approximate, it is, therefore, not to be wondered at if the rule, which may well have originally been stringent in the common law tribunals with their local traditions, and which was said to deny to an alien enemy all rights to invoke the assistance of the King's courts, became less definite. Indeed, as early as the time of Queen Elizabeth, in *Brocks* v. *Phillips* (21), the enemy administrator of one who was presumably a subject of the Crown was allowed to sue. No doubt it was not desired by the common law judges to drive him into Chancery. But the decisions of this period are certainly not consistent, for in *Anon.* (22) the

attempt by an enemy alien executor to bring an action of debt was disallowed. In the later text-books, such as BACON'S ABRIDGMENT (Tit. ALIEN), the question is treated with distinctness as one of public policy and as admitting in certain cases of doubt. In COMYNS' DIGEST, on the other hand (sub-Tit. ABATEMENT), it is said that a plea in abatement to the effect that even one of two of the plaintiffs is an enemy alien is a good plea.

The later authorities undoubtedly in many instances tend to treat the rule as one which had become a rigid principle of the common law, but they do not all of them tend in this direction. *Daubigny* v. *Davallon* (23), the dictum of SIR WILLIAM SCOTT (unnecessary, however, for the decision) in *The Hoop* (5), *M'Connell* v. *Hector* (6) and *Albrecht* v. *Sussmann* (24) are all averse to the title to sue. So is the judgment of LORD KENYON, C.J., in *Brandon* v. *Nesbitt* (4), and I think also the judgment in *Le Bret* v. *Papillon* (25). The former was an action on a marine policy by a British plaintiff who, however, appeared on the record to have been an agent in effecting the policy for enemy aliens. It was strongly laid down that such an action would not lie, and, having regard to things read in the course of the decisions I have just referred to, it is not surprising that this should have been so. On the other hand, in *Flindt* v. *Waters* (7), where a British agent had effected a policy of insurance on behalf of alien enemies who were not so at the time of the loss, but had become so before action brought, LORD ELLENBOROUGH, C.J., laid down the law more guardedly, saying (15 East, at p. 265):

> "The defence of alien enemies must be accommodated to the nature of the transaction out of which it arises; it may go to the root of the contract itself on which the plaintiff sues and operate as a perpetual bar, or the objection may, as in a case of this sort, be merely personal in respect of the capacity of the party to sue on it. Here the objection is taken up on the general issue, which is a plea of a perpetual bar, and if found against the plaintiff would have excluded him for ever, so that, though peace should be established to-morrow between the two countries, and the Crown should not have interfered to seize the debt, yet on this plea in bar the plaintiff would have been forever estopped to sue for his debt. But here the objection is only of a temporary nature: the contract itself was perfect at the time it was made; the trade was with an alien friend. . . ."

As the cause of action had arisen before the assured became alien enemies and was only temporarily suspended, the court thought that the supposed rule was not one which applied with such rigidity as to create a perpetual bar, and on the plea of the general issue it was, therefore, treated as not applying. *Ex parte Boussmaker* (11) is a case in which an analogous view was taken by LORD ERSKINE, L.C., for he allowed an enemy alien to invoke the assistance of Chancery by a petition to prove a debt under a commission of bankruptcy because the contract under which the debt arose had been entered into in time of peace, and the title to the debt would, therefore, become enforceable when peace came. The remedy was only suspended, and the dividend should, therefore, be reserved. In *Daubuz* v. *Moishead* (26) GIBBS, C.J., held that the plaintiff, although trustee for an alien, was entitled to a judgment for money, but added that he could not say what the Crown might not do to lay hands on the money. On the other hand, LORD CAMPBELL, C.J., in *Alcinous* v. *Nigreu* (27) allowed a plea puis darrein continuance that the plaintiff had become an alien enemy. The right of action was held to be suspended during the war.

While I think that the preponderance of authority down to this date has tended to the treatment of the rule as a rule of ordinary law and not as a mere case of applying policy, the courts have been, as I have shown, by no means unanimous, and I do not think that the course of subsequent decision has materially affected this conclusion. The careful and elaborate judgment of LORD READING, C.J., in *Porter* v. *Freudenberg* (8) is in favour of the view that the rule is a rigid one. *Candilis & Sons* v. *Victor & Co.* (13) was decided in the same sense. On the other

hand, in *Mercedes Daimler Motor Co., Ltd. and Daimler Motoren Gesellschaft* v. *Maudslay Motor Co.* (9) and in *Rombach Baden Clock Co.* v. *Gent & Son* (10) WARRINGTON and LUSH, JJ., respectively appear to have taken the other view. Under these circumstances I am of opinion that it is open to us, as a supreme tribunal unfettered by any decision of its own, to look at the reason of the rule invoked. If we can do this, I agree with the majority in the Court of Appeal that it is premature to stop the action at this stage from proceeding. And I think that, if this be so, the balance of public convenience is in favour of allowing the respondent firm to get in this debt if on the merits they can. Should they succeed in doing so, I am far from implying that any share of it should be paid out as part of the assets to be realised in taking the account to the enemy partner. But, so far as the decision of the Court of Appeal at present extends, it seems to me to have been right.

LORD ATKINSON.—The action out of which this appeal arises was brought by the firm of Speyer Bros. against the defendant to recover a sum of £26,430 14s. 6d., money alleged to be due to the plaintiffs under a certain agreement as money lent. It is therefore an ordinary common law action to recover money lent and nothing else. Whether the equivalent relief can be obtained in a different form of suit is, in my opinion, wholly irrelevant. The plaintiffs' firm was not a persona according to English law. The name of the firm is only a short name for the members composing the partnership. Those partners were Sir Edgar Speyer, a naturalised British subject; James Speyer, a German resident in New York; Eduard Beit von Speyer, a German resident in Frankfort-on-Maine, and, therefore, an alien enemy; Henry Oppenheimer, described as of German origin; and two British subjects. These six persons are the plaintiffs in the action. It matters nothing that they are described shortly by the name of their firm. It is admitted the partnership has been dissolved by the outbreak of the present war.

It is no doubt true that a partnership after dissolution continues to exist merely for the purpose of completing pending transaction, winding-up the business of the partnership, and adjusting the rights of the partners, and that for these purposes, and these only, the authority, rights, and obligation of the partners continue: *Beak* v. *Beak* (28); *Wood* v. *Braddick* (29); Partnership Act, 1890, s. 38. The relation between the partners after dissolution is not that of debtor and creditor unless and until the accounts have been finally taken, and a balance has been ascertained to be due by each one to the others. Advances made by one partner to the partnership, as well as those received from it by another, are mere items in the accounts between them and cannot be treated as debts due to it: *Richardson* v. *Bank of England* (30). The alleged indebtedness of von Speyer, the alien enemy partner, to the partnership in the present case may, therefore, be put aside. His debt is merely an asset of the partnership. The partners who, after dissolution, sue for a debt due to the firm, and, therefore, forming part of its assets, cannot be treated as the beneficial owners of the debt. It may, if recovered, increase the share of assets ultimately divisible among them on taking the final account. Or it may decrease the amount they have to pay to the creditors of the firm should it prove insolvent. So that the right by virtue of which the plaintiffs sue in this action to recover the sum sued for is precisely the same in character and nature as that by virtue of which they could have sued to recover it had the partnership not been dissolved. The fact that the attempt to recover the money is a step in the winding-up of the partnership business cannot alter the character in which they sue—namely, that of creditors to whom a debt is jointly due. Every authority, therefore, touching the right of a number of partners, one of whom is an alien enemy, to sue during the partnership for a debt due to them jointly applies to the case. It is quite right that property claimed by an alien enemy to belong to him should not during the war be given over to others. This and nothing more was, in my view, all that was decided in *Ex parte Boussmaker* (11). It may well be that any sum ultimately found to be due to the alien enemy on the taking

of the final account, should be preserved for him till the war is over and he ceases to be an alien enemy, but that is entirely beside the point. He is not now the beneficial owner of 1s. of the sum sued for, and no portion of it, if recovered, could be held in trust for him. At law the partners are joint tenants of debts due to the partnership. In equity they are as between themselves treated as tenants in common of such debts. For the purposes of the winding-up of the partnership affairs after dissolution each partner is the agent of the others, and thus each stands to the others in a fiduciary relation: *Cassels* v. *Stewart* (31) (6 App. Cas. at p. 77); *Hugh Stevenson & Sons* v. *Akt. für Cartonnagen-Industrie* (32). But in *Knox* v. *Gye* (33) LORD WESTBURY (L.R. 5 H.L. at p. 675) lays it down distinctly that a surviving partner is not the trustee of a deceased partner nor of his representatives in the proper sense of that term. And in *Piddocke* v. *Burt* (34) CHITTY, J., decided that a partner who receives assets of a partnership on account of himself and his co-partners is not liable to be imprisoned under s. 4 (3) of the Debtors Act, 1869, as a person acting in a fiduciary capacity, within the meaning of that statute. That decision has never been reversed, or, as far as I am aware, disapproved of. Moreover, so little is each partner in the position of a trustee for the firm or for his co-partners that one member of the partnership is not necessarily precluded from purchasing the share of another in the partnership without the knowledge of the rest of the partners, or from making, on his own account, a purchase not within the scope of or in rivalry with or injurious to the partnership: *Cassels* v. *Stewart* (31); *Trimble* v. *Goldberg* (35).

In my view, therefore, the plaintiffs in this common law action cannot be treated as suing as trustees in any proper sense of that word either for the dissolved partnership or for its members or any of them. Neither does their position in any way resemble that of the executors or administrators of a deceased person, who by the grant of probate or letters of administration by the proper courts are created representatives of that person clothed with authority to assert in courts of law, not their own rights, but the rights which would have belonged to the deceased person if alive. The plaintiffs are not in this action suing en autre droit. They do not even pretend to be so. The rule of law now, I think, firmly established by decisions extending over more than three centuries, made by some of the ablest and most distinguished judges that ever sat upon the English Bench is that an alien enemy, while he remains so, is personally disqualified from seeking the aid of the courts of the Sovereign of this country with whom the Sovereign Power to which he himself owes allegiance is at war, to enforce his own civil rights. Alienage alone formerly disqualified a person from bringing real or mixed actions in English courts, but the vital fact which disqualifies the alien enemy from seeking from the courts relief in his own right in any form of action is, not his alienage, but the hostility in war between the English Sovereign and his own. This rule of our law, like many other of our rules of law, was, no doubt, originally based upon and embodies certain views of public policy; but in this case, as in many others, the principles of public policy so adopted have, as numerous authorities conclusively show, crystallised, as it were, into strict and rigid rules of law to be applied, to use LORD STOWELL'S words, "with vigour." If that be so, as I think it clearly is, then the cases establish that it is wholly illegitimate for any judicial tribunal which may disapprove of the principles of public policy so embodied in the rigid rule to disregard that rule in any particular case and base its decision on other principles of public policy of which it more approves. To do so would be to usurp the prerogative and powers of the legislature, since it is the function of the legislature, not of judicial tribunals, to discard the principles embodied in such rules, and in its enactments embody others which it prefers. For instance, the well-established rule of law which throws the protection of an absolute privilege around the observations of a judge while presiding in a court of justice, of an advocate while speaking there on behalf of his client, of a witness while giving his evidence there, or of a member of either House of Parliament while speaking in the House to which he belongs, is also based upon a principle of public policy—

namely, that it is more for the public good that private individuals should be made to suffer in pocket or repute by the observations of the individuals I have named than that these latter should, by the fear of hostile litigation, be deterred from speaking their mind freely when discharging their respective duties. And yet an innocent and deserving citizen, who, owing to the erroneous view of his conduct taken by a judge at a trial may be most cruelly defamed, have attributed to him fraud, falsehood, or perjury, and yet, owing to this absolute privilege of the judge, be left without a remedy, is surely as worthy an object of sympathy and commiseration as an alien enemy, or as a merchant, who by taking into partnership an alien who he must know may subsequently become an alien enemy, finds himself embarrassed in winding-up the affairs of his partnership after it has been dissolved. He takes the alien into partnership cum onere as if the choice should turn out contrary he must bear the loss. But if a citizen so wronged should sue his judicial detractor for libel or slander, and the case were permitted to go to trial, and the presiding judge, disapproving of the principle of public policy embodied in this rule, were to hold that the defendant's privilege was only qualified or did not exist at all, his conduct would be rightly denounced as an outrage. And yet, if the strict rule of the law must be applied in this case—whatever the presiding judge's view of public policy may be—it is difficult to see upon what principle the strict rule is not to be applied on the other.

I regard this question of the illegitimacy of judicial tribunals acting in any particular case on its own views of public policy as distinguished from the established rule of law based upon public policy, that I may be excused from quoting the well-known passage from the judgment of PARK, B., in *Egerton* v. *Earl Brownlow* (15). It runs thus (4 H.L.Cas. at p. 123):

> "To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman and not the lawyer, to discuss, and for the legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only, the written from the statute, the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference, not to speculate upon what is best in his opinion for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of public good, for instance, the illegality of contracts in restraint of marriage or trade. They have become part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good and prohibit everything which we think otherwise."

That statement of the law was quoted with approval and enforced by LORD HALSBURY in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (18) ([1902] A.C. at p. 496), and by LORD READING when delivering the judgment of the Court of Appeal in *Continental Tyre and Rubber Co. (Great Britain), Ltd.* v. *Daimler Co.* (36) ([1915] 1 K.B. at p. 912).

If I am right in the view I hold that the authorities establish that an alien enemy is personally disqualified from suing in any action in any courts of law with the doubtful exception of cases where he sues as executor or administrator, then I think it can scarcely be contested that this appeal should succeed. Unless, indeed, a special exception be made in favour of the alien enemy and his associates in the case. My view has, however, been stoutly contested by the respondent's counsel, and it has been argued that the enemy alien's disqualification depends on the possible result of the litigation which he institutes and in which he is the actor. He is disqualified, it is contended, from suing only in those actions by which, if successful, he would be enriched. I need scarcely say that not a shred of authority was quoted in support of that proposition, while it is refuted by many of the cases

decided during the last century and a half. As, however, the foundation and binding force of the rule has been challenged, it is necessary to examine in detail some of these later authorities.

The rule of law itself and the grounds upon which it rests are, I think, as shortly, clearly, and accurately stated by BUCKLEY, L.J., in *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.* v. *Daimler Co.* (36) as they can well be. He said ([1915] 1 K.B. at p. 918):

> "The proposition that an alien enemy cannot sue rests, I conceive, upon the proposition that such a one cannot approach the King, has no resort to the King, and cannot invoke the assistance of the King. The court is the King's court. The alien enemy cannot come into that court or have the assistance of that court, because the court is for judicial purposes the King sitting in his court, and the alien enemy cannot approach him."

That statement of the law was not dissented from by any of the members of the Court of Appeal. The meaning of this passage clearly is that the disqualification of the alien enemy is a personal disqualification, depending upon his personal status as the subject of a State at war with the King of England, and not at all upon the nature and character of the civil right he desires to enforce, whether it be legal or equitable, joint or several, or upon the result of the suit. The numerous authorities cited in argument, in my opinion, clearly support this view.

I begin with *Sylvester's Case* (37). There a French refugee brought an action, the report does not state for what. It was pleaded in abatement that he was an alien enemy born under allegiance of the French King, then at war with Queen Anne. To this there was a demurrer. The plea was held good, and it was laid down (7 Mod. Rep. at p. 150) that

> "if an alien enemy comes into England without the Queen's protection he shall be seized and imprisoned by the law of England, and he shall have no advantage by the law of England, nor for any wrong done to him here, but if he have a general or special protection it ought to come of his side on pleading."

So immaterial to this decision was the cause of action in the estimation of the reporter that it is not even mentioned, as it would naturally have been if the disqualification depended upon it: to the same effect is *Anon.* (38). In *Sparenburgh* v. *Bannatyne* (39) the action was framed in assumpsit for wages due to the plaintiff as a seaman. A plea was pleaded that the plaintiff was an alien enemy of the English King adhering to the King's enemies. EYRE, C.J., on delivering judgment upon a motion for a new trial, is reported to have said (1 Bos. & P. at p. 170):

> "As to the ground of policy which was taken in argument for the defendant —namely, that a benefit would result to the enemy from the plaintiff's recovering, it is a policy perhaps doubtful, certainly remote, and which I do not hold to be satisfactory. I take the true ground upon which the plea of alien enemy has been allowed is that a man professing himself hostile to this country and in a state of war with it cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and the jurisdiction of our courts. Such is the case of an outlaw."

In this judgment the disqualification is clearly based on personal grounds, the hostility of the suitor to the Sovereign in whose courts he sues, not on the nature of the claim he makes, or on the result of the suit if successful in enriching him or benefiting his country.

In *Daubigny* v. *Davallon* (23) goods were alleged to have been received by the defendants as agents for the plaintiffs, and a bill for discovery was filed for the discovery of the goods so received, stating that discovery was necessary for the

purpose of supporting an action intended to be brought for recovering the value of the goods. A plea was filed to the effect that the plaintiffs were alien enemies. McDonald, C.B., on delivery judgment, said (2 Anst. at p. 467):

> "It has been insisted that the plea of alien enemy applies only to those suits in which relief is sought, and not to mere bills of discovery. However the law may originally have stood, it is now settled that alien friends have a right to institute suits in the King's courts for recovery of their rights. They come into this country either, as formerly was the case, with a letter of safe conduct, or under a tacit permission which presumes that authority. So if they continue to reside here after a war breaks out between the two countries, they remain under the benefit of that protection, and are impliedly temporary subjects of this Kingdom. But if the right of suing for redress of the injuries they receive were not allowed, then the protection afforded them would be incomplete and merely nominal. This claim to the protection of our courts does not apply to those aliens who adhere to the King's enemies. They seem on every principle to be incapacitated from suing either at law or in equity. A doubt had at first arisen whether suits for recovery were not in their nature an exception to this rule, but we are now satisfied that no real distinction exists. The disability to sue is personal. It takes away from the King's enemies the benefit of his courts whether for the purpose of immediate relief or to give assistance in obtaining that relief elsewhere."

Here not only is it expressly declared that the disability to sue is personal, but it is made the very basis of the judgment, which is quite inconsistent with the respondent's contention that the rule only applies to cases in which, if successful, the plaintiff would be enriched. Where an alien enemy is sued natural justice demands that he should be permitted to defend himself, and it is probable he would be permitted to file a bill solely for discovery in aid of his defence.

Brandon v. *Nesbitt* (4) decides in the main that alien enemies will not be permitted to do indirectly what they are disqualified from doing directly. There an agent had in his own name effected for his principals a policy of insurance on certain goods belonging to them shipped on board a ship named the *Greyhound*, to be carried from London to Bayonne. The goods were captured by the French, then at war with England. Several of the agent's principals, the owners of the goods, were alien enemies. The declaration filed by the agent, the plaintiff, contained an averment that the policy was effected for the benefit of and on the account of those principals, naming them. A plea was filed by the defendant company to the effect that the owners were alien enemies of the King of England. To this plea a replication was filed to the effect that the owners of the goods were indebted to the plaintiff in sums exceeding the amount sued for on the policy. This replication was demurred to, and the plea was thereby left open to attack. The argument in support of the plea was that the action was to all intents and purposes the action of the alien enemies. The plea was held good, and judgment was given for the defendant on the ground, as stated by Lord Kenyon, C.J., that "an action will not lie either by or in favour of an alien enemy." He then points out that the ultimate decision of the Exchequer Chamber in *Anthon* v. *Fisher* (40) proceeded on the same ground, and that they had not found a single case in which an action had been supported in favour of an alien enemy. For, though it was held in *Ricord* v. *Bettenham* (41) that an action by an enemy on a ransom bill might be maintained, the action was not brought till peace had been restored, which got rid of the objection. Lord Kenyon appears to be perfectly right in this latter statement, as, from the report in 3 Burr. 1734, it appears that the capture of the vessel took place on Aug. 24, 1762, and that the ransom bond was given on the same day, that peace was restored on Nov. 3, 1762, and that the trial did not take place before Lord Mansfield at the Guildhall till the Easter Sittings of 1765. The second point taken in argument was not that an alien enemy could sue, but that as the contract was made during the war, and the breach of it occurred during

the war, the question was whether such a contract could be enforced even in peace time. It was held it could, as it turned upon the necessity of the case; otherwise the vanquished might be killed by the victor. It will be observed that LORD KENYON in his judgment says not a word about the replication being a departure. That point, so far from being made the basis of the judgments, as contended for by the respondents' counsel in the present case, was entirely ignored.

In *The Hoop* (5) LORD STOWELL says (1 Ch. Rob. at p. 200):

> "In the law of almost every country the character of alien enemy carries with it a disability to sue or to sustain, in the language of civilians, a persona standi in judicio. The peculiar law of our own country applies this particular principle with rigour. The same principle is received in our courts of the law of nations. They are so far British courts that no man can sue therein who is a subject of the enemy unless under particular circumstances that pro hac vice discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, or pass, or some other act of public authority that puts him in the King's peace pro hac vice. But otherwise he is totally ex lege. Even in the case of ransoms which were contracts, but contracts arising ex jure belli and tolerated as such, the enemy was not permitted to sue in his proper person for the payment of the ransom bill but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom."

If that passage does not amount to a declaration that the alien enemy is personally disqualified from suing I don't know the meaning of language.

In *M'Connell* v. *Hector* (6) it was laid down by LORD ALVANLEY, and by the court decided, that two members of a firm of three who, though British subjects, resided in France, then at war with England, and carried on trade there, were to be treated for all civil purposes as much alien enemies as if they were born there, and that because of this a commission of bankruptcy founded on the petition of the member of the firm resident in England for a debt due to himself and his partners could not be supported. This case shows that one member of a partnership cannot sue in bankruptcy in his own name to recover the joint debt. The owners of the joint debt must all sue, and if two of them be in the position of alien enemies the suit must fail. The fact that they were partners affords no help.

The decision in this case was approved of, and in effect followed, by LORD ELLENBOROUGH in *Roberts* v. *Hardy* (42). In the latter case a debt was due to two partners, one of whom was resident in France. It was held to be good to support a commission of bankruptcy issued on the petition of the two partners because this residence was not shown, as it was in the case before LORD ALVANLEY to amount to an adhering to the King's enemies. LORD ELLENBOROUGH in giving judgment said (3 M. & S. at p. 536):

> "It is too much therefore to attach upon his remaining there [i.e., the partner's remaining in France], and not getting away from the country on its becoming hostile those disabilities which belong to a person who adheres to the King's enemies. I reserved the point on the authority of *M'Connell* v. *Hector* (6), and in deference to the judgment of the Court of Common Pleas, and of LORD ALVANLEY in particular, but there it is observable was a trading, and LORD ALVANLEY states both a residence and a trading. If that fact were so here we might draw the conclusion."

LE BLANC and BAYLEY, JJ., concurred. It is perfectly plain that if in that case the absent partner had been shown clearly to be an alien enemy, the court could have held, as LORD ALVANLEY had held, that the commission in bankruptcy could not be supported.

My Lords, it appears to me to be impossible to distinguish on any rational principle the present case from these two cases. In them partners, apparently while the partnership existed, sought to recover a debt due to the partnership, or a dividend upon it, through the medium of the Court of Bankruptcy. In the

present case the former partners seek to recover a debt due to the partnership through the medium of a court of common law. Surely the difference in the tribunal in which relief is sought cannot affect the alien enemy's personal disability to sue. Neither can the fact that the partnership has in the present case been dissolved, since the plaintiffs, as I have shown, now sue in the same character and by virtue of the same right as they would have sued in and by if there had not been any dissolution.

In *O'Meally* v. *Wilson* (43) the plaintiff filed a bill of scire facias against the defendants as bailsmen for one Newell. Three pleas in abatement were filed setting out in different forms facts showing the plaintiff was an alien enemy. LORD ELLENBOROUGH again laid it down that if the plaintiff, an Irishman by birth, voluntarily resided and carried on trade in France, the defendants would be entitled to a verdict on each of these three pleas.

In *Le Bret* v. *Papillon* (25) the plaintiff sued on assumpsit on a foreign judgment. At the time of action brought he was not an alien enemy, but became so before a plea in bar had been pleaded. It was held by LORD ELLENBOROUGH that this plea was bad as it should have been a plea in abatement and not in bar, but that the court was bound to give judgment on the whole record; and it appearing that the plaintiff had become an alien enemy and therefore incapable of further maintaining his suit, it was adjudged that he should be barred from further maintaining it. This case is, in my view, undistinguishable in principle from the present, and it is quite clear that in it the plaintiff's inability to sue was based upon a personal disqualification, namely, his status as an alien enemy, not on the nature of the relief sought. LORD LINDLEY in delivering judgment in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (18) refers to this case in the following sentence ([1902] A.C. at p. 502):

> "Of course, if war breaks out before the action is brought or before it is over, the war suspends its prosecution, for an alien enemy cannot sue in this country."

That able, distinguished, and accurate judge apparently knew nothing of the novel qualifications now insisted upon touching an alien enemy's disability to sue. If the respondents are right he should have said: "For an alien enemy cannot sue in this country unless he is a party to a suit brought by his former co-partners, in a partnership dissolved by the war, as a step in the winding-up of its affairs, or unless the suit is brought substantially for the benefit of his former co-partners, not for his own benefit." No mention is made of such things as these by LORD LINDLEY.

In *Albretcht* v. *Sussman* (24), in an action brought by two partners against a third for an account payment and an injunction, it was held by SIR THOMAS PLUMER, V.-C., and by LORD ELDON on appeal that a plea in abatement that the plaintiffs were alien enemies was good. SIR SAMUEL ROMILLY stated in argument that the law was clearly settled by numerous cases that an alien enemy, not resident here by permission of the government, is under a personal disability to institute a suit either at law or in equity, and cites in support of that proposition the authorities I have already cited.

In *Flindt* v. *Waters* (7) the plaintiff, an agent, who had effected a policy of insurance on behalf of persons who became alien enemies after the contract had been made and the loss happened, but before the bringing of the action was held entitled to recover against an underwriter, who only pleaded the general issue, on the ground that the contract was legal at the time it was made and liable to be enforced upon the return of peace, and that the temporary suspension of the assured's right to sue could not be taken advantage of under a plea of a perpetual bar, there being no legal disability on the plaintiff on the record to sue. In giving judgment LORD ELLENBOROUGH, C.J., said (15 East, at p. 265):

> "The ground of our decision in this case will not at all clash with the doctrine laid down by the court in *Brandon* v. *Nesbitt* (4). The point there

decided was that the fact of the parties interested in the insurance having become alien enemies before the loss happened might be pleaded to an action brought in the name of a British agent who effected the insurance, and the court are disposed to confirm that doctrine. But the defence of alien enemies must be accommodated to the nature of the transaction out of which it arises. It may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal in respect to the capacity of the party to sue upon it."

In *Alcinous* v. *Nigreu* (27) an action was brought for work and labour done. A plea was filed which was held to be in substance that the plaintiff was an alien enemy. Lord Campbell, in delivering judgment, said (4 E. & B. at p. 219):

"The contract, having been entered into before the commencement of hostilities, is valid, and when peace is restored the plaintiff may enforce it in our courts, but by the law of England so long as hostilities prevail he cannot sue here."

In *De Wahl* v. *Braune* (44) the plaintiff, living in England and separated from her husband, sued alone to recover the price of a leasehold interest which she had sold. A plea in abatement was filed to the effect that she was married and her husband was still living. To this plea a replication was filed to the effect that the plaintiff's husband was not at the commencement of the suit present in or resident in this country; that he was an alien enemy, while she, the plaintiff, was a subject of the Queen residing in England as a single woman. This replication was demurred to. The case was decided by Pollock, C.B., and Martin and Bramwell, BB. Martin, B., said (1 H. & N. at p. 182):

"In either view the replication is bad. Assuming the contract to have been made after marriage, it was the husband's contract, and he might have sued alone upon it. I doubt whether the principle of the wife being allowed to join where she is the meritorious cause of action applies to a case like this, but at all events she cannot sue alone. Then, assuming the contract to have been made before marriage, the effect of the marriage is to vest the right of action in the husband, so that the necessity of his being joined arises from the interest being in him. There is no authority for saying that an alien enemy is civiliter mortuus; he is alive but under a disability."

In *Porter* v. *Freudenburg* (8) Lord Reading delivered the judgment of the Court of Appeal, consisting in addition to himself of Lord Cozens-Hardy, M.R., Buckley, Kennedy, Swinfen Eady, Phillimore and Pickford, L.JJ. He reviewed all the authorities I have cited and some others, and came to the following conclusions among others: (i) That an alien enemy, unless he be within the realm by licence of the King, cannot sue in the King's courts; (ii) that he may be sued in those courts; (iii) that when sued he has a right to enter an appearance and defend the action; (iv) that he has also the right to appeal against any decision, final or interlocutory, that may be given against him, but an alien enemy, who is plaintiff in an action commenced before the outbreak of war, has no present right of appeal. His right of appeal is suspended until the conclusion of peace. He deals with *Ex parte Boussmaker* (11), and says ([1915] 1 K.B. at pp. 873, 874) that it is not for the reasons he gives to be regarded as an authority for the proposition that an alien enemy can present a petition to the court and be heard upon it. *Halsey* v. *Lowenfeld* (46) is to the same effect.

I have cited all these cases to endeavour to prove to demonstration, as I think they do, two propositions—(i) that an alien enemy's inability to sue as plaintiff in any of the King's courts is due not to the nature of the suit, nor to his interest in its subject-matter, but to his status as an enemy to the Sovereign whose courts these are, and (ii) that from the earliest times down to the present there is not a suggestion in any of the leading cases decided by the most distinguished judges that such an enemy unprotected by a licence from the Crown in some form can

sue in any form of action in any of the King's courts save where he sues as executor or administrator of some deceased person. The authorities dealing with this latter class of cases are conflicting. In my own view, those against the right to sue are more convincing than those in favour of it; but, however that may be, the exception which proves the rule does not, as has, in effect, been contended, destroy the rule. I am quite unable to appreciate the line of reasoning to the effect that because an alien enemy can sue in the limited class of cases where he sues as representative of a deceased person, therefore, he can sue equally well where he represents some living person or sues merely in his own right. Whether an alien enemy, therefore, can or cannot sue as executor or administrator is, in my view, in the present case entirely irrelevant. It does not touch the point in controversy.

Shepeler v. *Durant* (47), which turns on an undertaking given by a defendant to plead to the merits of the action, not in abatement, conflicts in no way with any of the cases cited, and while the objection is not now taken by plea on abatement, but by summons to stay proceedings, the change of practice cannot alter the principle on which the court acts. *Candilis & Sons* v. *Victor & Co.* (13) and *Hugh Stevenson & Sons, Ltd.* v. *Akt. für Cartonnagen-Industrie* (32), cited by PICKFORD, L.J., are entirely consistent with *Porter* v. *Freudenberg* (8). In *Act. für Anilin-Fabrikation and Mersey Chemical Works* v. *Levinstein, Ltd.* (12) (a case undistinguished from the present), two persons appealed, one an alien enemy and the other a British subject; it was held that that enemy alien was not entitled to sue as plaintiff either in a court of first instance or in a Court of Appeal. It was further held that where the facts were not in dispute, and it was clear that some of the plaintiffs were alien enemies, the action ought not to be allowed to proceed.

I proceed to deal with some of the contentions put forward on behalf of respondents in addition to those I have already mentioned. The first of these is that, if they had under Ord. 16, r. 11, of the Rules of the Supreme Court, 1883, made von Speyer, the alien enemy, a defendant, all difficulty would have been avoided and they would have been entitled to hold their judgment. I entirely dispute that. It was laid down as long ago as *Cabell* v. *Vaughan* (48), and many times decided since, that it is necessary that all the persons with whom a contract is made should join in an action at law to enforce it, and that if any one of these should be dead that fact should be stated. The fact that the plaintiffs were partners cannot, and on all authorities does not, alter this rule of law. LORDS CAIRNS and BLACKBURN have in *Kendall* v. *Hamilton* (49) laid down that Ord. 16, r. 11, has not altered the legal principles with regard to the parties to actions, and, further, that the court in the exercise of the discretion the rule confers upon it should be guided by the same principles as were formerly applicable to a plea in abatement. These principles are illustrated by *Jell* v. *Douglas* (50), which was an action of assumpsit for goods sold and delivered brought by the survivor of two partners, who were the original vendors of the goods. On proof of this latter fact it was held the action failed. A proceeding such as was taken in *Cullen* v. *Knowles* (1) is really a proceeding to make a person a plaintiff against his will. The relief he gets is just the relief a willing plaintiff would be entitled to, for judgment is entered for him together with the actual plaintiffs. No claim is made against him. He is not a defendant in any true sense of the term, and certainly not a defendant who has to defend himself against hostile claims within the meaning of *Porter* v. *Freudenburg* (8). The suggested device would not, therefore, get over the difficulty. The alien enemy would still be in reality engaged in asking the aid of the King's courts to enforce his civil rights, which is the very thing forbidden. The next contention put forward was that, acting under the emergency legislation of 1914 and 1916, the Custodian of Enemy Property might have been made a plaintiff to represent, I presume, the alien enemy. I am not quite sure that the rule of law which disqualifies the enemy alien from suing could thus be evaded, but, even if it could be, it is a sufficient answer to say that this has not been done, and the judgment has been actually entered up. What has been done, not what could

have been done, but has not been done, is the thing that matters. The third contention I had some difficulty in understanding, and I am not quite certain I have correctly apprehended it. Counsel for the respondents again and again urged that in substance this was an action by the five former partners of the firm other than von Speyer, the alien enemy. This contention is, I presume, founded on the fact that as between the partners themselves he is only beneficially entitled to a small proportion of the capital and profits of the partnership. It amounts to this, that where a promise is made to several persons jointly who are thus collectively entitled to the performance of it, any one of them may be treated as if he were dead or non-existent if he should not have a substantial interest in the sum or thing sought to be recovered, and the promisees who are substantially interested should be permitted to enforce by suit a promise never made to them alone. It is scarcely necessary to say that no authority was cited in support of this contention. It is opposed to all principles. The authorities, such as *Jell* v. *Douglas* (50), already cited, establishing the precisely contrary proposition, are conveniently collected in HALSBURY'S LAWS OF ENGLAND, 1st Edn., vol. 7, p. 337, note. [See now 3rd Edn., vol. 8, p. 61, note (r).]

It was finally contended that this House, disregarding what was said by PARK, B., in *Egerton* v. *Earl Brownlow* (15), and by LORDS HALSBURY and READING in the cases already cited, has in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (19) discarded the principles of public policy embodied in the old rules of law dealing with restraint of trade, and had adopted and applied new and different views of public policy which to it seem more conducive to the public good. And your Lordships were, as I understood, invited to follow a similar course in reference to the rule imposing disability upon alien enemies to sue as plaintiffs in our courts of law, to adopt and apply to this subject some new and more cosmopolitan views of public policy, and to lay it down that, at least for all the purposes of suits such as the present touching partnership affairs, if not, indeed, for the purposes of all suits which alien enemies might desire to institute, they should be put practically in the position of British citizens. Even if this House had taken in the *Nordenfelt Case* (19) the course mentioned, which I shall presently show is the very reverse of the course they actually took, I should earnestly hope your Lordships would not respond to this invitation, because the removal of the well-established personal disability of enemy aliens to sue must free the mind of every friendly alien wishing to embark in trade in any part of the King's dominions of every apprehension, that, should he become an enemy alien, he will experience any embarrassment in winding up his affairs. The absence of all anxiety upon that head would naturally make him all the more willing to enter into partnerships in this country with English partners, and would naturally make the English partners also all the more ready to receive him as a partner. And thus that system of the peaceful penetration by aliens into our commercial and industrial and financial enterprises, now recognised as a grave and serious danger to the State, would be encouraged and promoted. In the *Nordenfelt Case* (19) LORD MACNAGHTEN reviewed all the authorities from *Mitchel* v. *Reynolds* (51) downwards, relying much upon the judgments of TINDAL, C.J., in *Horner* v. *Graves* (20) and *Hitchcock* v. *Coker* (52), in the former of which the Chief Justice referred to the statement of PARKER, C.J., in *Mitchel* v. *Reynolds* (51) to the effect that a restraint against carrying on trade throughout the kingdom must be void, a restraint from carrying it on with a particular district, said:

> "These are rather instances and examples than limits of the rule which can only be at last what is reasonable with reference to each particular case."

LORD MACNAGHTEN then, in the frequently cited passage of his judgment, states what he considers the result of the authorities he had exhaustively analysed. The passage runs thus ([1894] A.C. at p. 565):

> "The true view at the present time, I think, is this. The public have an interest in every person's carrying on his trade freely; so has the indi-

vidual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of the authorities."

LORD MACNAGHTEN proceeded to say:

"For the reasons I have given, I think the only true test in all cases, whether of partial or general restraint, is the test proposed by TINDAL, C.J. What is a reasonable restraint with reference to the particular case? I think the restraint in the present case was reasonable in every point of view."

LORD HERSCHELL said (ibid. at p. 550):

"When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees."

LORD ASHBOURNE said (ibid. at p. 559):

"Having regard to the facts of the present case, to the nature of the business, to the class and number of customers, I think the covenant reasonable, and not larger than the protection of the respondents required."

So far then is this case from being an example of the rejection by this House of old principles, and the adoption and application of new principles. It is a conspicuous example of the adherence to and application of the principles established by old authorities to the new and peculiar facts of the particular case. There is not a syllable on any of the judgments delivered to suggest that their Lordships were applying any new rule or principle of public policy to these new facts. *Tingley* v. *Müller* (53) has not, in my mind, any application whatever to the present case.

On the whole, I am clearly of opinion that the judgment of PICKFORD, L.J., consistent as, in my view, it is with the decisions of EYRE, C.J., MACDONALD, C.B., LORD STOWELL, LORD KENYON, LORD ALVANLEY, LORD ELLENBOROUGH, LORD ELDON, SIR T. PLUMER, V.-C., POLLOCK, C.B., LORD CAMPBELL, and MARTIN and BRAMWELL, BB., in the cases I have cited, as well as with the most modern authorities, is clearly right in omnibus, and that the decision of BANKES, L.J., and SARGANT, J., in conflict, as I think it clearly is, with all these decisions, is erroneous and should be reversed, and this appeal be allowed.

LORD SUMNER.—This action cannot be maintained unless Herr Eduard Beit von Speyer, of No. 62, Forsthaus Strasse, Frankfort-on-Main, a German subject, is a party to it. That he is an enemy not sub protectione domini regis was brought to the notice of the court. In whatever capacity he is a party, the action, if it results in a judgment against Mr. Manuel Antonio Rodriguez of Argentina, will enure presently, if indirectly, to his material benefit. The decision appealed against involves the proposition that an alien enemy resident in Germany and not enjoying the King's licence or protection, can nevertheless flagrante bello enter the King's court as an actor and seek a judgment to his own advantage, provided he does so jointly with others who are under no incapacity. The action is brought on a joint contract to recover a joint debt. The plaintiffs sue as Speyer Bros., but for the purposes of this action and as against the defendant they are joint contractors. Whether the action is "in substance" an English action or an enemy action it is defective and unsustainable unless all are parties. This is a rule of

English law, at least as technical, at least as inconvenient, to the other partners, and at least as much based upon public policy as that in question, but no one has attempted to dispute it. From some observations of SARGANT, J., it would seem that he relied on the view that the objection of alien enemy must be taken by plea, though this in any case overlooked the fact that two of the summonses were connected with the enforcement of a judgment in favour of the enemy plaintiff with others. I think this view has not commended itself to your Lordships, but it had better be dealt with.

How can the court shut its eyes to the presence of an enemy before it. If it be, indeed, the rule that no enemy shall have his action in the King's courts, and a fortiori, if the rule rests on public policy, the courts may admit him or eject him, but on principle they must do one thing or the other, they cannot ignore him. Nor can the point be left to the defendant to take or waive as he pleases, for it is a rule of the forum not dissimilar to a limit upon its jurisdiction. Decisions have of course always turned to a large extent on the practice of the time, but in *Le Bret* v. *Papillon* (25), a case of assumpsit on a French judgment, where the objection of enemy character was wrongly pleaded in bar and not in abatement, the court held that notice must be taken of the plaintiff's incapacity although it was not properly pleaded. LORD ELLENBOROUGH applied the language of MONTAGU, C.J., in *Dive* v. *Maningham* (54) (1 Plowd. at p. 66), that

> "we by our office ought to give judgment against the plaintiff, for, although the defendant may not take the advantage, yet inasmuch as it appears to us that the plaintiff has no cause of action, we ought to give judgment against him."

Vanbrynen v. *Wilson* (55) is merely a case in which the court after verdict for the plaintiff refused summarily to stay judgment and execution on the ground of the plaintiffs being an enemy, but left the defendant to move formally. Whether this was done we do not know. *Shombeck* v. *De la Cour* (56) and *Thyatt* v. *Young* (57) decided that alien enemy might not be pleaded along with inconsistent pleas such as tender or non assumpsit, which assumes the plaintiff's locus standi in the court; it does not appear that the court proceeded to give judgment in favour of a plaintiff known to be an alien enemy. In *M'Connell* v. *Hector* (6), as in *Roberts* v. *Hardy* (42), the case was trespass to try the validity of a commission in bankruptcy issued by a defendant resident here in respect of a debt due to himself and his enemy partners jointly. Accordingly, it was not material to consider under what form effect should be given to the enemy's incompetence, and it was held in the former that the defendant could not sue for the debt by himself, and could not join his co-contractors who were resident among and adherent to the King's enemies. *Shepeler* v. *Durant* (47) was relied on in the court below. The ground on which it proceeded was that the defendant sought an indulgence contrary to good faith and to an undertaking given to the court. Probably it followed, though the case was not cited, *Simeon* v. *Thompson* (58). There to an insurance broker's action on a policy the underwriter, being under terms to plead issuably, pleaded that the parties interested were alien enemies. Thereupon the plaintiff signed judgment and successfully resisted a motion to set it aside, because in a judge's order "pleading issuably" means pleading to the merits.

If it were not for *Le Bret* v. *Papillon* (25) it might be thought from some of these cases that, in one way or another, it was possible for an alien enemy to obtain a judgment even from a court which had been told that he was an alien enemy, and that the court could not refuse to admit him if the defendant, either from negligence or design, failed to give him opportunity of doing so. I do not, however, find any case in which the enemy was eventually allowed to succeed if the fact of his being an enemy was established. The proposed plea may often have been unfounded and only put forward for delay, and then it was not unnatural to say that a mere allegation of enemy incapacity should not be used to gain time, unless it was made strictly in accordance with the rules. If at the trial the fact

of enemy incapacity became apparent, *Le Bret* v. *Papillon* (25), I take it, would always apply. In any case the whole of this system of practice has changed, and cases decided under it do not govern cases arising to-day, if their ratio decidendi was the system of practice and no more. Where the practice was itself the mode in which expression was given to the principle it would be otherwise, but no statement of principle is to be found except that in *Le Bret's Case* (25). Nowhere is there any suggestion that, as the rule rested on the ground of public policy, and there was inconvenience to a British partner, whose action "in substance" it was, the rule was capable of being moulded, or qualified, or was inapplicable, though the inconvenience lay on the surface in *M'Connell* v. *Hector* (6) and in *Flindt* v. *Waters* (7). When the point was decided on demurrer there was never any such objection as might have been expected, that, the matter being one of public policy, the facts ought to be inquired into, or that the pleading demurred to was bad for want of allegations showing how the facts stood that would raise a question of public policy. Some resourceful pleader, unable to reply sub salvo conductu or commorancy by the King's licence within the realm, would surely have replied to the regular plea of alien enemy, that there were circumstances of inconvenience, to wit, delay in winding-up a partnership in which loyal subjects were concerned or what not, which made it contrary to public policy that such a plea should prevail, if any such principle existed. Certainly at times he would have found in the court no unwillingness to circumvent the rule as to enemy incapacity if it could be done, at any rate at the beginning of the Crimean War, a war unpopular in itself, in which the application of the old rule was much complicated by the proclamations and licences then so freely resorted to. According to the report in 23 L.J.C.P. 140, JERVIS, C.J., in *Shepeler's Case* (47) said:

> "I should not wish to encourage pleas of this sort; there may be countries, in which advantage might be taken of such a plea, but fortunately in this country a more liberal policy prevails."

The discreet report in the Common Bench series does not give these words, but if they were used they show that JERVIS, C.J., at any rate, was unaware how easy a way to a more liberal policy he might have found by invoking the principle that where a rule of law rests on public policy the judges have it at their mercy.

Finally, under the system of pleading (or in the absence of it) then prevailing, MATHEW, J., allowed *Janson* v. *Driefontein Consolidated Mines, Ltd.* (18) to be tried under an agreement

> "that no dilatory plea should be set up based upon the fact that the plaintiff company was alien and could not sue while the war lasted. The case, it was agreed, should be dealt with as if the war were over" ([1900] 2 Q.B. at p. 343).

In your Lordships' House LORD DAVEY ([1902] A.C. at p. 499) questioned if such an agreement were permissible; LORD LINDLEY, while citing *Le Bret* v. *Papillon* (25) with approval, thought that the agreement in question might be justified under *Flindt* v. *Waters* (7). I must confess that I do not know how, for the plaintiff, Flindt, was a British subject, while the Driefontein company was an enemy company. The reasoning in *Flindt* v. *Waters* (7) is not satisfactory, but it was clearly based on the effect of a plea of the general issue. Personally Flindt was under no disability, and he was himself a party to the policy sued on. A judgment for the defendants on the general issue would have barred him for ever, and even his partners' disability continued only during the war; after peace they could have sued as parties interested. The trade itself in which the loss sued for occurred was covered by the King's licence, and the court considered that the decision was on the same footing as that in *Kensington* v. *Inglis* (59) and did not come under *Brandon* v. *Nesbitt* (4). Virtually the enemy partners were covered by the licence for the trade. For what my opinion may be worth, I have long thought that such an agreement as MATHEW, J., allowed should not have been tolerated. At any rate, what then took place is no authority for saying that a

court can only take notice of the plaintiff's incapacity when the defendant pleads it, and I think that no question of pleading or practice can now obscure the court's duty to enforce this rule when once its nature and limits have been ascertained. The decisions in *Re Merten's Patents* (8), *Act. für Anilin-Fabrikation and Mersey Chemical Works, Ltd.* v. *Levinstein, Ltd.* (12), and *Candilis & Sons* v. *Victor & Co.* (13) show that effect ought to be given to the enemy's incapacity wherever it is found to have arisen. It may be done even upon a summons to transfer to the Commercial List: *W. L. Ingle, Ltd.* v. *Mannheim Continental Insurance Co.* (60) or in the Court of Appeal. Such, too, has been the practice in Scotland: see LORD SKERRINGTON'S judgment in *Orenstein and Koppel* v. *Egyptian Phosphate Co., Ltd.* (61), 1915 S.C. at p. 64, which collects the authorities. The instances in which an enemy is allowed to be heard in the Prize Court are quite exceptional. They do not depend on the rules of law applicable to municipal courts. The older practice allowed an enemy to appear to claim only when he came under "some act of public authority that puts him in the King's peace pro hac vice. Otherwise such a person was regarded as totally ex lege." The existence of the Hague Convention has led to an extension of this practice in the case of an enemy claiming the benefit of them: *The Möwe* (62); *The Pindos* (63). I only mention the matter lest it should seem to have been overlooked.

So much for the pleading point. Perhaps I may here dispose of *Rombach Baden Clock Co.* v. *Gent & Son* (10) also. It is scantily reported, but apparently the learned judge thought that the plaintiff by getting himself appointed receiver in the action for dissolution could enable himself to do what otherwise would fail for non-joinder of his enemy partners. I do not know how an order made in the Chancery Division enables a plaintiff to disregard the law in the King's Bench Division. As receiver his business was to receive. He could not sue for the debt as a contracting party without the other contracting parties: *Re Sacker* (64), and I infer that nothing was vested in the receiver, for the action was not brought by him in his own person only, and LUSH, J., says, as is said here, "it was the receiver's action in substance," and "he brought the action under the protection of the court," considerations which, in my opinion, do not affect the inherent incompetence of such an action. The chose in action could only have been vested in him by an order, the propriety of which in time of war I take leave to doubt, for it would obviously open the door to a ready mode by which an enemy could collect his English debts without the observance of any safeguards or compliance with the substance of the law. The public Custodian is the proper person, and not a co-partner, in whom the interest of the enemy partner should be vested. As it stands, I think *Rombach Baden Clock Co.* v. *Gent & Son* (10) was ill decided.

Next, the majority in the Court of Appeal seem to have thought that Herr von Speyer might have been joined as a defendant, if not as a plaintiff, and that this would have mended matters or even have removed all difficulty. I cannot follow this. Whatever power a managing partner may have, or even any partner if not expressly restrained, to bring an action in the firm's name for a firm debt without obtaining the partner's special consent, no such power can make his doing so more legal or more competent than if the consent had been obtained. The same is true of Sir Edgar Speyer's arbitral power under art. 9. In neither case could one or all of other partners make Herr von Speyer a competent party by using his name on their own authority. Again, it is not shown that he was not willing to join as plaintiff, but even assuming that he could be made a defendant for the convenience and by the mere choice of his co-contractors, how is his position the better for that? The result is still that, if judgment is recovered, it must be a judgment in favour of the five plaintiffs and of one of the defendants, Herr von Speyer, and then under whatever disguise he would be a successful actor in the courts of His Majesty, whose enemy he is. Is our law so foolish, and is justice so blind, that this disregard of the rule, if it be a rule, can be got over by calling a plaintiff something else? The notion of making him a defendant and then pretending that all is well seems to me to be insupportable.

Nor is it enough to say that Herr von Speyer's interest in this particular debt is only such as a member of a dissolved partnership has in assets of the former firm pending its liquidation. It is so, but what of it? A judgment in his favour, although jointly with others, would cause an immediate improvement of his position in one way or another. The recovery of this judgment against the defendant would forthwith assure pro tanto the ultimate reduction of Herr von Speyer's debts to the firm, and forthwith diminish his liability for interest if any. Even if there are still debts outstanding, towards the payment of which whatever is recovered from the defendant might be applied, the result is still the same; for to that extent a debt due from Herr von Speyer jointly with the others, and if due to persons in neutral countries, presently enforceable, would be at once discharged.

It is a fallacy to suppose that everything turns on not remitting money to Germany during the war. I know that ROOKE, J. (no great authority), says something like this in *M'Connell* v. *Hector* (6), though entirely proprio motu, but the mischief is not confined to cases of present cash enrichment of an enemy. A British partner who paid to a Dutchman during the war a firm debt contracted before the war by his Frankfort partners has been convicted of "paying a sum for the benefit of an enemy country," contrary to the proclamation of Sept. 9, 1914: *R.* v. *Kupfer* (65). So here there would be a recovering of the sum for the benefit of an enemy, whether Herr von Speyer handled the cash or not. Even if judgment only were recovered against Señor Rodriguez without satisfaction, Herr von Speyer would benefit at once by getting an interest in a speciality debt secured by a charge in lieu of an interest only in a debt due upon a simple contract and unsecured. No order to keep the cash in this country during the war would deprive him of this immediate improvement of his position, nor is it impossible that, in some neutral country where the defendant may have property, he might actually recover satisfaction in respect of some right under the English judgment.

We always come back to the real question: What is the rule on this subject? As I understand them, BANKES, L.J., and SARGANT, J., proceeded on the following grounds: (i) the rule which disables an enemy alien from being an actor in legal proceedings, in which the recovery of a judgment will enure to his benefit, is only a rule of public policy; (ii) it would be against public policy that Sir Edgar Speyer and his British or neutral co-partners should be prevented from completing the liquidation of the affairs of the former partnership during the war; (iii) therefore, the action should proceed by remitting it to the master to inquire whether the defendant has any meritorious defence (the objection that one of the plaintiffs is an enemy alien being for this purpose unmeritorious), and, if has not, judgment should go for the full amount, with a charging order and an order for the appointment of a receiver in favour of this alien enemy jointly with the others under the firm name of Speyer Bros. I will proceed to examine these positions.

Any discussion of our law on the question of an alien enemy's disability as an actor in litigation in our courts naturally starts with the writings of LORD COKE. From him we may work backwards or forwards. For the earlier period discussion takes the form of criticism of his statements and authorities; after his time, until quite recently, there is little to be done except collect instances of the application of the rule and to note the development of the methods of pleading the point. The authorities before the seventeenth century are not very numerous. The right of an alien enemy to bring trespass in respect of personalty and the inability of an alien enemy to sue at all are recognised in the time of Henry VI and the substance of the necessary plea is already stated:

> "le defendant dit que le plaintiff est et fuit jour de brief purchase un alien ne de south le legiance le Roy de Denmark qui est enemy": 32 Hen. 6, Hil. T. pl. 5.

An enemy as such cannot sue: secus, if he comes with the King's licence or safe conduct. So, too, is 19 Edw. 4, T. pl. 6. I do not think that anything can be gathered for present purpose from the earlier position of mere aliens in England,

or that it is useful to inquire how and why a period of toleration of strangers was followed by one in which all aliens were treated as enemies, to whom legal rights were denied, and that again by a later period in which alien merchants enjoyed permission to trade and, apparently as a consequence, a limited right of suit. At an early date they resorted to the Lord Chancellor, but this proves nothing. The petitions collected in vol. 10 of the Selden Society's publications, SELECT CASES IN CHANCERY, are all presented by alien amis; they appeal as much to the administrative as to the judicial powers of the Chancellor, and there is nothing to show that, when the alien amy is thereafter found as litigant in the King's courts of law, his altered position is due either to the interference of the Chancellor's jurisdiction or to any conscious application of notions of public policy. I expect it had something to do with fees. At any rate, there seems to be no ground for thinking that in this case equity moderated the rigour of a common law rule. Commentators and compilers of abridgments at most connect the alien amy's rights to sue with the right to trade, and the right to trade, whether it originates with the King's licence or with Magna Carta or with a particular statute, does not arise from any rule of policy formulated by the courts. As for the alien enemy's right to sue, clearly it derives from the King's safe conduct direct. On the other hand, it is long before any reasons come to be given for the alien enemy's disability. I should think it was taken as obvious by the mediæval mind. DYER [*Anon.* (38)] simply says: "He is an enemy of our lord the King, in which case he shall have no benefit of his law," and no bad reason either; and to the like effect are *Anon.* (22) and *Watford* v. *Masham* (66), where, if it be an enemy case at all, no doubt "nul" is omitted before the words "action de debt," for, as was pointed out as early as *Richfeild* v. *Udal* (67) (CARTER, at p. 191), the case in MOORE "is against the authorities of all our books" as it stands. LORD COKE'S statement in the INSTITUTES already mentioned by your Lordships is almost identical with that in his report of *Calvin's Case* (68), which is also worth quoting (7 Co. Rep. at p. 17a):

> "An alien friend as at this time . . . may by the common law have, acquire . . . any goods personal as well as any Englishman, and may maintain any action for the same; . . . But if this alien become an enemy . . . then is he utterly disabled to maintain any action. . . ."

Observe this is by the common law. COKE is unconscious that any tribunal other than the courts of common law had been concerned in thus deciding or of any qualification or mitigation of that law whatever, nor do I think that his comprehensive and exact mind can have stated the matter so absolutely without considering and dismissing such an obvious case as that of a firm with an alien partner who becomes an enemy by the outbreak of war. For nearly two centuries the decisions go little further than this except for practice and pleading: see 1 Williams' Saunders, pp. 3 to 5, Notes to *Jevens* v. *Harridge* (69). There is often a good deal to be gleaned on legal points of some antiquity by consulting the Abridgments and Digests, the Books of Entries and Precedents of Pleadings of the sixteenth, seventeenth, and eighteenth centuries. As far as I can find they all agree and treat the rule as to suits by alien enemies as an unqualified rule of personal disability. They so describe it and so explain it, and they accept it uncritically as axiomatic in our law. RASTALL, CLIFT, WENTWORTH, the MODERN ENTRIES are all to the same effect. In our own day DICEY ON PARTIES and BULLEN AND LEAKE'S classic third edition, PRECEDENTS OF PLEADING, take the same line. There is a finished example of the plea in *Le Bret* v. *Papillon* (25).

It is suggested now that this rule is nevertheless neither absolute nor unqualified, and that the decisions are not inconsistent with its being held inapplicable here. I think it would be difficult to find another rule so little qualified over so many centuries. When first we hear of it, not long after the beginning of recorded decisions, it was already clear; we never find it emerging from doubt into certainty under the influence of successive decisions, if that is what is meant by "crystallising"; it has always been as certain as language could make it, as curt as the

Commandments. It has never been doubted; the current of decision has run strong and steady and always the same way. It has always been a rule of personal disability. Historically the King's courts have never been open to all comers without exception. Before yet they were fully grown it was established that a considerable number of persons could not seek the King in his courts to pray for legal redress, and an alien enemy was among them. His disability he shared with outlaws and felons, with persons excommunicate and persons professing religion, not being "persons politique," as Lord Coke says, and some others. Exceptions such as they are depend on grounds not germane to the present case. The abbot alienigena could sue in respect of the property of his religious house situate within the realm, not as a natural person foreign born, but as an English person politic. Similarly, when it is said that an alien enemy can be an executor, and as such can bring actions flagrante bello in respect of the testator's estate, this is possible only because he sues en autra droit. As to this right, the decisions before 1870 were certainly in conflict, and the text-writers on the whole were adverse to it. The passage in Bacon's Abridgment relied on by Bankes, L.J., is really an extract, slightly altered, from Gilbert, C.B.'s History of the Common Pleas, p. 166, in which he says that there has been great debate on the point, but expresses no opinion of his own, and cites no authorities except those which were cited to your Lordships during the argument. He mentions the disadvantage to the devisees if the executor is excluded from the courts, but the decisions quoted do not treat this as the reason for holding that an alien enemy can sue as executor even in the few cases in which it was so held. So, too, Williams on Executors left the point quite undecided in his text from 1832 to 1873, and the note so much relied on, if critically examined, is not exact in its treatment of the cases, and expresses only a guarded doubt. If s. 2 of the Naturalisation Act, 1870, which enables aliens to hold all kinds of property, and so removed most of the difficulties which encumbered the path of the alien executor, did really by implication allow an alien enemy executor to sue during the war, it is again important to observe that it was a statute and not a judicial decision that settled this. Whether it had that effect or not need not now be discussed, for at any rate the only ground for enabling the alien enemy in this regard would be that he would sue en autre droit, and I think that the important point in this connection must be that he sues as executor, en autre droit only, and not as a party interested, in his own right. This is borne out by the parallel case of outlawry. An executrix married and sued to recover a debt due to the estate. It was pleaded in Bar that her husband was an outlaw, and Lord Coke decided against the plea:

> "by his outlawry clearly the husband forfeits nothing of the goods which his wife had as executrix, for that he only had them in right of his wife as executrix": *Hix* v. *Harrison* (70).

Now, it is only possible to say that Herr von Speyer is on record here, suing en autre droit, by assuming that, as against the defendant, he sues as trustee for certain beneficiaries, the other partners in Speyer Bros. of 1914 to wit. But he is not, nor is he so described on the writ, and, if he was, he would still sue for his own benefit as well, and not purely en autre droit.

I believe that much confusion has crept into this case by forgetting that this firm was not an incorporated company nor in any sense an entity distinct from the persons of the partners. Sargant, J., says that the recovery of the debt would be a recovery "for an English trading unit," whatever that is, and that "the action is not von Speyer's so far as any directing mind is concerned." This must mean that Herr von Speyer sues, not for himself at all, but for others, like a bare trustee. It is said that if a British subject, or, I suppose, an alien amy for that matter, sues as a trustee for the benefit of an alien enemy, the action is competent, though if the court is apprised of the plaintiff's position some stay of execution or order for payment into court may be imposed, and it is thence inferred, I do not see how,

that conversely an alien enemy must be able to sue as trustee for the benefit of a British subject. *Kensington* v. *Inglis* (59), *Daubuz* v. *Moishead* (26), on the one hand, and the *Mercedes and Maudslay Motor Co. Case* (9) on the other, are relied on here. With *Kensington* v. *Inglis* (59) I think *Brandon* v. *Nesbitt* (4) and *Bristow* v. *Towers* (71) should be read. The broker Brandon averred interest in enemy aliens, and on that fact being pleaded, replied that the parties interested owed him for premiums more than the amount insured, and he relied on his broker's lien and set-off as equivalent to an insurable interest in himself. He failed, for he had no interest that would support an indemnity, and this although the replication had clearly made one of the points relied on before your Lordships —viz., that there would be no impolicy in letting the broker recover, since he would not let the money go out of the Kingdom, "which is an answer to DYER, 2 b" (p. 26). As for those who had—namely, his clients the assured—a contract to indemnify them would be illegal as in the nature of trading with the enemy and as protecting against British capture. Kensington, on the other hand, averred interest in an alien enemy, whose ship, the subject-matter of the insurance, was engaged in a trade licensed under the King's authority. If so, such dealing with the enemy as it involved was an authorised trade, and Kensington recovered in trust for the Spanish shipowner as if he had been an alien amy, though without a safe conduct he could not come here to sue. It should be noted that the public policy referred to in these cases is that only which forbids trading with the enemy. The rule that an alien enemy is disabled from suing is a personal "non-abilitie" (as it is called in BROOKE'S ABRIDGMENT, p. 62) independent of the character of his cause of action on public or other grounds, of which LORD KENYON, speaking in 1791, says: "An action would not lie either by or in favour of an alien enemy," and adds that they "had not found a single case in which the action had been supported in favour of an alien enemy." On the other hand, LORD ELLENBOROUGH says in *Kensington's Case* (59) (8 East, at p. 290) that in *Brandon* v. *Nesbitt* (4)

> "any protection afforded to such property by means of a contract of indemnity directly and materially contravened the public interest, which was concerned in the precariousness or destruction of such property. In the present case no public policy of the country is contravened by sustaining and giving effect to such a trust . . . although the King's licence cannot in point of law have the effect of removing the personal disability of the trader in respect of suit so as to enable him to sue in his own name, it purges the trust in respect to him of all those injurious qualities in regard to the public interest which constituted the particular ground of objection in [*Bristow* v. *Towers* (71) and *Brandon* v. *Nesbitt* (4)]. As, therefore, there is in this case no legal incompetence and no public interest which stands in the way of maintaining this suit,"

the plaintiff recovered for his client, the Spaniard. This is no authority for saying that an alien enemy can sue successfully under cover of a trustee, for first of all Kensington sued on a contract, to which he was himself a party, and, secondly, he averred interest in a client whose enemy character was purged by the licensing of the trade in question.

Daubuz v. *Moishead* (26) is a nisi prius case, so far as this point goes, poorly reported, and, as the plaintiff was an English holder of a bill of exchange, his success in the action proves nothing to the purpose. The *Mercedes Co. Case* (9) is also meagrely reported. If, as appears, the alien enemy plaintiff was a bare trustee for the English plaintiff it may be supportable. If so, it need not be considered now. If the alien enemy company sued for its own benefit, though jointly with the English company, I think the decision was wrong. The final answer, however, to both these cases, that of the executor and that of the trustee, is that the enemy plaintiff here is neither, and that these cases, if treated as exceptions to or mitigations of the personal disability of the enemy, do not affect the rule, for in the former the enemy does not sue for himself and in the latter the trustee has

never, so far as I know, recovered and certainly ought not to be allowed to recover for the enemy's benefit, unless the cause of action arose under a licence which makes the enemy quasi sub protectione domini regis.

Reference has been made to the cases on ransom bills as to which it is evident that some difficulty was found in reconciling them with the two standard rules, which prevented a subject from trading with the enemy and prevented an enemy from suing. Much ingenuity and erudition were expended in supporting such actions. An anonymous decision of LORD HARDWICKE'S, mentioned in the argument in *Ricord* v. *Bettenham* (41) (3 Burr. at p. 1741), to the effect that "an alien enemy may sue as executor or for an account," was there supposed to support a ransom bill as though the enemy plaintiff sued on the bill en autre droit, which he pretty clearly did not. LORD MANSFIELD says in *Cornu* v. *Blackburne* (72) (2 Doug.K.B. at p. 648): "This is a contract which arises out of a state of hostility and is to be governed by the law of nations and the external rules of justice" (to which no lawyer appeals except in extremity), and it is difficult to see why an action by the holder of a bill of exchange should be governed by the law of nations, or, as *Antoine* v. *Morshead* (73) suggests, be tried in a court of prize, unless it was felt that by the common law the action must fail. These cases are valuable on two grounds. It seems incredible that, with the above fixed principles of the common law before them, so many judges anxious to assist British prisoners of war and the recovery of prizes from captors should not have said that in substance these were actions for the British party interested, without which no prisoner could supply himself with funds, and no shipowner could recover his ship, things contrary to public policy in the highest degree. The only explanation is that no such theory had ever been heard of. They show also how necessary it is to keep clearly apart cases on trading with the enemy and cases on enemy disability to sue in considering the principles involved.

There are two quite separate principles to be considered in connection with contracts with an alien enemy. One forbids a subject to make or to perform certain contracts with an enemy. The other limits, or, as I think, denies the capacity of an enemy not enjoying the King's protection to enter the courts as a suitor. Both commonly arise in the same case, and observations germane to the one are apt to be transferred or referred to the other. This, again, is a fertile source of confusion. The statement that both are based on the same broad considerations of a public policy is historically without foundation, and finds no support in the books. The latter was full grown centuries ago; the former attracts much attention towards the end of the eighteenth century. The rule against trading with the enemy always is rested on public policy, and is represented as guarding the country against a public mischief; yet, even so, it has long been clear that the rule is now absolute as far as the courts are concerned, and admits of no relaxation in the interest of a profitable trade. BULLER, J., narrates in *Bell* v. *Gilson* (74) (1 Bos. & P. at p. 354) how LORD MANSFIELD used to tolerate insurances of enemy property by British underwriters on the ground that they were good for business; but no one defends this, and the law is now well settled to the contrary by *Janson's Case* (18) ([1902] A.C. at p. 494). The other rule has only recently been connected with public policy at all, and then only for the purpose of finding a modern explanation for supporting its invariable enforcement. SIR WILLIAM SCOTT in *The Hoop* (5) (1 Ch. Rob. at p. 200), after dwelling on the public mischiefs which are grounds for forbidding all trading with the enemy, passes to what he calls "another principle of law of a less politic nature, but equally general in its reception"—namely, an enemy's total inability to sustain any contract by appeals to tribunals—an inability due to the hostile character with which enemy subjects are invested by the fact of war. Indeed, the enemy's inability is not confined to contract or to trade. He could not sue in tort, nor could he sue on any contract except when under protection. It is only this principle "of a less politic nature" with which we are here concerned, and I think it is very significant that personal disability is the gist of it, applied without consideration of the effects.

Passages like the following are easily collected. LORD COKE, who classes praemunire with outlawry, excommunication, and enemy alienage, says of the first, "he that is out of the protection of the King cannot be aided or protected by the King's law or the King's writ," just as BRACTON (chap. 13, 5 and 7) says of an outlaw returning from outlawry without the King's pardon, "nor will he be able to appeal others, because he has lost all law." An alien can bring personal actions

> "if there be no war between this realm and the kingdom to which the alien belongs, for then he is an enemy of our lord the King, in which case he shall have no benefit from his laws": *Anon.* (38).

The reason why an alien enemy can sue when coming to this country under safe conduct is given in *Wells* v. *Williams* (75). It is not that at common law judges are to relax or enforce the disability according to public policy or the convenience of British subjects concerned, but that "suing is but a consequential right of protection, and, therefore, an alien enemy that is here in peace under protection may sue a bond." The passage in *Tuerloote* v. *Morrison* (76) in YELVERTON (p. 198), that the law allows an alien merchant "safe conduct with his goods because it is beneficial to the King in his customs," is not found in the fuller report in 1 BULSTRODE 134. BLACKSTONE says (1766 Edn., p. 372):

> "When I mention these rights of an alien, I must be understood for alien friends only or such whose countries are at peace with ours, for alien enemies have no rights, no privileges, unless by the King's special favour during the time of war."

MACDONALD, C.B., in *Daubigny* v. *Davallon* (23) says:

> "The disability to sue is personal; it takes away from the King's enemies the benefit of his laws,"

and so on. No doubt the rule in question is a rule of public policy, as all general rules, which the law maintains, must be deemed to be for the public good. The application of the rule is not in the election of private persons. Its theory connects it with State policy, not with private right. LORD DAVEY speaks of it as based on consideration of public policy in *Janson's Case* (18), and the Court of Appeal calls it a rule of public policy in *Porter* v. *Freudenberg* (8) ([1915] 1 K.B. at p. 884). The same might be said of service of writs out of the jurisdiction. It was not, however, in this sense that it was treated in this case by the Court of Appeal. So estoppel by matter of record is a rule of public policy, for "interest rei publicae ut sit finis litium," but the only question is whether there is res judicata or not; so "The King can do no wrong" states a rule of the highest public policy, but leaves nothing to the opinions of the age in the application of it. I can find no warrant in the case for thinking that the rule against enemy suitors is less fixed or more exposed to the effect of change in opinion from time to time. I have tried—but with indifferent success—to make out who first spoke of public policy in this connection. I think it was SIR T. PLUMER, M.R., who, in *Albretcht* v. *Sussmann* (24) (2 Ves. & B. at p. 326), I dare say desiring "to justify the ways of law to man," remarks:

> "The argument from the injustice which may be the effect of this plea in this particular instance is answered by the observation that it stands on public grounds. . . . The failure of private justice, assuming that to be the result of the plea, is a sacrifice due to public policy."

Surely these weighty words form a not inappropriate answer to much of the reasoning of BANKES, L.J., and SARGANT, J.

If, however, that aspect of public policy is invoked which is illustrated by *Egerton* v. *Earl Brownlow* (15) and *Nordenfeldt's Case* (19), it appears to me to be inapplicable to such a case or such a principle as your Lordships have before you. Considerations of public policy are applied to private contracts or dispositions in order to disable, not in order to enable. A man validly contracts as he will

because he is a free man; he validly disposes of his property as he will because it is his own. The courts, on grounds of policy, declare contracts in restraint of trade to be unenforceable, dispositions in perpetuity of which fetter the prerogative to be invalid. I never heard of a legal disability from which a party or a transaction could be relieved because it would be good policy to do so. When it had been established that the reasonableness of restrictive covenants upon a trader's prosecution of his calling was a factor in their permissibility, it followed naturally enough that in judging what is reasonable the relevant conditions of trade must be looked at as at the time when the question arises. The principle itself is that one party may impose reasonable restrictions upon the other. Where reasonableness is not an element in a principle the case is otherwise. Ex turpi causa non oritur actio I suppose can only be modified by statute, even though in a particular age public opinion about commercial morality may have veered in the direction of doubting whether honesty really is the best policy. No court could allow a departure from the rule which forbids trading with the enemy, let public opinion change as it will. To do so would be to trench on the domain of the executive in advising on the exercise of the King's prerogative, the very thing which so much alarmed this House in *Egerton* v. *Earl Brownlow* (15). Where a statute forbids a thing to be done by contract, the grounds of the prohibition are irrelevant. I do not see that they become more relevant where the prohibition is imposed by an established rule of law. If the application of a rule founded on public policy admits of doubt it is legitimate to consider that policy, in order to decide whether the case falls within the public mischief which the rule purports to prevent; but when the rule and its application are perfectly clear and admit of no doubt the mischief must be assumed and the policy needs no inquiry. I recall without quoting them Lord Halsbury's words of warning in *Janson's Case* (18) against new heads of public policy, and will only say that, in my opinion, so well settled is the rule against enemy suitors, be its historic origin or its judicial foundation what they may, that any attempt to apply it anew on some idea of adapting it to the convenience of a particular case is an attempt to exercise a dispensing power. As Alderson, B., said in advising your Lordships' House in *Egerton* v. *Earl Brownlow* (15), "my duty as a judge is to be governed by fixed rules and settled precedents."

To turn to the particular argument urged by the respondents, their case, very ingeniously put, I understand to be this. The rule, they say, never applied to actions "in substance" brought by or under the direction of or for the benefit of British subjects, for that would be against public policy. No single test can be laid down by which to settle of what character an action is "in substance." The test of the proportion in which the enemy plaintiff is interested was disclaimed, for what really concerns public policy is that the enemy should not be enriched during war. I think this disclaimer at any rate is right. To inquire whether more harm will be done by inconveniencing the British plaintiffs than by barring the enemy suitor is to make the question of public policy a mere question of degree in every case. I notice, first, the extreme vagueness of this proposition. The action must "in substance" be an English action, but that does not depend on the shares which the respective partners may have in the firm. On what, then, does it depend? If it depends on the right of the English partners to use the enemy partner's name without his specific consent, he is still a plaintiff liable for costs, and cannot be denied any control over the action in which his interest may overshadow that of the others. If so, he is an actor in the suit, no matter at whose instance he came into it. Otherwise the contention would be the converse of the decision in *Hugh Stevenson & Sons* v. *Akt. für Cartonnagen-Industrie* (32), and would enable the English partners to make use of the enemy partner's name and interests for their own benefit and behind his back. Sargant, J., seems to have thought that the present action was "in substance" under the control of the directing mind of Sir Edgar Speyer, an English partner. The plaintiffs are not a company. We are dealing with co-contractors, all natural persons. Further, art. 9, which is relied on, only applies to "questions upon which there may be any

difference among the partners," and there is no evidence or suggestion that any difference on this or any point has arisen among them. When LORD PARKER OF WADDINGTON said, in *Daimler's Case* (36), that the rule "has to be applied to modern circumstances as we find them and not limited to the applications of long ago," he was speaking of the rule against trading with the enemy, and, applying his words in this case, I think that we ought not to limit the rule against admitting an enemy to sue to the applications of long ago, but should apply it in accordance with principle to an enemy suing jointly with co-contractors. In that case a company formed and registered under English law, and as such a body politic distinct from its corporators, was alleged to be of enemy character, and it was suggested that the control of its affairs by a preponderant body of enemy shareholders and directors would afford the same test for determining enemy character as is afforded by residence among or adherence to the enemy in the case of a natural person. Such cases are common: *The Indian Chief* (77); *The Portland* (78); *The Jonge Klassina* (79). *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.* (36) involved a test appropriate to an incorporated person for the purpose of determining the same character.

Here, however, there is not and never was any doubt about the enemy character of the natural person, Herr von Speyer, and, even if the articles made him the puppet of Sir Edgar Speyer, they would not give him a persona standi in judicio during the war. Again, the passage at [1916] 2 A.C., p. 347, was quoted as rendering Herr von Speyer's presence on the record as a plaintiff permissible. My noble friend [LORD PARKER OF WADDINGTON] was there considering the suggestion that conduct otherwise lawful could be rendered unlawful by the bare fact that it might have as an ulterior consequence some enrichment of persons, at present enemies, after the conclusion of peace. In meeting this he dealt, first, with the business of a company earning profits by lawful trade and declaring dividends which, where shareholders are enemies, will not be paid to them during the war; secondly, the similar case where a trustee carries on a business and has some enemies among his beneficiaries; thirdly, the case of moneys in the hands of a trustee which he desires to pay into court in order to relieve himself. It was irrelevant in such an argument to inquire whether an enemy could carry on business or do acts connected with a business in England in the capacity of a bare trustee, and to contemplate that an enemy might carry on his business in England during the war under the guise of a trustee trading for him. *Tingley* v. *Müller* (53) ([1917] 2 Ch. at p. 177) would have been contrary to the whole tenor of that and every other opinion of that great man. The trustee to whom he referred was one to whom, for example, a business had been left in trust to carry it on for the benefit, say, of a testator's children, some of whom might have married German husbands; he had in mind neither any consideration of a trust relied on as an answer to the incapacity of an enemy to sue, nor any contemplation of a trust adopted as a device to defeat the law against trading with an enemy.

The respondent's argument is adapted to the case of partnerships "in substance" English. Can it be limited to the actions of British subjects? The courts are freely open to neutrals; why does not this principle equally apply to them? Why should not five Danes or five Swedes bring such an action, joining an enemy partner to complete the body of co-contractors, and say "in substance it is a neutral's action"? Yet, if so, where is the public policy in allowing it, and what British interest is concerned? Now, can the courts either refuse to the neutrals execution on their judgment, or, if they grant it, ensure that the neutrals shall wind-up their affairs without any roundabout enrichment of the enemy? Why should such an argument stop at the case of partners? Suppose joint owners of a horse hire him out, not being partners, but make a joint contract. The outbreak of war makes one of them an enemy. Is an action to recover the hire affected by the disability of the enemy co-contractor? If not, there is no particular efficacy in basing the argument on the position of partners; if it is, where is the public policy in being careful of the interests of partners and careless of those of mere joint owners?

It has been said that the right to trade involves the right to sue for the protection of that trade; from that I should have thought the true conclusion was that all right to sue ends, at any rate pro tempore, when the right to trade ends—namely, on the outbreak of war. *Ex parte Boussmaker* (11) has been fully explained in *Freudenberg's Case* (8). There is all the difference between asking the court to grant you something better than you have got—namely, a judgment, which is the effect of suing on a simple contract—and calling the court's attention to the fact that it has got hold of something which is yours already, and ought not to give it away behind your back. In *Boussmaker's Case* (11) the statute then in force (5 Geo. 2, c. 30, p. 26, relating to bankruptcy) provided that at the meeting mentioned "the said commissioners shall admit the proof of any creditor's debt, and shall assign every such bankrupt's estate to such person as the major part of such creditors shall choose." To admit one of such creditors, though an enemy, to protest against the distribution of the estate in favour of the other creditors till he can be fully heard after the war is no warrant for modifying the rule that an enemy cannot sue for beneficial relief flagrante bello.

Let it, however, be assumed that a court of law can adapt or modify the law about alien enemy plaintiffs when it thinks it to be in the public interest to do so, and that considerations about trading with the enemy are fully in point here, how do such considerations stand in this case? It is plain that, whatever mischief is to be apprehended from trading with the enemy, on the ground of the dangerous communications to which it opens the door, is equally to be apprehended here. If an alien enemy can sue, provided he joins as co-plaintiff a British or neutral partner, he can also instruct his own solicitors and counsel, for to oblige him to place the whole conduct of the case in his co-plaintiff's hands might deny him justice. If his case is to be properly conducted, he must have full communication with his advisers, I do not say without being censored, but certainly with as little delay and restriction as possible. On the same ground he may claim to attend the trial in person and with his witnesses, even though they, too, are alien enemies. No doubt, he cannot make this claim as of right or without being subjected to precautions, but how difficult it must be to refuse the claim, and so frustrate that access to the courts which the liberality of a progressive and adaptable law has assured; yet what a channel is thus opened up for communication between this country and that of the enemy, through the medium of bona fide actions at law, which it would be part of the enemy plan that its subjects should be in a position to bring. Trading with the enemy might almost as well go on unhindered if the right of litigation in our courts is a right which the enemy can always claim in a well-chosen case. In the present case what are the objects for the sake of which the law is to be altered on the ground of policy? None that I can see but two. One is to save Speyer Bros. the expense of paying the costs thrown away by having begun this action on the wrong lines and without recollecting the rules of English law by which it is governed. The other is to save them the loss of time which might be involved if the proceedings were remodelled in unexceptionable form. I see no public policy in saving them the costs or delay involved in getting their tackle in order. If the interest of Herr von Speyer were vested in the Custodian of Enemy Property, and he were then joined as the co-plaintiff instead of the enemy plaintiff, the action, for anything that has been advanced by counsel, could duly proceed, nor has any doubt been raised that this step could be taken if the proper application were made. The Custodian would then sue in virtue of the title vested in him by statute, and not for any private person's benefit, but in discharge of a public duty. Even if there be some obstacle, I do not think the disadvantage of delay in liquidating the affairs of a particular partnership comparable to the public disadvantage which would result from opening our courts to enemy plaintiffs, however respectable the company in which they sue. As for the time it would take, this debt is claimed to have been due and payable before war broke out, and some additional delay would be a small matter. I am, therefore, of opinion that the disability of alien enemies as actors in legal proceedings in time of war is not

a matter so depending on public policy as to warrant any court of law in departing from or relaxing it in favour of any alien enemy, even though they sue as members of a dissolved British firm. I am equally of opinion that if such a thing could be done, the dissolved firm of Speyer Bros. of 1914 has no claim to indulgence.

The other way in which this case has been put is that, apart from public policy and the circumstances of this case, the question is really one of the true extent and meaning of the rule. This view is that the rule does not apply when its application would debar persons, to whom our courts are open, from enforcing their rights and adjusting their business interests with the assistance of the law. The whole gist of this argument is that it is hard on British subjects, who have been partners with one who is now an enemy, to have the liquidation of partnership concerns impeded. It may be hard and yet wholesome for all that; the question is whether the rule, as it has been invariably formulated and applied hitherto, can be understood as having been all along subject to an implied and unmentioned limitation that would leave such a case outside it. The argument appears to be that our law cannot be so crude as to work this inconvenience, even if it does date from the Plantagenets, and that if no trace is to be found in the books of this limitation in a history of 500 years, that is because partnerships between subjects and aliens have been few before the age of steam and telegraphs, and because the case has never arisen owing to our rare participation in European war. I cannot help thinking that there must have been many partnerships between subjects and Frenchmen or Dutchmen during the many wars of the eighteenth century. Really the contention must be that the disability of an alien enemy, being only personal, cannot extend to disabling other persons, who in themselves are competent and meritorious; but, if you come to think of it, this is due to the necessity for making all the co-contractors parties to the action, and not to the rule which disables one of them, whether he be a party jointly or severally. Why criticise this rule and undermine its principle on account of hardship, which is caused by another rule? As a matter of fact the law has not much troubled about such collateral inconveniences. Not so long ago the conviction of a partner for felony must have been very inconvenient to the other partners. The knot is said to have been cut in stricter days because the felon's share was forfeit to the Crown, and, as the Crown does not own property or choses in action jointly with its subjects, it proceeded to oust the other partners from the partnership assets by virtue of the prerogative, but it is long since this was done. In the meantime I suppose the joint contracts could not be sued on till the felon had served his sentence or obtained a pardon. It was the same with outlawry, and though there are now no outlaws there is outlawry still. The fact is that a body of law, which like ours has grown through a long period of intensely conservative and unsystematic development, is sure to contain gaps, blemishes, if you will, which a philosopher or a nomothete would have contrived to avoid. It cannot be helped. It is too late for law courts to improve or explain them away. That is for the legislature. In the result, I agree with PICKFORD, L.J., and think that the orders of PETERSON, J., were right and should be restored, and that the orders made by the Court of Appeal should be set aside.

LORD PARMOOR.—The question in this appeal is whether British subjects, or neutral friends, in partnership with an enemy alien at the outbreak of war, which partnership ipso facto then determined, are unable during the continuance of the war to take action to enforce rights which had legally accrued in their favour prior to the outbreak of war, although there is no possibility that, during the war, the enemy alien would be enabled to derive any immediate benefit as the result of the action. It was argued on behalf of the appellant that enemy aliens can have no locus standi in judicio, and that, irrespective of all conditions, there is an inflexible rule of law placing them under a personal disability to appear as plaintiffs in any action during the period of war, and that, whatever the resulting inconvenience or loss to British subjects, or neutral friends, they must submit to it, on

the ground of public policy. The Court of Appeal decided by a majority against this contention. The question before your Lordships is concisely stated in a sentence in the dissenting judgment of PICKFORD, L.J.:

> "The older cases, however, and *Porter* v. *Freudenberg* (8) are concerned only with the case of a single enemy alien plaintiff, and in this case we have to consider if the same principle applies to the case of an alien enemy suing jointly with British or alien friends."

M'Connell v. *Hector* (6) is a case which might be regarded as not coming within this general statement as to alike cases, but the point really argued and directed in that case was that a British subject, who for all commercial purposes resides under the allegiance and protection of a hostile State, is to be considered for all civil purposes as much an alien as if he were an alien by nationality and birth. The learned lord justice, however, was of opinion that, so far as the Court of Appeal was concerned, the case was governed by the decision in *Candilis & Sons* v. *Victor & Co.* (13).

I accept the general principle that a single enemy alien plaintiff cannot sue on his own behalf during the continuance of war. This question was fully considered in *Porter* v. *Freudenberg* (8). It is there stated ([1915] 1 K.B. at p. 867):

> "This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the State at war with the Crown, and later it was grounded upon public policy which forbids the doing of acts that will be, or may be, of advantage to the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money, goods, or other resources available to individuals in the enemy State."

In this passage the later law is said to be directly founded on public policy, and does not connote the existence of a general personal disability founded on nationality, or that it is impossible to join an enemy as a party, if the forms of procedure so require, in order to enforce the rights of British subjects. It has long been established that a person of enemy nationality commorant in this country is not as such debarred from access to the tribunals, whereas, on the other hand, British subjects and neutral friends may have acted in such a manner as to disentitle themselves to the right of such access. In the passage from COKE ON LITTLETON to which your Lordships were referred, an alien is a person alibi natus, or, more exactly, a person born out of the liegance of the King. Such an alien is said to be capable of bringing a personal action on the ground that "an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personal action," but this right "is to be intended of an alien in league, for if he be an enemy alien the defendant may conclude to the action." Nationality is no longer a test of alienage in the enforcement of civil rights. The test is the place where a person voluntarily resides or the place where he carries on his business or businesses, and a person who is a British subject or the subject of a neutral State is regarded for all purposes as an enemy alien if he is voluntarily residing in, or has the place of his business or businesses in, a hostile country. In *Wells* v. *Williams* (75) it was held:

> "Suing is a consequential right of protection, and therefore an alien enemy that is held in peace under protection may sue a bond; aliter of one commorant in his own country."

In *Watford* v. *Masham* (66) it was held that an alien enemy suing as executor could have an action of debt on a bond or for personal things. In *Janson* v. *Driefontein Consolidated Mines, Ltd.* (18) LORD LINDLEY says ([1902] A.C. at p. 505):

> "The subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy;

the validity of his contracts does not depend on his nationality, nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses."

LORD LINDLEY in this passage was dealing only with the case of the place or places where a person was carrying on his business, and to make the statement complete it should be added that the same principle applies to the case of a British subject or neutral friend who at the time is voluntarily resident in the enemy country.

In considering a rule of law founded on public policy, care must always be taken not to introduce new principles which, to be valid, would require the sanction of the legislature, and to maintain the important limitation that it is beyond the jurisdiction of tribunals to determine matters of national policy. On the other hand, LORD WATSON in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (19) and LORD PARKER in *Daimler & Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.* (36) emphasise the necessity of considering modern conditions as they affect the basis on which a rule of law has in reality been founded. LORD WATSON says ([1894] A.C. at p. 554):

> "The function of the tribunals, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present times."

LORD PARKER says ([1916] 2 A.C. at p. 344):

> "The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them, and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require."

I think it sufficiently clear that there is no inflexible rule of law founded on public policy which under all circumstances prevents an enemy alien from having any locus standi in judicio as co-plaintiff, and that to attempt to enforce such a rule would in the present case eventuate, not in any disadvantage to the enemy country, but in the depriving British subjects of rights which on other grounds they unquestionably possess, and which have long been recognised as an inalienable heritage. In the passage in COKE ON LITTLETON to which reference has been made, it is stated that a prior or abbot may bring a real or mixed action concerning his house as acting en autre droit. It does not appear whether this statement applies to an abbot born out of the King's liegance in a country with which the King is at war, but the rights vested in a prior or abbot in connection with the property of his house make it difficult to understand how the property of an alien priory or abbey could have been safeguarded, in the event of a war, if the alien prior or abbot had under no circumstances the right of access to the courts. The right of an enemy alien executor to bring an action as such was discussed at great length before your Lordships, and your Lordships were referred to a note in the seventh edition of WILLIAMS ON EXECUTORS [vol. 1, p. 230, n.]. It appears that there are precedents both in favour of, and against, the right of enemy aliens who are executors to sue as plaintiffs, but the right was recognised in *Brocks* v. *Phillips* (21) and in *Richfeild* v. *Udal* (67). In this latter case BRIDGMAN, C.J., expresses the view that "an action by an alien executor doth lye." In principle, there would appear to be no objection on public policy so long as no advantage to the enemy alien could accrue as the result of the action. In the present case there is no question of suing en autre droit, but the recognition of such a right is of importance in deciding whether there is an inflexible rule against all access to the tribunals by enemy aliens. BANKES, L.J., in this connection quotes at length a passage from BACON'S ABRIDGMENT which aptly draws attention to the conflict which may arise

between public utility and private convenience, and to the possible prejudice to the King's subjects, who could not recover their debts from an alien executor by his not being able to get in the assets of the testator. I agree with SARGANT, J., that this passage is "curiously applicable to the circumstances of the present case."

Perhaps the strongest case against the contention of the appellant is *Ex parte Boussmaker* (11), which came before LORD ERSKINE, L.C., in 1806. Various attempts have been made to explain away the significance of this case, but it is a sufficiently clear authority that under certain conditions an enemy alien can present a petition to the court and be heard upon it. The claim was allowed to be entered, and the dividend of the alien enemy was reserved, with the result that the differential sum could be divided among the other creditors after reserving the dividend on the claim. This may differ in form from a case in which an enemy alien comes in the court to prove the existence of the debt and claims judgment on the amount, but it is not consistent with the existence of an inflexible rule that an enemy alien has no locus standi in judicio, and it is noticeable that a distinction is expressly drawn between a debt arising from a contract during war with an enemy alien and a contract which was originally good and would revive on the return of peace. It has been suggested that this case was not fully argued, but a similar question had been recently considered in *Ex parte Lee* (80), where the proof of debt in an insurance case was expunged on the ground of the illegality of the transaction, and that the loss was incurred by capture by a British ship after hostilities had commenced. The Lord Chancellor says:

> "The consequence of permitting such an assurance would be that it would be a complete indemnity against capture either by His Majesty's ships or private ships, authorised by letters of marque to make prizes, and the loss would fall upon British subjects."

In *Porter* v. *Freudenberg* (8) the decision of BAILHACHE, J., in *Robinson & Co.* v. *Continental Insurance Co. of Mannheim* (81) was approved, and it was held that there was locus standi in judicio for an enemy alien defendant against whom an action had been brought. In the judgment of the Court of Appeal the distinction between an enemy alien plaintiff and an enemy alien defendant is based on public policy, and that there is no consideration of public policy which would justify preventing the enforcement by a British or neutral subject of a right against an enemy alien. In the present case the question which arises is not dissimilar, and the distinction between making the enemy alien a plaintiff or defendant is in the same cases little more than one of form. I cannot see there is any ground based on public policy for depriving British subjects of their right of access to the courts, and preventing the enforcement of their claims, however small may be the possible contingent interest of an alien enemy, who was in partnership with them prior to the outbreak of the war, and to whom no payment can be made so long as the war lasts. It would be superfluous to re-examine the cases collected in *Porter* v. *Freudenberg* (8), but in many of them the disability to sue is referable not to the status of the party, but to the illegality of the contract, and the decision is given on this ground.

In *Cornu* v. *Blackburne* (72) an action of assumpsit was brought on a ransom bond. LORD MANSFIELD gave the judgment of the court in favour of the plaintiff: "It is sound policy as well as good morality to keep faith with an enemy in time of war." This is a contract which arises out of a state of hostility and is to be governed by the law of nations and the eternal rules of justice. Reference is made to *Ricord* v. *Bettenham* (41) as notorious all over Europe, but it was pointed out in the subsequent case of *Brandon* v. *Nesbitt* (4) that the action was not brought until peace was restored. Subsequently *Anthon* v. *Fisher* (40) came on for hearing. LORD MANSFIELD gave judgment in favour of the plaintiff, but there was a division of opinion, and a writ of error was brought. The judges of the Common Pleas and Exchequer were unanimous in holding that an enemy alien cannot sue for the recovery of a right "to be acquired by him in actual war." The important point

is that this decision was based on the illegality of the contract which it was sought to enforce. In *Brandon* v. *Nesbitt* (4) the same principle is applied to an insurance case, and LORD KENYON in his judgment refers to *Anthon* v. *Fisher* (40), but LORD ELLENBOROUGH points out in *Flindt* v. *Waters* (7) (15 East, at p. 265): "In *Brandon* v. *Nesbitt* (4) the party interested had become an enemy alien before the voyage insured was performed and the loss had happened." BAYLEY, J., added "that in *Brandon* v. *Nesbitt* (4) the voyage insured was illegal." Much reliance was placed, in the argument of the appellant's counsel, on the well-known decision in *The Hoop* (45), in which it was decided that British subjects were not at liberty to trade with the enemy without the King's licence, and that all property taken under such a trade is confiscable as prize to the captor. This again was a case of an illegal transaction and it was said that to such transactions the law gives no sanction; they have no legal existence, and the whole of such commerce is attempted without its protection and against its authority.

I think it is open to this House to consider whether the rule of law against the right of access to the courts by enemy aliens is so inflexible as to prevent access by British subjects when, in order to properly constitute their action, it is necessary that a former partner who is an enemy alien should be joined either as co-plaintiff or defendant. [HIS LORDSHIP stated the facts.] No question of partnership law is involved in the appeal, but, as stated by SARGANT, J., in substance the recovery of the debt for the partnership would be as much a recovery for the benefit of an English trading unit, and primarily of their creditors, as if the partners had constituted an English limited company, one-fortieth of the share capital of which belonged to the enemy alien. It follows, therefore, that if the principle for which the appellant contends is maintainable, then any contingent interests, however small, in partnership property in a former partner who by the outbreak of war has become an enemy alien, even though such property is applicable primarily in discharge of the debts of the partnership and might be all required for this purpose, would deprive British subjects of all right to recover debts due to the partnership during the period of war, however large their interests may be, and even though it may be certain that such debts will become irrecoverable to the detriment of British creditors, unless immediate steps can be taken to enforce their collection. In my opinion, there is no rule of law which prohibits the use of the name of an alien enemy, who has been a partner with British subjects prior to the outbreak of war, when it is necessary to enforce the payment of debts to which persons had become liable in lawful transactions where the real object is either to meet the claims of British creditors or to protect the interests of the British partners. It is not alleged that the action was brought without authority, or that it was necessary to approach the alien enemy in order to obtain his concurrence or assent. On this point the articles of partnership seem to be conclusive. There may be a question whether the alien enemy would not more properly have been joined as a defendant (*Cullen* v. *Knowles* (1)) than as a plaintiff, but this is not the objection which was really taken, and I see no reason why this should not have been done. I agree, however, with the opinion expressed by BANKES, L.J., that this objection, to be entertained, should have been taken at an earlier stage, when it might have been met by amendment. It was further argued that any inconvenience which might have resulted from the inability of British subjects to recover debts due to a partnership dissolved by outbreak of war had been remedied under the Acts passed to regulate trading with the enemy. No doubt, these Acts provide additional facilities in procedure, but they do not affect the general rule of law or the principles which determine the right of access to the tribunals.

The present appeal does not involve the question of the ultimate destination or payment of the funds sought to be recovered, but such funds cannot under any circumstances be paid over to an enemy alien during the period of war, and any decision which your Lordships give does not affect this fundamental principle. This distinction is clearly stated by LORD PARKER in the *Daimler Case* (36) ([1916] 2 A.C. at p. 347):

"It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. I entirely dissent from this view. I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy cestuis que trust should not during the war continue to carry on the business, although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy, but in the hands of a trustee in this country, should not be paid into court and invested in government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. . . . The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes."

If a trustee of an English business with enemy cestuis que trust should during the war continue to carry on the business, it appears to be essential that such trustee should have a right of access to the tribunals, but it is not necessary in the present case to say more than that in the liquidation of a partnership the English partners in whom is vested a power to bring actions should not be disentitled by the rule of procedure that it is necessary to join an enemy alien as a party in order that the action may be properly constituted.

There have been recent cases in which a question has been raised similar to that which is now in debate and on which learned judges have expressd differing opinions. WARRINGTON, J., in *Mercedes Daimler Motor Co., Ltd. and Daimler Motoren Gesellschaft* v. *Maudslay Motor Co., Ltd.* (9) and LUSH, J., in *Rombach Baden Clock Co.* v. *Gent & Son* (10) have given decisions in substantial accord with those of BANKES, L.J., and SARGANT, J. In *Mercedes Daimler Motor Co., Ltd. and Daimler Motoren Gesellschaft* v. *Maudslay Motor Co., Ltd.* (9) a patent had been vested jointly in the plaintiffs (an English company) and a German company; but the English company had the sole right of bringing actions for infringement and might join the German company as co-plaintiffs. The English company did bring an action for infringement, joining as co-plaintiffs the German company. WARRINGTON, J., held that, as the English company had the sole right to bring the action, the fact that the German company was an alien enemy was not a ground for suspending the action, and that to deny the English company the right to prosecute the action would be to deny the right of a British subject to bring an action for his own protection. In *Rombach Baden Clock Co.* v. *Gent & Son* (10) a partnership firm consisting of three partners, of whom one was an enemy alien resident in Germany, sold goods to the defendant, and one of the other partners brought an action for dissolution of partnership and was appointed receiver. LUSH, J., held that an action was maintainable by the receiver to recover the price of goods sold by the partnership:

"It was true that the receiver had had to join his two partners, but it was the receiver's action in substance, and it was impossible to say that it was brought for the benefit of a firm, one of whom was an alien enemy."

SARGANT, J., in expressing his agreement in the judgment of LUSH, J., said that: ". . . a contrary decision would paralyse the liquidation, even with the aid of the Chancery Division, of partnerships with alien enemies dissolved by the war." In *Candilis & Sons* v. *Victor & Co.* (13) the action was brought in the name of a firm consisting of one British and two enemy alien partners. The action came on for trial, and a summons was taken out for a stay of proceedings on the ground that two of the members of the firm were alien enemies. It is unnecessary to consider whether this case was binding on the Court of Appeal; but BANKES, L.J., who was

a party to that judgment, was in the present instance one of the majority judges. In the result, I agree with the judgment of the majority in the Court of Appeal, and in my opinion the appeal should be dismissed.

Solicitors: *Richard Furber & Son*; *Bircham & Co.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

UNION CASTLE MAIL STEAMSHIP CO., LTD. *v.* BORDERDALE SHIPPING CO., LTD.

[KING'S BENCH DIVISION (Bailhache, J.), March 24, 25, 1919]

[Reported [1919] 1 K.B. 612; 88 L.J.K.B. 979; 120 L.T. 669; 14 Asp.M.L.C. 435; 24 Com. Cas. 164]

Shipping—Charterparty—Stowage—Owners to be "responsible for proper stowage"—Liability—Term not amounting to absolute warranty.

By a charterparty dated July 27, 1915, it was provided that the charterers should pay the expense of loading and discharging the cargo, but that the stowage should be under the control of the master and that the shipowners should be responsible for the proper stowage and correct delivery of the cargo. Chloride of lime in iron drums, apparently in good condition, was stowed below deck under the superintendence of the chief officer although the shippers had intended it to be stowed on deck and had so marked the drums. During the voyage, owing to a latent defect in the drums, the chloride of lime corroded the drums and fumes escaped which damaged other cargo. The charterers having claimed damages against the shipowners,

Held: the provision in the charterparty that the shipowners were to be responsible for proper stowage did not amount to an absolute warranty, but meant that they would not be negligent in the stowage of the cargo; no negligence could be imputed to the master in the stowage of the cargo below deck; and, therefore, the shipowners were not liable to the charterers for the damage to the other cargo.

Notes. As to the duties of shipowners as to loading and stowage, see 30 HALSBURY'S LAWS (2nd Edn.) 451, 452; and for cases see 41 DIGEST 466 et seq.

Cases referred to in argument:

Brass v. *Maitland* (1856), 6 E. & B. 470; 26 L.J.Q.B. 49; 27 L.T.O.S. 249; 2 Jur.N.S. 710; 4 W.R. 647; 119 E.R. 940; 41 Digest 314, *1750.*

Hutchinson v. *Guion* (1858), 5 C.B.N.S. 149; 28 L.J.C.P. 63; 32 L.T.O.S. 276; 4 Jur.N.S. 1149; 6 W.R. 757; 141 E.R. 59; 41 Digest 471, *3029.*

Ohrloff v. *Briscall, The Helene* (1866), L.R. 1 P.C. 231; 4 Moo, P.C.C.N.S. 70; Brown. & Lush. 429; 35 L.J.P.C. 63; 14 L.T. 873; 12 Jur.N.S. 675; 15 W.R. 202; 2 Mar.L.C. 390; 16 E.R. 242, P.C.; 41 Digest 467, *2989.*

Sack v. *Ford* (1862), 13 C.B.N.S. 90; 1 New Rep. 96; 32 L.J.C.P. 12; 9 Jur.N.S. 750; 143 E.R. 36; 41 Digest 470, *3015.*

Action in the commercial list tried by BAILHACHE, J., in which the plaintiffs, charterers of the steamship *Border Knight*, claimed damages from the defendants, who were the shipowners, for breach of a charterparty dated July 27, 1915, breach of contract, and breach of duty in and about the carriage of goods.

By the charterparty the *Border Knight* was let to the plaintiffs for a round voyage, hire being payable at the rate of £4,470 per calendar month. The charterparty

provided that the charterers should pay the expense of loading and discharging; that "the stowage shall be under the control of the master and the owners shall be responsible for the proper stowage and correct delivery of the cargo." It further provided that the master, although appointed by the owners, should be under the orders and directions of the charterers as regards employment agency and other arrangements, and should sign bills of lading as presented, but the charterers guaranteed that the bills of lading should be in accordance with the mate's receipts and cargo returns. The charterers were not to be responsible for any damage to the steamer arising from any cause whatever, but "nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage." Under the charterparty the *Border Knight* was sent to New York in August, 1915, and there loaded a general cargo for Cape Town. The vessel left New York in September, 1915, and arrived at Cape Town on Nov. 9, 1915. Part of the cargo loaded in New York was a consignment of chloride of lime in iron drums, the shippers of which intended that it should be shipped on deck, the drums being marked to indicate their intention, but for a reason connected with the stability of the vessel and because it was desired to carry a considerable quantity of coal on deck, the drums were stowed below deck. The master of the *Border Knight* took no active part in the stowage of the cargo. The chief officer superintended this, made a note of the cargo coming on board, and gave the usual mate's receipts for, among other cargo, the chloride of lime, the drums being all apparently in good condition. They were stowed below deck with the knowledge of the Lloyd's surveyor at New York, who certified that the cargo was properly stowed. When the vessel arrived at Cape Town on Nov. 9, 1915, it was found that the chloride of lime had corroded through the iron drums and fumes had leaked out during the voyage and had seriously damaged the other cargo in the hold. The holders of the bills of lading for the damaged cargo brought claims against the plaintiffs. The plaintiffs, for business reasons and by arrangement with the defendants, paid these claims, leaving open the question of which of the parties, the plaintiffs or the defendants, if either, was liable. They now brought this action to recover from the defendants the amount of the claims which they had paid, and certain other expenses which they alleged they had incurred as a consequence of the chloride of lime having been, as they alleged, improperly stowed. They alleged that the drums ought not to have been stowed under deck with other cargo, and/or that the master ought not to have stowed them there without inquiring into or investigating the fitness of the drums for carriage under deck.

The defendants denied that the drums were improperly stowed, and alleged that if there was any negligence it was that of the plaintiffs' servants or agents. They counterclaimed for damage caused to the vessel by the chloride of lime by reason of the alleged negligence of the plaintiffs or their agents.

R. A. Wright, K.C., and *Stuart Bevan* for the plaintiffs.
MacKinnon, K.C., and *C. Robertson Dunlop* for the defendants.

BAILHACHE, J., stated the facts and continued: The plaintiffs claim that under the charterparty they are entitled to be indemnified by the defendants in respect of the claims they have paid to the owners of the damaged cargo. Under the charterparty the stowage was to be under the control of the master and the shipowners were to be responsible for proper stowage. Under such a contract owners of cargo would have a right to claim against owners of the ship; but this is not a claim by the owners of the cargo. It must be borne in mind that the *Border Knight* was running in a line and that when she arrived at New York to be loaded, her owners had nothing to do with the booking or loading of her cargo, apart from the provisions of the charterparty. The charterparty says that the stowage "shall be under the control of the master and that the owners shall be responsible for the proper stowage and correct delivery of the cargo," and if there had been improper stowage by reason of some physical act or default in the process of stowage, such as

the provision of insufficient dunnage, I think the owners would have been liable under that clause. But here there is no question with regard to the physical act of stowage. So far as the physical stowage of the drums was concerned it was unobjectionable. The damage in this case was caused by the chloride of lime corroding the drums and the fumes escaping. Chloride of lime is a substance which is likely to corrode the iron drums in which it is packed unless they are protected by an internal coating of varnish or unless they had a wooden lining at the ends. But when these drums were presented for shipment no one could tell, on looking at them, whether they had the proper internal protection or not.

The question to be decided is whether, when the drums of chloride of lime were presented for shipment on the *Border Knight*, the master ought to have been so far suspicious of them as to have refused to allow them to be carried except on deck, or should have made inquiries to find whether they had been properly protected. The charterparty provides that the stowage shall be under the control of the master, and that the owners shall be responsible for the proper stowage, but I cannot read that as an absolute warranty. I think it only means that the owner will not in any case be negligent in the stowage of the cargo. It would be a strange thing if it was an absolute warranty, for, if it were, the master might have presented to him some cargo of a kind of which he had never heard before; and if it caused damage, which he had no reason to expect, his owners would be liable. That, I think, would be pressing the language of the contract too far. The question really is whether there was negligence on the part of the master in allowing this chloride of lime to be stowed below deck. Notwithstanding that the stowage was effected by the plaintiff's agents, Barber & Co., and under the superintendence of Captain Marshall on their behalf, I should be of opinion that the defendants would be liable if the master knew or ought to have known of the danger, and ought to have stopped the stowage and refused to carry it or to have had it stowed on deck instead of below deck. There is no evidence that the master had any actual knowledge that the chloride of lime would do any harm; and can it be said that he ought to have known? Chloride of lime in drums is an article which is quite commonly carried, and generally it does no harm. Barber & Co. had had an unfortunate experience with chloride of lime on another occasion when damage resulted from its carriage, but apparently they had no suspicion that anything was wrong with this consignment. It did not occur to them that it would do any harm if stowed below deck, and neither Captain Marshall nor the surveyor of Lloyd's underwriters had any suspicion of it either.

In these circumstances I am not prepared to impute to the master a state of knowledge which was not shared by the plaintiffs' own agents and the other persons I have mentioned. If in fact the drums had been properly protected no harm would have been done, and in view of all the circumstances, I hold that no negligence is to be imputed to the master. As negligence is the foundation of the action the claim fails and must be dismissed with costs.

Judgment for defendants.

Solicitors: *Parker, Garrett & Co.*; *William A. Crump & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

VAN LIEWEN *v.* HOLLIS BROS. & CO., LTD., AND OTHERS. THE LIZZIE

[House of Lords (Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Wrenbury and Lord Buckmaster), November 14, 17, December 12, 1919]

[Reported [1920] A.C. 239; 89 L.J.P. 86; 122 L.T. 659; 36 T.L.R. 148; 25 Com. Cas. 83; 14 Asp.M.L.C. 596]

Shipping—Demurrage—Liability of charterers—Charter providing for discharge "with customary dispatch . . . according to custom of the port"—Custom of port requiring consignee to provide suitable berth, quay space and bogies before vessel's arrival—Delay in discharge at port due to circumstances beyond consignee's control—Extent of charterers' and receivers' obligation to discharge.

By a charterparty dated Aug. 14, 1915, the steamship *Lizzie* was chartered to load a cargo of wood at a Swedish port and to deliver the cargo at Hull, Victoria or Alexandra Dock. Clause 3 of the charterparty provided that the cargo should be "loaded and discharged with customary steamship dispatch as fast as steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports." In the event of the ship being detained beyond the time stipulated in cl. 3, demurrage at a daily rate was payable. By the custom of the port of Hull, embodied in a printed statement drawn up in 1899, it was the duty of the consignee of a wood cargo at Hull to provide, on or before arrival of the ship in dock, a vacant available and suitable berth and a clear quay space the length of the vessel and/or a sufficient and continuous supply of bogies, and/or suitable lighters alongside. The *Lizzie* loaded a full cargo of wood under several bills of lading all of which incorporated the terms and exceptions of the charterparty, and shortly before she arrived at Hull the bills of lading were assigned to the consignees, three firms of timber merchants. She arrived in the Humber on Sept. 29, 1915, but owing to congestion of traffic at the port of Hull the consignees were unable to provide a clear quay space or a sufficient supply of bogies (the quay and bogies being under the control of the dock owners), and the ship was not able to begin discharging her cargo until Oct. 7, 1915. As a result, she took eleven days longer to discharge than she would have done had there been continuous discharge. In a claim by the shipowner against the consignees for eleven days' demurrage the trial judge found that the delay in discharge was due to circumstances which were beyond the consignee's control.

Held: if, by the terms of a charterparty, the charterer agreed to discharge the chartered ship within a fixed period of time, that was an absolute and unconditional engagement for the non-performance of which the charterer was answerable whatever was the nature of the impediments that prevented him from performing it, but if, as in the present case, no time was fixed expressly or impliedly by the charterparty, the law implied an agreement by the charterer to discharge the cargo within a reasonable time having regard to all the circumstances of the case as they actually existed, including the custom or practice of the port of discharge, the facilities available thereat, and any impediment arising therefrom which the charterer could not have overcome by reasonable diligence; the obligation of the consignees under the charterparty was merely to discharge with the utmost dispatch practicable; the delay was due to matters beyond their control; and, therefore, they were not liable for demurrage.

Notes. Referred to: *Bargate Steamship Co.* v. *Penlee and St. Ives Stone Quarries* (1921), 125 L.T. 280; *Compañia de Navigacion Zita, S.A.* v. *Louis Dreyfus et Compagnie*, [1953] 2 All E.R. 1359.

As to the time within which delivery must take place, see 30 HALSBURY'S LAWS (2nd Edn.) 537 et seq.; and for cases see 41 DIGEST 539 et seq.

Cases referred to:

(1) *Hulthen* v. *Stewart & Co.*, [1903] A.C. 389; 72 L.J.K.B. 917; 88 L.T. 702; 19 T.L.R. 513; 9 Asp.M.L.C. 403; 8 Com. Cas. 297, H.L.; 41 Digest 547, *3746.*

(2) *Wright* v. *New Zealand Shipping Co., Ltd.* (1878), 4 Ex.D. 165, n.; 40 L.T. 413; 4 Asp.M.L.C. 118, C.A.; 41 Digest 545, *3726.*

(3) *Postlethwaite* v. *Freeland* (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 28 W.R. 833; 4 Asp.M.L.C. 302, H.L.; 41 Digest 539, *3666.*

(4) *Ford* v. *Cotesworth* (1868), L.R. 4 Q.B. 127; 9 B. & S. 559; 38 L.J.Q.B. 52; 19 L.T. 634; affirmed (1870), L.R. 5 Q.B. 544; 10 B. & S. 991; 39 L.J.Q.B. 188; 23 L.T. 165; 18 W.R. 1169; 3 Mar.L.C. 468, Ex. Ch.; 12 Digest (Repl.) 439, *3348.*

(5) *Lyle Shipping Co.* v. *Cardiff Corpn.*, [1900] 2 Q.B. 638; 69 L.J.Q.B. 889; 83 L.T. 329; 49 W.R. 85; 16 T.L.R. 536; 9 Asp.M.L.C. 128; 5 Com. Cas. 397, C.A.; 41 Digest 547, *3745.*

(6) *Ashcroft* v. *Crow Orchard Colliery Co.* (1874), L.R. 9 Q.B. 540; 43 L.J.Q.B. 194; 31 L.T. 266; 22 W.R. 825; 2 Asp.M.L.C. 397; 41 Digest 562, *3876.*

(7) *Beatley* v. *Bryson, Jameson & Co.*, unreported; cited in 14 Com. Cas. at p. 6.

(8) *Serraino & Sons* v. *Campbell*, [1891] 1 Q.B. 283; 60 L.J.Q.B. 303; 64 L.T. 615; 39 W.R. 356; 7 T.L.R. 174; 7 Asp.M.L.C. 48, C.A.; 41 Digest 406, *2526.*

(9) *Hick* v. *Raymond and Reid*, [1893] A.C. 22; 62 L.J.Q.B. 98; 68 L.T. 175; 41 W.R. 384; 37 Sol. Jo. 145; 7 Asp.M.L.C. 233; 1 R. 125; sub nom. *Hicks* v. *Rodocanachi*, 9 T.L.R. 141, H.L.; 41 Digest 544, *3710.*

Also referred to in argument:

Castlegate Steamship Co. v. *Dempsey*, [1892] 1 Q.B. 854; 61 L.J.Q.B. 620; 66 L.T. 742; 40 W.R. 533; 8 T.L.R. 523; 36 Sol. Jo. 460; 7 Asp.M.L.C. 186, C.A.; 41 Digest 544, *3717.*

Armement Adolf Deppe v. *John Robinson & Co., Ltd.*, [1917] 2 K.B. 204; 86 L.J.K.B. 1103; 116 L.T. 664; 14 Asp.M.L.C. 84; 22 Com. Cas. 300, C.A.; 41 Digest 529, *3568.*

Appeal from an order of the Court of Appeal ([1919] P. 22) reversing an order of the Divisional Court which set aside a judgment of the county court judge of Yorkshire.

By a voyage charter in the Scanfin form made in Stockholm on Aug. 14, 1915, between agents for the appellant, the owner of the steamship *Lizzie*, and charterers, Bergvik and Ala Nya Aktiebolig of Söderhamn, it was agreed that the *Lizzie* should proceed to a loading place in the Söderhamn district of Sweden and there load a full and complete cargo of timber and therewith proceed to Hull, Victoria or Alexandra Dock. By cl. 3 of the charterparty the cargo was

> "to be loaded and discharged with customary steamship dispatch as fast as steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports. . . . Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at the rate of £25 per day and pro rata thereof."

The cargo was to be taken from alongside steamer at charterers' risk and expenses as customary. The *Lizzie* was loaded at Nyhamn with a full cargo under several bills of lading which were assigned to the respondents, three separate firms of timber merchants respectively, shortly before the arrival of the ship at Hull. The ship arrived in the Humber on Sept. 29, 1915, but, owing to the congestion of traffic at the port, she was unable to obtain a clear quay space or a sufficient supply

of bogies, and was unable to begin to discharge until Oct. 7 and did not complete until Oct. 18. The appellant brought an action against the respondents in the county court for eleven days' demurrage, alleging that, if there had been continuous dispatch, the cargo would have been discharged by Oct. 7, and he relied upon the custom of the port of Hull which was embodied in a printed statement drawn up in 1899 by a committee of shipowners and timber merchants. By this custom it was the duty of the receiver of a wood cargo at Hull to provide for the steamship on or before her arrival in dock a vacant available and suitable berth to which she could forthwith proceed, and to supply a clear quay space the full length of the vessel and/or a sufficient and continuous supply of bogies and/or suitable lighters alongside. The dock and bogies belonged to and were under the control of the North-Eastern Railway Company. The county court judge held that, admitting the existence of the custom and practice as set forth in the printed statement and its incorporation into the charterparty, it had not the effect of converting a customary dispatch charter into a lay day charter, and that its existence imposed no greater obligation upon the receivers than the general law imposed upon them under a customary dispatch charter, i.e., to use (as he held they had used) their best endeavour to find quays, spaces, and bogies. He, therefore, gave judgment for the respondents. The Divisional Court (HORRIDGE and HILL, JJ.) reversed that decision upon the ground that the effect of the custom was to impose upon the respondents an absolute duty to provide quay space and bogies. The Court of Appeal reversed that judgment, per SWINFEN EADY, M.R., and EVE, J., on the ground that the evidence failed to establish any uniform custom as alleged, and per DUKE, L.J., on the ground that the custom did not apply to a case where the bills of lading were held by several receivers.

Compston, K.C., and *Harvey* for the appellant.
MacKinnon, K.C., and *W. H. Owen* for the respondents.

The House took time for consideration.

Dec. 12, 1919. The following opinions were read.

VISCOUNT HALDANE.—I have had the advantage of reading the judgment which my noble and learned friend, LORD DUNEDIN, proposes to deliver relative to the implications of the charterparty and custom of the port of Hull, and on this question I do not desire to add anything to what I understand him to be about to say. If his view of these is the true one, then I think that a conclusion, which is fatal to the appeal, may be rested on a single point. Since this House decided *Hulthen* v. *Stewart & Co.* (1), it must be taken to be the law that charterparties fall into two classes. There are some that prescribe a definite time—generally measured by a certain number of days—within which the discharge is to be taken by the charterers. The obligation is, in that case, an unqualified one and, if the time fixed is exceeded, demurrage is payable, irrespective of the circumstances; but the charterparty may merely stipulate that the discharge is to be taken "with all dispatch," or "as fast as the vessel can deliver according to the custom of the port," or may embody language which, as in these expressions, does not either name a period of time, or necessarily imply one of an altogether inelastic character. In such a case the liability of the charterer is treated as being only an obligation to take delivery with the utmost dispatch practicable, excluding affection by circumstances not under the control of the charterer. If a liability not qualified in this fashion is to be imposed, the language employed must be definite on the point and free from ambiguity. The charterparty under construction belongs to the second of these classes. Neither by its terms, nor by the custom of the port of Hull, as proved at the trial before the learned county court judge, is a definite and unqualified period of time prescribed within the meaning of the rule of construction as stated. It makes no difference to the general character of the obligation that there is a special clause in the charterparty providing for strikes and epidemics. This consideration disposes of the argument of the appellant and

makes it unnecessary to consider any other point raised. I think that the appeal ought to be dismissed with costs.

LORD DUNEDIN.—I think it unnecessary to re-state the facts which are set out in the judgments of the courts below. The first point to settle is: What was the extent of the admission made at the trial? I hold, without hesitation, that the respondents through their counsel, admitted that there was a custom at Hull in connection with the discharge of wood cargoes and that that custom is accurately set forth in the statement issued by the representatives of the Timber Trade Federation and the Documentary Committee of the Chamber of Shipping. Such an admission was most proper to give. BRAY, J., had found the custom and it would have been otiose to have insisted upon the re-proving of the custom. But to give this admission the further effect of saying that it was an admission which barred the respondents from contending that the law applied to the case by BRAY, J., was wrong, is, in my view, quite out of the question and, I ought to add, that the learned counsel for the appellant did not so press it. On the other hand, the admission accepted was sufficient proof of the custom, and I cannot understand the view of the Court of Appeal that the custom to the extent of what was contained in the document remained unproved. Now it is admitted that the words "the steamer shall be discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours of the port" import an obligation that the charterers shall use all reasonable dispatch, but "reasonable" must be reasonable under all the circumstances of the case. The appellant puts his case on the succeeding words, "according to the custom of the respective ports," and finding in the custom of Hull, as stated, that it is the duty of the receiver of cargo to supply and have ready a clear quay space the full length of the steamer and a sufficient and continuous supply of bogies, he argues that this is a super-added absolute obligation the object of which cannot be excused by its being impeded by causes over which the receiver of cargo has no control.

I think the question is really concluded by authority. The only difficulty that has arisen is from the rather uncertain doctrine which was laid down in some of the decided cases, and especially from *Wright* v. *New Zealand Shipping Co., Ltd.* (2). I do not think I should serve any useful purpose by examining and stating the somewhat numerous authorities. I will go at once to the cases in your Lordships' House which, in my opinion, settle the law. The most recent is *Hulthen* v. *Stewart & Co.* (1). That case, as this, contained the obligation for customary discharge according to the custom of the port, which there, was also the port of Hull. Indeed, the document there construed was a White Sea Wood Charter, commonly called Merblanc, which is a sister of the charter in the present case, commonly called Scanfin. The cause of delay was the crowded state of the port. The argument put forward that the normal period of discharge could be expressed in terms of days and then constituted an absolute obligation was rejected, its having been found as a fact that the charterers had done all that they reasonably could to discharge the vessel and the existence of a strike clause being held to make no difference. The general proposition was laid down by LORD MACNAGHTEN as follows ([1903] A.C. at p. 394):

> "It is, I think, established that, in order to make a charterer unconditionally liable, it is not enough to stipulate that the cargo is to be discharged 'with all dispatch,' or 'as fast as steamer can deliver,' or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished."

It was just possible in the present case to say that the impediment there was unconnected with the special duty undertaken by the charterers under the custom —namely, to provide bogies. The passage which exactly deals with such a case will be found in the words of LORD SELBORNE in *Postlethwaite* v. *Freeland* (3)

(5 App. Cas. at p. 608), where he quotes the words of BLACKBURN, J., in *Ford* v. *Cotesworth* (4):

> "If, by the terms of the charterparty [the charterer] has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time—that is, as was said by BLACKBURN, J., in *Ford* v. *Cotesworth* (4), 'a reasonable time under the circumstances.' Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If, as in the present case, an obligation indefinite as to time is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice which the charterer could not have overcome by the use of reasonable diligence ought, I think, to be taken into consideration."

That passage from *Ford* v. *Cotesworth* (4) was approved and quoted by A. L. SMITH, L.J., in *Lyle Shipping Co.* v. *Cardiff Corpn.* (5), as well as by LORD SELBORNE in *Postlethwaite* v. *Freeland* (3) in this House, and LORD BLACKBURN in the same case, while naturally adhering to his own view in *Ford* v. *Cotesworth* (4), does, in explaining *Ashcroft* v. *Crow Orchard Colliery Co.* (6), give the only ground on which *Wright's Case* (2) can be supported, namely, the view that, on the facts, the charterer failed through what he calls a self-imposed inability. That is really viewing the expression "overcome by the use of reasonable diligence" from, so to speak, the other side, and makes the whole of the cases, if that view of the fact in *Wright's Case* (2) is taken, consistent. If that view of the facts is not possible, then *Wright's Case* (2) as an authority must disappear, for we have the dictum in *Ford* v. *Cotesworth* (4) approved both by the Court of Appeal and by this House and the same thing said by LORD MACNAGHTEN again, in this House, in *Hulthen* v. *Stewart & Co.* (1). It follows that the unreported judgment of the case decided by MATTHEW, J., and the Court of Appeal under the presidency of LORD ESHER (*Beatley* v. *Bryson, Jameson & Co.* (7)), cannot, in my view, be supported. The view I have taken makes it unnecessary to consider the further question argued as to whether the custom being proved as regards one receiver of cargo held good in the case where there were more than one receiver of cargo under separate bills of lading. I am not satisfied that the above statement of the proposition is accurate. After all, a custom consists in a method of doing something, and the question whether the ensuing legal result which applies in the case of one will apply in the case of many is, I rather suspect, a question for the law to decide and not for a custom to prove. In any view, I reserve my opinion on this matter until it is necessary to decide it. For these reasons I am of opinion that the result reached by the Court of Appeal was right, although I cannot tread the path which they took to reach it. The appeal should be dismissed.

LORD ATKINSON.—In this case all the terms of the exceptions contained in the charterparty are expressly incorporated in the bills of lading of which the three defendants are endorsees. There is no such inconsistency or conflict between the provision of these bills of lading and the charterparty as existed in the case of *Serraino & Sons* v. *Campbell* (8), to which your Lordships have been referred. In that case "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever" were expressly excepted in the bill of lading; then followed the words "and all other conditions as per the charterparty." The charterparty contained not only the same exceptions as the bill of lading, but the further exceptions "strandings and collisions, and all losses and damage caused thereby even when occasioned

by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners." Owing to the negligence of the master the ship was stranded and the cargo lost. The plaintiffs who sued the shipowners for the loss of their goods, part of the cargo, were the endorsees of the bill of lading, but strangers to the charterparty, and it was held on review of all the authorities that the words "all other conditions as per charterparty" did not incorporate into the bill of lading the exception "stranding occasioned by the negligence of the master," and that the shipowners were consequently liable to the plaintiffs. No such conflict or inconsistency as this exists between the provisions of the bill of lading and the charterparty in the present case. It is untouched by this authority, and the present respondents are therefore bound by the terms of the charterparty. The nature and extent of the duties imposed upon charterers touching the discharge of the cargo from the ships they have chartered are well established.

If by the terms of the charterparty the charterer has agreed to discharge the chartered ship within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which they are answerable, whatever be the nature of the impediments which prevented them from performing it, and thereby causing the ship to be detained in their service beyond the time stipulated. If no time be fixed expressly or impliedly by the charterparty the law implies an agreement by the charterer to discharge the cargo within a reasonable time, having regard to all the circumstances of the case as they actually existed, including the custom or practice of the port, the facilities available thereat, and any impediments arising therefrom, which impediment the charterer could not have overcome by reasonable diligence: *Postlethwaite* v. *Freeland* (3), *Hick* v. *Raymond and Reid* (9), and *Hulthen* v. *Stewart & Co.* (1).

In the last of these three cases the charterparty provided that the cargo was to be "discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours" of the port of discharge, "but according to the custom" of the port, "Sundays, general or local holidays used unless excepted." These are very precise and peremptory words, much better calculated to impose an absolute and unconditional obligation than are the words upon which, in my view, the question for decision in the present case turns. Lord Macnaghten held in *Hulthen* v. *Stewart & Co.* (1) that the meaning of the above-mentioned words was not tantamount to fixing a certain definite number of days or hours as the period within which the discharge of the vessel was to be accomplished. That what the words pointed to was, he said, "the discharge of the cargo with the utmost dispatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel, and all the other circumstances in existence at the time, not being circumstances brought about by the person whose duty it was to take delivery or circumstances within his control." The learned judge who tried the case, Phillimore, J., had found as a fact that the respondents had done all they reasonably could to discharge the vessel. In the present case the trial judge has found that the respondents were not responsible for ordering the ship into dock, and that the delay in the discharge of the ship was not due in whole or in part to circumstances over which the respondents or the charterers had control. Having regard to this finding I think the first question for decision in this case resolves itself into this. Do the words of the written statement of the custom and practice concerning the discharge of steamships laden with wood cargoes, existing at the port of Kingston-upon-Hull, impose upon the charterers of the *Lizzie*, and also upon the respondents who are bound by the terms of the charterparty, an obligation to discharge this ship as absolute and unconditional in character, as if a definite number of days had been fixed for her discharge? It has been contended that they do impose such an obligation because the paragraph headed "Discharging Berth" imposes an absolute duty upon the receiver of the cargo to provide or arrange (on or before the arrival of the ship) a vacant available and suitable berth to which she can forthwith proceed and be at liberty to forthwith commence her discharge, and that there is a correlative duty

of the same absolute character imposed upon the receiver to enable the ship to take advantage of this liberty. I think that contention is unsound. It is not thus that absolute unconditional obligations can be spelt out and imposed. Adopting the words of LORD MACNAGHTEN in the judgment from which I have already quoted, I may say that in order to impose the liability contended for, the language used "must in plain and unambiguous terms define and specify the period within which delivery of the cargo is to be accomplished." The language relied upon in this case is not of this character. I, therefore, think that the appeal upon this point fails, and that being so it is unnecessary to deal with the second point, namely, the possibility of holding the consignees as liable as one consignee would be. I think the appeal should be dismissed with costs.

LORD WRENBURY.—I agree. I do not think it necessary to prepare an independent judgment of my own.

LORD BUCKMASTER.—I had prepared a written independent opinion on this case, but after reading the opinions of the other noble and learned Lords who have preceded me, I realised that I should be only clothing in different words exactly what they had already expressed. In such circumstances it would be vain repetition to deliver my opinion to the House, and I, therefore, content myself with expressing my entire agreement with the proposed motion, and with the reasons put forward in its support.

Solicitors: *Botterell & Roche*, for *Andrew M. Jackson & Co.*, Hull; *Trinder, Capron & Co.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

NORTH *v.* LOOMES

[CHANCERY DIVISION (Younger, J.), February 3, 4, 5, 7, 1919]

[Reported [1919] 1 Ch. 378; 88 L.J.Ch. 217; 120 L.T. 533]

Sale of Land—Memorandum—Parties—Signature of solicitor of one party—Sufficiency—Material term not included in memorandum—Assertion that no such term in contract—Acceptance by other party—Subsequent reliance on absence of term.

N. agreed to sell a freehold house to L., the agreement being evidenced by a receipt for the deposit signed by N., but not by L. The parties also verbally agreed that L. should pay the charges of N.'s solicitor. L. instructed his solicitor to carry out the contract and on Feb. 8, 1918, the solicitor wrote to N.'s solicitor that he was acting for the purchaser, and that no further contract was required than the receipt, which was sufficient. In a letter dated Mar. 2, 1918, L.'s solicitor insisted that the arrangement was that vacant possession would be given, and said that, provided that was done, L. would pay the charges of N.'s solicitor, but not otherwise. The question of the charges was not thereafter referred to in the correspondence. Vacant possession could not be given, and L. refused to complete. N. brought an action for specific performance of the contract as contained in the receipt. By his defence L. pleaded the Statute of Frauds generally and denied the contract, and alleged that it was a term of the agreement that vacant possession would be given on completion. The court found that there was no agreement as to vacant possession and it was accepted that the letter of Feb. 8, 1918, would have

been a sufficient memorandum of the contract as pleaded had it been signed by the defendant and not only by his solicitor. At the trial it was argued that the memorandum was insufficient because it made no reference to the agreement that L. should pay the charges of N.'s solicitor. This point was not pleaded, and the plaintiff was willing to waive that term.

Held: (i) L.'s instructions to his solicitor were sufficient authority for him to write the letter of Feb. 8, 1918, which, accordingly, was a sufficient memorandum of the contract pleaded; (ii) it was not open to L. to argue that the memorandum was deficient in that no reference was made in it to the payment by him of the charges of N.'s solicitor, because the point was not pleaded and it would not be proper to allow an amendment, but, even if the point were open to L., he would still fail because the apparent denial contained in the letter of Mar. 2, 1918, that the charges were payable by L. seemed to have been accepted, and, having obtained that acceptance, L. could not now be permitted to set up the omission of this obligation of his in order to escape from the contract.

Smith v. *Webster* (1) (1876), 3 Ch.D. 49, distinguished.

Notes. Considered: *Thirkell* v. *Cambi*, [1919] 2 K.B. 590. Distinguished: *Hawkins* v. *Price*, [1947] 1 All E.R. 689; *Burgess* v. *Cox*, [1950] 2 All E.R. 1212. Referred to: *Grindell* v. *Bass*, [1920] All E.R.Rep. 219; *Koenigsblatt* v. *Sweet*, [1923] 2 Ch. 314.

As to memorandum of contract for the sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 207 et seq.; and for cases see 40 DIGEST (Repl.) 21 et seq.

Cases referred to:

(1) *Smith* v. *Webster* (1876), 3 Ch.D. 49; 45 L.J.Ch. 528; 35 L.T. 44; 40 J.P. 805; 24 W.R. 894, C.A.; 12 Digest (Repl.) 177, *1173*.

(2) *Daniels* v. *Trefusis*, [1914] 1 Ch. 788; 83 L.J.Ch. 579; 109 L.T. 922; 58 Sol. Jo. 271; 12 Digest (Repl.) 177, *1178*.

(3) *Pullen* v. *Snelus* (1879), 48 L.J.Q.B. 394; 40 L.T. 363; 27 W.R. 534, D.C.; 12 Digest (Repl.) 194, *1341*.

(4) *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; 2 Nev. & M.K.B. 28; 2 L.J.K.B. 127; 110 E.R. 713; 12 Digest (Repl.) 398, *3082*.

(5) *Martin* v. *Pycroft* (1852), 2 De G.M. & G. 785; 22 L.J.Ch. 94; 20 L.T.O.S. 135; 16 Jur. 1125; 42 E.R. 1079, L.JJ.; 12 Digest 403, *3118*.

(6) *Vouillon* v. *States* (1856), 25 L.J.Ch. 785; 27 L.T.O.S. 268; 2 Jur.N.S. 845; 17 Digest (Repl.) 353, *1597*.

(7) *Hawksley* v. *Outram*, [1892] 3 Ch. 359; 62 L.J.Ch. 215; 67 L.T. 804; 2 R. 60, C.A.; 42 Digest 509, *748*.

Also referred to in argument:

Lloyd v. *Nowell*, [1895] 2 Ch. 744; 64 L.J.Ch. 744; 73 L.T. 154; 44 W.R. 43; 13 R. 712; 12 Digest (Repl.) 491, *3690*.

Marquis of Townshend v. *Stangroom* (1801), 6 Ves. 328; 31 E.R. 1076, L.C.; 40 Digest (Repl.) 303, *2516*.

Marten v. *Whale*, [1917] 2 K.B. 480; 86 L.J.K.B. 1305; 117 L.T. 137; 33 T.L.R. 330, C.A.; 12 Digest (Repl.) 56, *310*.

Filby v. *Hounsell*, [1896] 2 Ch. 737; 65 L.J.Ch. 852; 75 L.T. 270; 45 W.R. 232; 12 T.L.R. 612; 40 Sol. Jo. 703; 12 Digest (Repl.) 162, *1044*.

North v. *Percival*, [1898] 2 Ch. 128; 67 L.J.Ch. 321; 78 L.T. 615; 46 W.R. 552; 12 Digest (Repl.) 97, *568*.

Von Hatzfeldt-Wildenburg v. *Alexander*, [1912] 1 Ch. 284; 81 L.J.Ch. 184; sub nom. *Hatzfeldt* v. *Alexander*, 105 L.T. 434; 12 Digest (Repl.) 92, *523*.

Williams v. *Moss Empires, Ltd.*, [1915] 3 K.B. 242; 84 L.J.K.B. 1767; 113 L.T. 560; 31 T.L.R. 463, D.C.; 12 Digest (Repl.) 399, *3099*.

Morrell v. *Studd and Millington*, [1913] 2 Ch. 648; 83 L.J.Ch. 114; 109 L.T. 628; 58 Sol. Jo. 12; 12 Digest (Repl.) 402, *3116*.

Hickman v. *Haynes* (1875), L.R. 10 C.P. 598; 44 L.J.C.P. 358; 32 L.T. 873; 23 W.R. 872; 12 Digest (Repl.) 401, *3110*.

Gregory v. *Mighell* (1811), 18 Ves. 328; 34 E.R. 341; 30 Digest (Repl.) 406, *496*.

Mundy v. *Joliffe* (1839), 5 My. & Cr. 167; 9 L.J.Ch. 95; 3 Jur. 1045; 4 Jur. 621; 41 E.R. 334, L.C.; 30 Digest (Repl.) 441, *840*.

John Griffiths Cycle Corpn., Ltd. v. *Humber & Co., Ltd.* [1899] 2 Q.B. 414; 68 L.J.Q.B. 959; 81 L.T. 310, C.A.; reversed sub nom. *Humber & Co.* v. *Griffiths Cycle Co.* (1901), 85 L.T. 141, H.L.; 12 Digest (Repl.) 178, *1189*.

Stratford v. *Bosworth* (1813), 2 Ves. & B. 341; 35 E.R. 349; 12 Digest (Repl.) 88, *500*.

Action for specific performance of an agreement for the sale of real property.

In January, 1918, Frederick John North was possessed of a freehold house, orchard, and other land, known as Holmleigh, at Chinnor, in the county of Oxford. The house and land were let to Robert Keene for £32 a year on a tenancy, determinable at six months' notice to terminate on June 24. Keene's wife died in January, 1918, and, being anxious to give up his tenancy, he asked Joseph Goddard Loomes, who carried on the business of a laundryman at Chinnor, whether he would buy the premises for business purposes. Loomes understood from Keene that, if he did so, Keene would vacate the premises at Lady Day, but Keene did not admit that this was so. Loomes desired Keene to ask North whether he would sell, and, in consequence of what Keene told him, had an interview with North on Jan. 31, when the matter was discussed between them, and it was finally arranged that Loomes should buy the premises for £590, the purchase to be completed on Mar. 25, and that, in addition, Loomes should pay North's solicitor's costs of the purchase. It was agreed that £50 should be paid as deposit, which Loomes at once paid, and North gave him a receipt in the following terms:

"Received of Mr. Joseph Goddard Loomes the sum of fifty pounds deposit on the purchase price, five hundred and ninety pounds (£590), for the house, premises, and land in the occupation of Mr. R. Keene, situate in the High Street, Chinnor, and known as Holmleigh. The balance of the purchase price to be paid on or before Mar. 25, 1918.

Purchase price	£590
Deposit	£50
Balance	£540

Jan. 31, 1918. FREDERICK J. NORTH."

Loomes was under the impression that North had undertaken that vacant possession should be given on Mar. 25, but, on the evidence given at the trial by North, Loomes, and Keene, YOUNGER, J., held that this impression was derived from what Keene had said to Loomes, and that North had given no undertaking. On Feb. 5, Mr. Lewis W. Taylor, Loome's solicitor, wrote to Mr. A. H. Franklin, North's solicitor, stating that he was acting for the purchaser and asking for an abstract. On Feb. 7, Franklin wrote enclosing a draft contract for perusal and approval, and on Feb. 8, Taylor wrote that another contract was unnecessary as the one which North had signed was, he thought, sufficient. In the meantime, Loomes had had another interview with Keene, who declined to give up possession on Mar. 25, unless he was paid something for doing so, basing his claim on the value of the coming fruit crop. He required £15, while Loomes offered £5, which he would not increase, and Keene refused to go out. Subsequently North gave Keene six months' notice from Mar. 25, which Keene accepted, though strictly any such notice should terminate on June 24, and he left before the expiration of the notice. On Feb. 14, Franklin wrote to Taylor stating that it was part of the agreement that Loomes should pay North's solicitor's costs, and, after some correspondence between them, Taylor wrote to Franklin on Mar. 2 a letter which contained the following words:

"The arrangement was that the vendor should give vacant possession of the premises on completion, and I am now instructed to say that, provided this is done, my client will pay your charges for deducing title, but not otherwise."

The abstract was delivered, on which Taylor sent requisitions, one of which required vacant possession, and Franklin submitted a draft conveyance which was approved and executed by North. Loomes, however, declined to execute the conveyance, and the purchase was not completed on Mar. 25. A long correspondence took place between the solicitors on the question of vacant possession, and also as to a question which arose as to the stamping of the letting agreement with Keene. On June 27, North issued a writ against Loomes for specific performance of the agreement of Jan. 31. By the statement of claim the plaintiff alleged that the defendant had accepted the title, but there was no mention of any claim for the payment of the plaintiff's solicitor's costs. The first paragraph of the defence was as follows:

"The defendant as to the whole action will rely on the Statute of Frauds, and, without prejudice to that defence and in the alternative, says as follows."

The defence then alleged that it was an express term of the agreement that vacant possession should be given to the defendant on Mar. 25, 1918, and set out the circumstances on which the defendant relied, and denied that he had accepted the title. The defence did not refer to the question of the payment of the costs.

C. J. Mathew, K.C., and *R. M. Pattisson* for the plaintiff.
H. Terrell, K.C., and *J. G. Wood* for the defendant.

Cur. adv. vult.

Feb. 7, 1919. **YOUNGER, J.,** read the following judgment.—This is an action for specific performance of an agreement for sale by the plaintiff to the defendant of certain hereditaments known as Holmleigh in the village of Chinnor in Oxfordshire. The plaintiff is a retired farmer living in the village; the defendant is a laundryman carrying on business there. On Jan. 31, 1918, the date of the agreement between them, the premises were in the occupation of a Mr. Keene as tenant. He is an uncle of the plaintiff; his tenancy was a yearly one, determinable on six months' notice. On Jan. 25 his wife had died, and the place in consequence became too large for him. A few days after his wife's death he met the defendant and suggested that the place would be suitable for him and his laundry. He made it clear, I am sure, from the first, and it was the fact, that now his wife was dead he had no wish to retain the premises longer than was necessary. I am satisfied, nevertheless, after seeing Mr. Keene, that he never intended to go out without receiving compensation for his so-called unexhausted garden improvements. I think also that he definitely made that statement to the defendant before he approached the plaintiff at all on the subject. The defendant may not have appreciated that position fully—he is a little deaf. But it was the position, and the defendant's misunderstanding has been the cause of all the trouble in the case. After talking over the matter with Keene, the defendant suggested that Keene should see the plaintiff and ask him whether he was willing to sell and at what price. Keene did see the plaintiff, who said that he had better himself see the defendant. The interview between the two took place on Jan. 31. There may also have been—I think there was—an earlier interview on the 30th. It was, however, on the 31st that the bargain was struck and the terms arranged.

Before that happened the defendant had gone over the house with Keene, and had been shown round the field, and had had pointed out to him the work done in the garden. The plaintiff when they met explained the position to the defendant. He says he told him—and I am satisfied he did—that no notice had been given by him to Keene, nor had he received any notice from Keene. He told him also that, if the defendant bought the property, he would be entitled to the rent from Mar. 25, but he added that he thought there would be no difficulty in coming to

an arrangement with the tenant to give up vacant possession on Mar. 25, if Mr. Loomes so desired. I was much struck with Mr. North's careful evidence. His attitude throughout was quite clear. All arrangements as to possession must be made by the defendant with Keene himself; to these he was no party. But he did say that he thought there would be no difficulty in coming to an arrangement, nor need there have been. Keene's maximum claim for improvements, according to the defendant, was only £15, and the evidence is that that was a very moderate demand. The better view, I think, is that it never exceeded £12. But from this claim which the defendant would not meet all the trouble and litigation have proceeded. There was some discussion as to price between the plaintiff and defendant—whether £600 or £590. After some bargaining, the price was agreed at £590, but it was understood between them, as the plaintiff puts it, that out of the £10 in difference the defendant would pay the vendor's costs and his own; the estimate of these costs on each side being £5. This arrangement as to costs, which the defendant now also deposes to in the witness-box, so unimportant in the minds of both at the time as it was that no reference to it was made either in the terms of their bargain set forth in the receipt, to which I will presently draw attention, nor in the instructions of either of them to their respective solicitors, has strangely enough become the decisive issue in the action. The arrangement being thus concluded, the defendant paid the plaintiff £50 by way of deposit, and in the receipt for that sum drawn up by the plaintiff at the time, and handed to the defendant, their bargain is recorded in the following terms: [His Lordship then read the receipt, and continued:] That receipt was regarded by both of them as their contract. "I thought," says the defendant, "that the receipt was the agreement and contained everything," and its meaning is quite clear. It is a sale of the freehold subject to a tenancy. There is no agreement to give vacant possession to be found in it. A day or two later the defendant sent it by his daughter to his solicitor in London, instructing her, as he said, to tell him that this was the agreement entered into, and that he was to carry it out. At the same time the plaintiff put the completion into the hands of his solicitor. That gentleman, Mr. Franklin, seeing that his client had, if the receipt was the agreement, bound himself by an open contract, began the negotiation by sending Mr. Taylor, the defendant's solicitor, a draft formal contract. Mr. Taylor, seeing that his client had obtained an open contract, would hear nothing of any further contract, and on Feb. 8 wrote and signed this letter to Mr. Franklin, which is important on the issue of the Statute of Frauds later raised in this action:

> "Thank you for your letter of yesterday's date. I need not trouble you to send me another contract as the one which your client has signed is, I think, quite sufficient. As possibly you have not a copy I am sending you one herewith, and shall be pleased to have the abstract of title as early as possible."

The further correspondence at this time is important on a further question under the statute as well as because it raises the question of possession which this action was brought to settle. On Feb. 14, Mr. Franklin wrote:

> "It would have been more convenient for all concerned if you had agreed for a formal contract on the basis of the draft submitted, as it is obvious that the receipt does not purport to contain all the terms. Since writing to you I have seen Mr. North, the vendor, who informs me that it was arranged that my charges, as vendor's solicitor, should be paid by your client. On this basis I enclose abstract of title and shall be pleased to produce the deeds for inspection at any time you may appoint."

On Feb. 19, Mr. Taylor wrote:

> "With regard to your suggestion that the purchaser should pay the vendor's solicitor's charges, I have no instructions from my client that this is so, and, as you probably know, it is unusual for that course to be adopted in London, apart from express contract. Moreover, there is no suggestion of it, either in

the contract signed by the vendor or the draft further contract submitted by you."

On Feb. 21, Mr. Franklin wrote:

"I have not 'suggested' that the purchaser should pay my charges, nor that it is the usual course adopted, but my instructions are that there was an express contract to that effect; that was why as soon as the information came to me I acquainted you with it."

On Mar. 2, Mr. Taylor wrote:

"The arrangement was that the vendor would give vacant possession of the premises on completion, and I am now instructed to say that, provided this is done, my client will pay your charges for deducting title, but not otherwise."

On Mar. 4, Mr. Franklin wrote:

"I have had no instructions with regard to the property being sold with vacant possession, and I had regarded your requisition on that point as a general one and not entirely specific. You will remember that the receipt which your client has specifies that the property is in the occupation of Mr. Keene, and that there was nothing in the receipt to say that vacant possession was intended. If you had only adopted my suggestion and had a formal contract all these matters could have been cleared up at the time and these difficulties and extra correspondence avoided. I am, however, writing to Mr. F. J. North, my client, on the subject, and if it was understood that vacant possession should be given I cannot conceive that any difficulty will arise. On hearing from him I will communicate with you."

On Mar. 8, Mr. Franklin again wrote:

"As promised by my previous letter, I have been in communication with my client as to the point raised by you with regard to vacant possession, and Mr. North informs me that there was no agreement to this effect in any way. I also understand that your client has since the date of the contract endeavoured to come to an arrangement with the tenant, Mr. Keene, but so far without success. The tenant has not received or given notice to terminate the tenancy."

Then there was a long correspondence on the terms of the tenancy and on the stamping of the agreement, much of which, I regret to say, magnifies difficulties which were really non-existent and operated to keep apart this vendor and purchaser, who were both, I am sure, eager to conclude their bargain. I will not read it; it speaks for itself. At last, the defendant having refused to pay or offer Mr. Keene more than £5 for improvements for which he demanded £12, the issue between the plaintiff and the defendant was narrowed to the question whether under the contract the plaintiff had agreed to give vacant possession to the defendant, and, the defendant by his solicitor insisting on this claim, the writ was issued on June 27, 1918. The agreement alleged in the statement of claim is that in the receipt. There is no reference to any provision as to costs in the statement of claim. The defence is a general plea of the Statute of Frauds and a claim to vacant possession and a denial of the agreement.

On the question of possession I have already stated my opinion. I find clearly that there was no such agreement as is here alleged. It is not to be found in the receipt, and that followed what I am satisfied was the course of the interview at which it was given. There was never any difficulty as to possession. Keene in fact ceased to live on the premises on or before Mar. 25. His claim for compensation was the only difficulty on the facts, and, having seen all the witnesses, I find against the defendant on this issue. But I should be sorry if that finding were supposed to carry with it any suggestion that the defendant did not intend to tell the truth. It does not. His position is due to misunderstanding. The plaintiff and Keene being related, perhaps naturally, but nevertheless without warrant, he regarded what was said to him by Keene as having been said to him

by the plaintiff; he treats his dispute with Keene as one for which the plaintiff is responsible to him; he had even brought himself to think that possession was given him by the receipt itself, and he was obviously surprised when he found, on its being put to him in court, that it was not so. He was, I am sure, an honest witness, although mistaken in more matters than one. I am sorry for the position in which he is placed.

This question disposed of, the only one that remains is that of the Statute of Frauds. The statute is pleaded generally, but the point to which it clearly refers primarily, and as I think, for reasons to be given later, exclusively, is that concerning the contract as pleaded in the statement of claim. Is there of that contract a sufficient memorandum signed by the defendant or by the agent of the defendant thereunto lawfully authorised? I think there is, and it is contained in Mr. Taylor's letter of Feb. 8. It is not denied that this letter would have been a sufficient memorandum had it been signed by the defendant himself. It is said, however, that Mr. Taylor had no authority to sign such a letter, so as in effect to conclude a binding contract between the defendant and the plaintiff, and *Smith* v. *Webster* (1) is relied on in support of that contention. But in my opinion that case is easily distinguishable. Mr. Taylor's instructions here were to carry out the contract which his client told him he had already made, and on which he had paid £50 as a deposit. Mr. Taylor had, in fact, the authority which MALINS, V.-C., in *Smith* v. *Webster* (1) believed that the solicitor there possessed, and it was because the Court of Appeal found that the solicitor possessed no such authority that they disagreed with the judgment of the Vice-Chancellor. JAMES, L.J., said (3 Ch.D. at p. 57):

> "He goes to his solicitor and the only authority he gives him is to prepare a formal document. He gives him no authority to prepare anything more."

And as SARGANT, J., in *Daniels* v. *Trefusis* (2), commenting on *Smith* v. *Webster* (1) says ([1914] 1 Ch. at p. 798):

> ". . . authority of a solicitor to prepare a draft contract did not include, and indeed was inconsistent with, an authority to state, in a binding form and so as to constitute a contract, the rough heads of information which had been given by the client to the solicitor as material on which to draw the formal contract."

Very different, however, as I have said, is the case here. Mr. Taylor's instructions from the defendant were to complete, not to negotiate, a contract. It was an essential implication that he should, if and when necessary, affirm on behalf of his client the existence and validity on his side of the contract he was so instructed to carry out. His authority to write the letter of Feb. 8 was therefore, in my opinion, complete, and this defence of the statute fails; and in my judgment, on this pleading, this finding exhausts and disposes of the defence of the statute in the only way in which it can be used.

But it was sought to use the defence of the statute for another purpose, and that attempt I must now examine. It was said that the receipt, now, by virtue of the letter of Feb. 5, to be treated as having been signed by the defendant's agent, is an insufficient memorandum of the contract, in that it contains no reference to the arrangement as to costs to which I have referred. Is this contention open to the defendant on the defence as it stands? Here it must be repeated that this provision as a term in the contract between the plaintiff and the defendant is not pleaded by the defendant. The defence of the Statute of Frauds, as pleaded by him, is a defence to the contract as alleged by the plaintiff, or at most as added to by the allegation as to possession. That last allegation has been disproved; therefore it is only to the contract as alleged by the plaintiff that the present plea of the statute applies. Production of a signed memorandum sufficient to comply with the statute in respect of that contract would be a complete answer to that plea. That memorandum has been produced. The plea, therefore, has been met. Further it must be remembered that the point intended to be raised by the statute

must in a pleading be clearly stated: *Pullen* v. *Snelus* (3); here it could not even be conjectured. Therefore, without amendment of the defence by asserting this additional term, the defence of the statute is not, I think, in this respect open. No amendment was asked for. Is it one that could have been allowed? I think not. It was to the defendant's interest to make in his original pleading no reference to this stipulation as to costs. It was a stipulation to his detriment. It was to his interest, on the defence as drawn, not to avow it, and he did not bring it forward. Its omission from his pleading does not, it is true, now advantage him, but that is only because of his failure to prove the other allegation as to possession, which he made. Is he now to be allowed to bring that contention forward, its omission having ceased to be to his advantage, in order that under cover of it he may raise a plea of the Statute of Frauds, not hitherto made, in such a way as to enable him to take this point? In my opinion, no; this is an instance in which the statute would operate to work an obvious injustice, and it is, I conceive, the duty of the court in such a case to exercise its discretion in allowing amendments, so as to avoid such injustice if it can. In my opinion, therefore, this point is not open to the defendant on his defence as it stands, and an amendment so as to open it is not, even if it were asked for, an amendment proper to be allowed.

But assuming, contrary to my opinion, that the defence of the statute were, with regard to this matter, open to the defendant, there would still, in my judgment, be in this case a complete answer to that defence. If the letters of Feb. 14 and Mar. 2 are referred to, it will be found that Mr. Taylor's letter of Mar. 2 is either an admission of the existence of the bargain with reference to costs set up in the earlier letter, or a denial of that bargain with the proposal of a new term, and in fact the letter of Mar. 2 seems to have been taken by the plaintiff as a denial, and accepted by him as such, for the claim for costs was not again set up by the plaintiff either in this action or at all. In these circumstances, the defendant is in this difficulty, either the statute is fully complied with, or he is seeking to set up now this obligation of his own, not in order to meet, but in order by means of it to escape from, his contract, on the plea that there has been omitted from the memorandum of that contract an obligation binding on himself, as to the existence of which he had previously put forward and obtained the acceptance of his denial. To my mind, the defendant in such circumstances and for such a purpose is not entitled to take that course. The defence of the statute accordingly for this reason would not avail him even if open to him.

In this view of the case it becomes unnecessary for me to deal with the question of far more general interest, which emerged from the facts in the course of the argument—viz., whether, where a provision in a contract for the sale of land, solely for the benefit of one of the parties to it, is omitted from the memorandum, because to neither of the parties did it seem of sufficient importance to be referred to, the defendant, who gains by the omission, can in an action on the contract in which the stipulation is not asserted against him claim that the memorandum of the contract is insufficient by reason of the omission. It is a question on which no authority has been cited. I can see that much may be urged on either side of it. I will only here say that it is not, in my opinion, resolved by reference to such a case as *Goss* v. *Lord Nugent* (4). The gist of that and all like cases is that in them an attempt was made to enforce the omitted term against the defendant. Here the memorandum contains every provision benefiting the defendant, the omission is the omission of a burden on him, and he is not being asked to bear it. May not, in the circumstances, the omission be cured by the plaintiff's waiver of the claim? That is the question which will have to be dealt with on some other occasion. There must be the usual decree for specific performance, with costs.

Since writing this judgment I have found two cases which appear to have a very material bearing on the point last therein referred to. They are *Martin* v. *Pycroft* (5) and *Vouillon* v. *States* (6). In the first of these cases many of the arguments of the defendant's counsel here are anticipated and disposed of. Together they

would appear to establish in principle that there is nothing in the Statute of Frauds to prevent a plaintiff in an action on the contract waiving as against the defendant a stipulation exclusively for his own benefit which formed part of the arrangement between himself and the defendant, although embodied in no memorandum of it signed by or on behalf of the defendant. In other words, the Statute of Frauds would not appear to prevent the application of the principle laid down in *Hawksley* v. *Outram* (7).

Solicitors: *Lovell, Son & Pitfield*, for *A. H. Franklin*, Oxford; *Lewis W. Taylor.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

Re DOHERTY-WATERHOUSE. MUSGRAVE *v.* DE CHAIR

[Chancery Division (Sargant, J.), May 30, 31, 1918]

[Reported [1918] 2 Ch. 269; 87 L.J.Ch. 630; 119 L.T. 298; 62 Sol. Jo. 636]

Will—Bequest—"Bequest of personal property described in general manner"—"All my shares" in specified security—Inclusion of shares subject to general power of appointment—Wills Act, 1837 (1 *Vict.*, *c.* 26), *s.* 27.

The testatrix bequeathed "all my shares in the Halifax Corporation New Market consolidated stock" to a legatee, and devised and bequeathed all her real estate and all the residue of her personal estate, including any property over which she might have an absolute power of appointment, to her trustees on certain trusts therein declared. At the dates of her will and of her death she owned some of this stock and had a general power of appointment over a further sum of the Halifax stock.

Held: the bequest of the stock was "a bequest of personal property described in a general manner" within the meaning of s. 27 of the Wills Act, 1837, and operated as an execution of the general testamentary power, and, accordingly, the further sum over which the testatrix had a general power of appointment passed to the legatee and not under the gift of residue, there being no "contrary intention" appearing by the will within the meaning of s. 27.

Notes. As to the exercise of general powers of appointment by will, see 30 Halsbury's Laws (3rd Edn.) 250 et seq.; and for cases see 37 Digest 435 et seq. For the Wills Act, 1837, s. 27, see Halsbury's Statutes (2nd Edn.) 1347.

Case referred to:

(1) *Scriven* v. *Sandom* (1862), 2 John. & H. 743; 70 E.R. 1258; 37 Digest 442, *462.*

Also referred to in argument:

Hawthorn v. *Sheddon* (1856), 3 Sm. & G. 293; 25 L.J.Ch. 833; 27 L.T.O.S. 304; 2 Jur.N.S. 749; 65 E.R. 665; 37 Digest 441, *451.*

Shelford v. *Acland* (1856), 23 Beav. 10; 26 L.J.Ch. 144; 28 L.T.O.S. 198; 3 Jur.N.S. 8; 5 W.R. 170; 53 E.R. 4; 37 Digest 434, *401.*

Hurlstone v. *Ashton* (1865), 11 Jur.N.S. 725; 37 Digest 441, *457.*

Re Wilkinson (1869), 4 Ch. App. 587; 17 W.R. 839, L.JJ.; 37 Digest 435, *406.*

Turner v. *Turner* (1852), 21 L.J.Ch. 843; 20 L.T.O.S. 30; 37 Digest 440, *448.*

Re Jacob, Mortimer v. *Mortimer*, [1907] 1 Ch. 445; 76 L.J.Ch. 217; 96 L.T. 362; 51 Sol. Jo. 249; 37 Digest 443, *468.*

Re Greaves' Settlement Trusts (1883), 23 Ch.D. 313; 52 L.J.Ch. 753; 48 L.T. 414; 31 W.R. 807; 37 Digest 444, *482.*

Originating Summons.

By her will, dated in 1913, the testatrix, who died in 1916, bequeathed "all my shares in the Halifax Corporation New Market consolidated stock" to a certain legatee, and devised and bequeathed "all my real estate and all the residue of my personal estate, including any property over which I may have at the time of my death an absolute power of appointment, to my trustees" on the trusts therein set out. Both at the time of the date of her will and at the time of the date of her death the testatrix owned a sum of £111 3s. 5d. of the stock in question and this was standing in her own name, and she had also a general testamentary power of appointment over a further sum of £550 of the same stock standing in the names of trustees. This was an originating summons raising the question whether the sum of £550 stock was included in the specific bequest or whether it passed by the residuary bequest.

Stafford Crossman for the trustees.
Bryan Farrer for the specific legatee.
D. D. Robertson for the residuary legatees.

SARGANT, J.—The questions which I have to decide are, first, whether the bequest of "all my shares in the Halifax Corporation New Market consolidated stock" is, in itself, effectual to carry to the legatee the £550 stock by force of s. 27 of the Wills Act, 1837; and, secondly, whether a "contrary intention" appears in the will by reason of the express inclusion in the gift of the residuary estate of any property over which at the time of her death the testatrix might have an absolute power of appointment.

As regards the first point, the argument of counsel for the residuary legatees is a curious one—namely, that the terms of the bequest of the stock are so specific that they cannot be said to pass "property described in a general manner." It would, indeed, be odd if the subject-matter of a gift were too specifically described to be capable of passing; and to give such an effect to s. 27 of the Wills Act would, in my judgment, be to invert the operation of the section, which is aimed at making a gift effective not because of generality of description, but notwithstanding generality of description. An absolutely specific gift of property subject to a power, whether general or limited, was always sufficient to exercise the power. It was when the description was sufficiently general to be also capable of describing the testator's own property that a difficulty arose, because then the words of gift could be satisfied without imputing to the testator an intention to exercise the power. The section cured this by altering with regard to general powers the primâ facie presumption of intention, and by putting in this respect ownership and general power on the same footing. I cannot think that the section left any hiatus between an absolute specific gift of property subject to a general power, which is sufficient to pass that property apart from the section, and such a more general description of the property as might, but for the section, be satisfied independently of the property subject to the power. Here, though the gift is specific as compared with a gift of "all my stocks and shares," or of "all my stock in municipal corporations," it is more general than a gift of "my present holding of £550 stock in the Halifax Corporation New Market consolidated stock." It is admittedly sufficiently general to include the £111 3s. 5d. stock then possessed by the testatrix, or any other stock of the same description which she might thereafter acquire in the ordinary way. And it is, therefore, in my judgment, a "bequest of personal property described in a general manner" within both the language and the intention of the section.

The second point taken by counsel for the residuary legatees is that there is a "contrary intention" shown by the testatrix within the meaning of s. 27. In *Scriven* v. *Sandom* (1) WOOD, V.-C., said (2 J. & H. at p. 744):

> "There is no contrary intention within the meaning of the statute, unless you find something in the will inconsistent with the view that the general devise was meant as an execution of the power."

In the present case, I can see no such inconsistency, or even any doubt. By the additional words the testatrix is, I think, only intending to make it clear that, in disposing of her real estate and the residue of her personal estate, she is dealing with that to which she is absolutely entitled or over which she has any general power of appointment, but I see nothing which would limit or restrict the bequest of the stock in question. That express inclusion of any property over which the testatrix might have a power, following, as it does, immediately on the gift of real and residuary personal estate, has reference, in my opinion, only to her real estate and the "residue" of her personal estate, and bears no reference to the antecedent bequest of the stock in question. In short, I can see no reason, from the language used, for extending the gift to all property over which she might have a power of appointment so as to result in cutting down the effect of the language used in the antecedent bequest of the stock in regard to which s. 27 of the Wills Act would otherwise operate to pass the stock subject to the power.

Solicitors: *Thorold, Brodie & Bonham-Carter*; *Martineau & Reid.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

Re KEITH, PROWSE & CO., LTD.

[Chancery Division (Peterson, J.), February 6, 1918]

[Reported [1918] 1 Ch. 487; 87 L.J.Ch. 290; 118 L.T. 591; 34 T.L.R. 283]

Company—Register—Rectification—Motion—Directors joined as respondents—Costs of motion—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 32.

At a board meeting of a company the chairman and one of the directors voted against a resolution that the names of the executors of a deceased shareholder should be inserted in the register as holders of the shares, and, the voting being equally divided, the chairman gave his casting vote against the resolution and declared the same to be lost. The executors launched a motion under s. 32 of the Companies (Consolidation) Act, 1908, for the rectification of the register by the insertion of their names as holders of the shares of the deceased shareholder, and they joined with that of the company the names of the two directors as respondents, asking that they should be ordered to pay the costs of the motion.

Held: on applications such as this, directors should not be joined as respondents, and, therefore, the directors would not be ordered to pay the costs of the motion.

Re Copal Varnish Co., Ltd. (1), [1917] 2 Ch. 349, distinguished.

Notes. The Companies (Consolidation) Act, 1908, was repealed and replaced by the Companies Act, 1929, which has been repealed and replaced by the Companies Act, 1948. For s. 32 of the Act of 1908, see now s. 116 of the Act of 1948.

As to rectification of the register of a company's members, see 6 Halsbury's Laws (3rd Edn.) 216 et seq.; and for cases see 9 Digest (Repl.) 215 et seq. For the Companies Act, 1948, s. 116, see Halsbury's Statutes (2nd Edn.) 549.

Cases referred to:

(1) *Re Copal Varnish Co., Ltd.*, [1917] 2 Ch. 349; 87 L.J.Ch. 132; 117 L.T. 508; 9 Digest (Repl.) 226, *1447.*

(2) *Re Tahiti Cotton Co., Ex parte Sargent* (1874), L.R. 17 Eq. 273; 43 L.J.Ch. 425; 22 W.R. 815; 9 Digest (Repl.) 218, *1388*.

Also referred to in argument:

Re Sussex Brick Co., [1904] 1 Ch. 598; 73 L.J.Ch. 308; 90 L.T. 426; 52 W.R. 371; 11 Mans. 66, C.A.; 9 Digest (Repl.) 219, *1396*.

Motion under s. 32 of the Companies (Consolidation) Act, 1908, by the executors of the will of B. L. Jones for the rectification of the register of members of the company by the insertion of their names as holders of the ordinary shares in the company held by B. L. Jones at the date of his death. They joined the names of the chairman and one of the directors of the company, J. Truman, as respondents. B. L. Jones, at the date of his death in September, 1909, was the holder of preference and ordinary shares of the company. When the probate of his will was lodged with the company in November, 1909, for registration, the registration was fully and properly completed with respect to the preference shares, but in respect of the registration of the ordinary shares only the words "Exors. late" had been inserted before the name of B. L. Jones, which still remained on the register. There was a dispute, which was still sub judice, as to the validity of the appointment of one of the directors, of whom there were five. At a meeting of the board of directors of the company held on Jan. 30, 1918, the chairman moved the following resolution:

> "That no alteration be made in the register of members of the company except under the directions of the board at which all the directors shall be present, and no such alteration be made in any case where there is ground for believing that the object of the change is to affect voting at any general meeting, in any case the secretary being instructed to give the chairman four days' notice of any proposed change in or addition to the register of members."

The chairman having ruled that one of the directors was not competent to vote, he and the respondent Mr. Truman voted for the resolution and the other two directors against. The chairman then gave his casting vote in favour of the resolution, and declared the same to be carried. Thereupon one of the applicants, a director of the company, moved a resolution that the names of the executors of B. L. Jones should be properly inserted in the register as holders of the ordinary shares. The voting again being equally divided, the chairman gave his casting vote against the resolution, and declared the same to be lost. The registration of the applicants as shareholders would have materially altered the voting at an extraordinary general meeting proposed to be held on Feb. 11, 1918. At the hearing of the motion, the rectification of the register was not resisted, and the only question was whether the two respondent directors should be ordered to pay the costs of the motion.

Maugham, K.C., and *Devonshire* for the applicants.
F. K. Archer for the respondent company.
H. E. Wright for the respondent directors.

PETERSON, J., stated the facts, and continued: As the result of the proceedings at the board meeting on Jan. 30, 1918, the present application was launched, and the chairman and the director who supported him were made respondents. There is no resistance to the application for rectification of the register, as, indeed, it is clear there could be none, the first resolution being totally indefensible; and the only question is whether the two respondents should be ordered to pay the costs. There was a provision in s. 35 of the Companies Act, 1862, that the court might order the company to pay the costs of an application for rectification of the register, but that provision has been omitted from s. 32 of the present Act, and nothing is said as to the person who can be ordered to pay the costs. Under the old Act, it was indicated in *Re Tahiti Cotton Co., Ex parte Sargent* (2) that there was no jurisdiction to order any person other than the company to pay the costs of the application, and there are various other cases referred to in BUCKLEY ON THE

COMPANIES ACTS (9th Edn.), pp. 118–119, which are to the same effect; and the learned author in his note to s. 32 adds:

"The present section does not reproduce the language of Companies Act, 1862, s. 35, as to costs. But its effect may be the same."

Since the Act of 1908 there has, so far as I know, been only one case dealing with this question—viz., *Re Copal Varnish Co., Ltd.* (1). That was an application for rectification of the register. One of the directors, Percy Randall, wilfully refused to attend a board meeting with the object of stopping transfers from being registered, and he was added as a respondent to the action at his own request. EVE, J., said ([1917] 2 Ch. at p. 355):

"In my opinion Percy Randall has taken up an attitude in this dispute which is untenable, and, bearing in mind that he was added as a party to this motion at his own request, in making an order directing the company to rectify the register by giving effect to these transfers I must at the same time order him to pay the costs of the motion."

It appears to me that the learned judge laid great stress on the fact that Percy Randall had been added as a respondent at his own request in order that he might personally contest the question, and it was on that ground that the judge thought that he was able to order him to pay the costs.

In the present case, the directors have no doubt gone beyond their powers in refusing to register the names of these executors as the holders of the ordinary shares in question; and when I say "the directors," I mean, of course, those persons who refused to register them—viz., the two respondents. But supposing the whole board had improperly—that is, without justification—refused to register them, would the whole board be the proper parties to join as respondents to a motion of this nature? In my view, they would not. The directors are the agents of the company, and in law it is the company which is legally responsible for the unjustifiable acts of its agents, and the directors are not to my mind necessary or proper parties to an application of this kind. If an order on a company to rectify the register does operate, as in my view it does, as a rectification of the register from the date when the order is made, then the only object of joining directors as respondents to the motion is that a punitive order may be obtained against them for payment of the costs. I do not think that, on applications of this sort, directors ought to be joined as respondents. Mainly for this reason I do not direct the respondent directors to pay the costs of the motion, but I do not give them any costs, and I make an order that the company pay the costs of the applicants.

Solicitors: *Golding, Hargrove & Golding*; *G. C. Whadcoat.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

DUNSTER *v.* HOLLIS

[KING'S BENCH DIVISION (Lush, J.), July 23, 24, 1918]

[Reported [1918] 2 K.B. 795; 88 L.J.K.B. 331; 120 L.T. 109; 17 L.G.R. 42]

Landlord and Tenant—Repair—Liability of landlord—Common staircase or steps retained in landlord's possession—Extent of obligation on landlord to repair.

Where a lessor lets rooms in a house to several tenants, but retains control of a common staircase and a flight of steps leading to the street, his implied obligation to his tenants is not an absolute one to keep the staircase and steps in a reasonably safe condition, nor is it merely to take reasonable care to avoid exposing a tenant to a concealed danger or trap of which the tenant has had no notice or warning, but it is to take reasonable care to keep the staircase and steps in a reasonably safe condition. Accordingly, the fact that the tenant knows that the staircase or steps are defective does not of itself afford a defence to an action by the tenant against the lessor although it may indicate that the tenant was guilty of contributory negligence.

Hart v. *Rogers* (1), [1916] 1 K.B. 646, not followed.

A landlord let two rooms on the third floor of a house to the tenant, the remaining floors of the house being let to other tenants. The landlord retained control of a common staircase and flight of steps leading from the house to the street, neither of which formed part of the demise to any of the tenants. The steps leading to the street were old and out of repair and the tenant knew of their defective condition. While walking down the steps the tenant, without negligence on his part, tripped, fell, and was injured. On the evidence the landlord had had ample opportunity to ascertain that the steps needed repair.

Held: the landlord was guilty of negligence in allowing the steps to fall into a state of disrepair, and the tenant was, therefore, entitled to recover damages for the injuries which he had sustained.

Landlord and Tenant—Repair—Liability of landlord—Statutory liability—Fitness for human habitation—Non-repair of common flight of steps not rendering house unfit for human habitation.

The Housing, Town Planning, &c., Act, 1909, s. 14 and s. 15, which provided that in contracts of letting a house or part of a house at a rent not exceeding specified limits a condition should be implied that the house was reasonably fit for human habitation at the commencement of the tenancy and would be kept so fit by the landlord during the tenancy, **held,** not to apply where part of a house is let and another part—a common flight of steps serving the part let—is found to be unfit for human habitation so as to impose on the lessor of the part of the house let an obligation to keep the steps in repair.

Notes. The relevant terms of s. 14 and s. 15 of the Housing, Town Planning, &c., Act, 1909, are now contained in s. 6 of the Housing Act, 1957.

Considered: *Cockburn* v. *Smith* (1923), 40 T.L.R. 113. Distinguished: *Devine* v. *London Housing Society, Ltd.*, [1950] 2 All E.R. 1173. Referred to: *Murphy* v. *Hurly*, [1922] All E.R.Rep. 169; *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74.

As to a landlord's liability for injury from non-repair of the part of the premises retained in his possession, see 23 HALSBURY'S LAWS (3rd Edn.) 573; and for cases see 31 DIGEST (Repl.) 100 et seq. As to the implied warranty and undertaking of fitness on lettings of small houses, see 23 HALSBURY'S LAWS (3rd Edn.) 575; and for cases on what amounts to breach of warranty of fitness, see 31 DIGEST (Repl.) 196. For the Housing Act, 1957, s. 6, see 37 HALSBURY'S STATUTES (2nd Edn.) 323.

Cases referred to:

(1) *Hart* v. *Rogers*, [1916] 1 K.B. 646; 85 L.J.K.B. 273; 114 L.T. 329; 32 T.L.R. 150; 31 Digest (Repl.) 104, *2483*.

(2) *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex. Ch.; 34 Digest 191, *1565*.

(3) *Miller* v. *Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 41 W.R. 578; 9 T.L.R. 512; 37 Sol. Jo. 558; 4 R. 478, C.A.; 31 Digest (Repl.) 100, *2471*.

(4) *Smith* v. *London and St. Katharine Docks Co.* (1868), L.R. 3 C.P. 326; 37 L.J.C.P. 217; 18 L.T. 403; 16 W.R. 728; 3 Mar.L.C. 66; 36 Digest (Repl.) 48, *253*.

(5) *Huggett* v. *Miers*, [1908] 2 K.B. 278; 77 L.J.K.B. 710; 99 L.T. 326; 24 T.L.R. 582; 52 Sol. Jo. 481, C.A.; 31 Digest 102, *2477*.

(6) *Lucy* v. *Bawden*, [1914] 2 K.B. 318; 83 L.J.K.B. 523; 110 L.T. 580; 30 T.L.R. 321; 31 Digest (Repl.) 101, *2473*.

(7) *Dobson* v. *Horsley*, [1915] 1 K.B. 634; 84 L.J.K.B. 399; 112 L.T. 101; 31 T.L.R. 12, C.A.; 31 Digest (Repl.) 101, *2474*.

(8) *Groves* v. *Western Mansions, Ltd.* (1916), 33 T.L.R. 76, D.C.; 31 Digest (Repl.) 101, *2475*.

(9) *Norman* v. *Great Western Rail. Co.*, [1914] 2 K.B. 153; 83 L.J.K.B. 669; 110 L.T. 306; 30 T.L.R. 241; reversed, [1915] 1 K.B. 584; 84 L.J.K.B. 598; 112 L.T. 266; 31 T.L.R. 53, C.A.; 38 Digest (Repl.) 404, *634*.

Action tried by LUSH, J., without a jury.

The plaintiff, a tenant, claimed damages against his landlord for personal injuries sustained by a fall downstairs owing to the alleged defective condition of some steps leading to the street. The plaintiff was the tenant of two rooms on the third floor of a house of which the defendant was landlord. The defendant let the house in separate floors to the plaintiff and other tenants. There was one staircase common to all the tenants, and at the entrance there was a flight of steps leading from the ground floor to the street. Both the steps and the staircase were kept by the defendant under his own control. They were intended for the use of all the tenants of the house and persons visiting them, but were not part of the demise to any of the tenants. The steps leading from the ground floor to the street were old and out of repair, and were in other respects very defective. The plaintiff had noticed their defective condition. While walking down the steps the plaintiff tripped up and fell, and was injured.

Thorn Drury, *K.C.*, and *G. H. Head* (for *Cartwright Sharp*, serving with His Majesty's Forces) for the plaintiff.

du Parcq (*Barrington-Ward* with him) for the defendant.

Cur. adv. vult.

July 24, 1918. **LUSH, J.**—The question in this case is: What is the duty which the lessor of rooms in a house owes to his tenant with regard to a staircase or steps which remain under a lessor's control, and which are intended for the use of the persons in the house? This question has arisen frequently in recent years, and it is not easy to reconcile all the three decisions with regard to it.

There are three possible standards of obligation on the part of the lessor: First, the lessor may be under an absolute obligation towards his tenant to keep the steps in a reasonably safe condition; or, secondly, the lessor may be under an obligation towards his tenant to take reasonable care to keep the steps in a reasonably safe condition; or, thirdly, the lessor may only be under an obligation towards his tenant to take reasonable care to avoid exposing the tenant to a concealed danger or a concealed trap of which the tenant has no notice or warning. The last is, of course, an obligation of the kind referred to in *Indermaur* v. *Dames* (2). If the first proposition is the correct one, the result would be that if the steps had suddenly become defective without any fault on the part of the lessor, and in such

circumstances that the lessor had no opportunity of observing the defect or of remedying it, he would still be liable in damages to his tenant, and this would be a very serious position. If the second proposition is correct, the lessor would only be liable to his tenant if negligence was proved, but, if it was proved that the lessor had been negligent and that the accident had arisen through his negligence, it would be no answer to say that the defect was visible and obvious, or to say that the tenant had had warning or notice of its existence. That circumstance might be relevant on the question whether the tenant was guilty of contributory negligence, but it would not of itself afford any defence to the action. If the third proposition is the correct one, it would be a defence to the action if it were shown that the danger was visible and obvious, or that the tenant had had warning or notice of its existence. The distinction between the second and the third propositions is an important one. I will illustrate it by supposing that the approach to the house would be safe only if there was a balustrade on which a person entering the house could rest his hand. If during the tenancy the balustrade had fallen away, its absence would be visible and obvious, and the tenant in walking along the access without it would be exposed to a risk of which he had full notice. But if the lessor's obligation is to take reasonable care to keep that access in a reasonably safe condition, the lessor might still be liable to the tenants although the danger was obvious, because the question for the jury in such a case would be whether the lessor had negligently allowed that access to become unsafe, and the jury might well find in such a case that he had done so, and if they did and there was no contributory negligence, the lessor would be liable although the danger was obvious. That illustrates the important distinction between putting the lessor's liability on the ground stated in the second proposition and putting it on the ground stated in the third proposition on the principle of *Indermaur* v. *Dames* (2).

I have now to consider the authorities and decide which of these three possible views is the correct one. The case which has given rise to the difficulty and which had been commented on time after time is *Miller* v. *Hancock* (3). There the action was not brought by the tenant. It was brought by a person who had no contractual relation with the lessor, but who had occasion to visit the tenant. There the Court of Appeal apparently laid down these wide propositions—namely, (i) that as between the lessor and the tenant the lessor was under an absolute obligation to keep the access to the premises in a safe condition, and (ii) that a visitor of the tenant had the same right as the tenant himself. Lord Esher in that case, after saying that the only mode of access was by the staircase, and pointing out that there was an implied obligation on the part of the lessor towards the tenant to afford them a reasonably safe exit and entrance, went on to deal with the case of tradesmen and others who might have business with the tenants and who would have to use the same access, and held that a similar duty arose towards them. Bowen and Kay, L.JJ., took the same view. The case cited in support of it in the judgment was *Smith* v. *London and St. Katharine Docks Co.* (4). I would point out with reference to the facts in *Miller* v. *Hancock* (3) that the stairs were in a worn and defective condition, and the jury found that they were in an unsafe condition. If *Miller* v. *Hancock* (3) is to be taken as laying down the two propositions which I have just mentioned, it would follow that the first of the three propositions that I have mentioned at the beginning of my judgment is the proper one to apply to cases like the present. But *Miller* v. *Hancock* (3) has been often commented on. In *Huggett* v. *Miers* (5) Sir Gorell Barnes, P., stated that the decision in *Miller* v. *Hancock* (3) must be taken as applying to the particular facts of that case. *Miller* v. *Hancock* (3) was a case in which there was, at all events, something in the nature of a trap; and in *Huggett* v. *Miers* (5) the Court of Appeal appears to me to have dissented from the view, if it was intended to be expressed in *Miller* v. *Hancock* (3), that there was an absolute obligation on the lessor towards the tenant's visitors, or even towards the tenant.

In *Lucy* v. *Bawden* (6) Atkin, J., had a similar question to deal with, and he considered the authorities. He mentioned the effect of *Huggett* v. *Miers* (5) and

the supposed decision in *Miller* v. *Hancock* (3), and he came to the conclusion that in *Miller* v. *Hancock* (3) the Court of Appeal did not intend to lay down any such absolute propositions as would appear from a mere cursory reading of the judgment. ATKIN, J., said ([1914] 2 K.B. at p. 325):

> "On principle it is difficult to see how an obligation could be imposed upon a landlord larger than the obligation to avoid traps. It is plain that he is, in the absence of express or implied agreement, not liable at all for the consequence of letting a house in a state of even dangerous disrepair. If he lets a loft approached by a ladder, a cellar approached by steep steps, or invites access to his premises over a plank, there seems no reason why the person accepting an invitation to use the ladder, the steps, or the plank, should, if injured by no hidden danger, be at liberty to complain that the access was not of a different and safer character. I can see no difference between the use of an unlighted staircase: *Huggett* v. *Miers* (5), and the use of an unfenced staircase."

I desire to point out that in *Lucy* v. *Bawden* (6) ATKIN, J., was not dealing with an action by a tenant against his lessor. He was dealing with the case of a person who had no contractual relation with the lessor, and, when one confines his observations, which I have read, to that case, I entirely agree with them. Unless it has been expressly decided by the Court of Appeal, in which event I should, of course, follow the decision without making any observations upon it, I do not see how it can be said that a stranger to the lessor can make him liable for damage sustained through a defect in the steps where there is no trap and no concealed danger.

The question again arose in the Court of Appeal in *Dobson* v. *Horsley* (7). There the action was brought, not by the tenant, but by a stranger to the lessor, and the Court of Appeal held that, as there was no trap or concealed danger, no cause of action was established. There the judgment of the Court of Appeal in *Miller* v. *Hancock* (3) was considered, and BUCKLEY, L.J., after considering the facts of *Miller* v. *Hancock* (3), said ([1915] 1 K.B. at p. 639):

> "By allowing a stair to be defective the lessor was exposing them to a trap. He was leading them to think there was something there which was not there. The plaintiff was trapped by something which he was not bound to anticipate, and he suffered injury. That was the basis of the decision in *Miller* v. *Hancock* (3).

In the following year the same point arose in *Hart* v. *Rogers* (1) before SCRUTTON, J. There the plaintiff was the tenant, and therefore the position was not identical with that in the two cases which I have just cited. In *Hart* v. *Rogers* (1) landlords let to a tenant a flat on the top floor of a building, but retained possession and control of the roof. Water found its way into the flat through cracks in the roof, and it was held that the landlords were bound to repair the roof, and that they did not discharge this obligation by showing that they took reasonable care to keep it in repair. In that case, as I understand the judgment, SCRUTTON, J., put the liability of the lessor, in a case where the plaintiff was the tenant, on the highest of the three grounds that I have mentioned, and decided that, even in the absence of negligence, the lessor was liable because he had entered into an absolute obligation to keep in proper repair a roof which was under his control. The learned judge dealt with the criticisms which he considered had been passed on the judgments in *Miller* v. *Hancock* (3), and, after referring to the judgment of ATKIN, J., in *Lucy* v. *Bawden* (6), he said ([1916] 1 K.B. at p. 650):

> "I have carefully considered the language of *Miller* v. *Hancock* (3), and have come to the conclusion that, as reported, all the judges imposed an absolute duty to repair on the landlord. I think if the court, and particularly BOWEN, L.J., had meant merely to impose a liability for traps on the line of *Indermaur* v. *Dames* (2), they were quite capable of expressing it in clear words and

would have done so. If it is to be held that they really meant to limit themselves to imposing either a duty to use reasonable care to repair or a duty to give notice of traps or concealed defects of which the landlord knew and the tenant did not know, it must, in my view, be so held by the Court of Appeal and not by a judge of first instance."

Then the learned judge found that there was a breach of the absolute duty, but he did not say whether he was confining his observations to a case where the tenant was suing the lessor or whether he intended them to cover a case where the person suing was a person visiting the tenant. He appears to me, however, to have said that one must take the judgments of the Court of Appeal in *Miller* v. *Hancock* (3) as not having been delivered with reference only to the particular facts, but as laying down an absolute principle binding the lessor not only as between himself and the tenant, but as between himself and a stranger, because, if one is to take the judgments of the Court of Appeal without any reservation, it is clear that they apply to both those cases and were not confined to one of them. I feel a difficulty owing to this judgment of Scrutton, J., because he was dealing with the case of a tenant and so am I, but in *Groves* v. *Western Mansions, Ltd.* (8) I pointed out that *Dobson* v. *Horsley* (7), where the Court of Appeal had qualified their judgment in *Miller* v. *Hancock* (3), had not been brought to the attention of Scrutton, J. In *Groves* v. *Western Mansions, Ltd.* (8) the facts were again different from those of the present case in this respect, that there the person suing was a stranger—namely, the wife of the tenant—and Bailhache, J., and I in those circumstances, notwithstanding what Scrutton, J., had said, held, in accordance as we believed with *Dobson* v. *Horsley* (7), that, unless the case could be brought within the cases dealing with a trap, the plaintiff had no cause of action, and we held that there was no trap.

There is another case in the Court of Appeal where I think the judgment is inconsistent with *Miller* v. *Hancock* (3), that is if *Miller* v. *Hancock* (3) must be taken as laying down the principle that the lessor is under this absolute obligation —namely, *Norman* v. *Great Western Rail. Co.* (9). In that case a railway company was sued by a person who had to go to a station yard on business, and one of the questions was what duty was owed by the railway company to a person having occasion to use the railway premises. In the Divisional Court it was held that a railway company was not merely in the position of an invitor who invites persons to come on the premises for business, but was under a statutory obligation to allow the public to go upon its premises, and therefore its duty to a person who availed himself of his right to go upon them was higher than that of a person who merely invited another to go upon his premises; it owed to persons having a right to be on its premises a duty to take reasonable care to see that the premises were in a safe condition. The Court of Appeal took a different view, and Buckley, L.J., after dealing with the ascending scale of liability on the part of occupiers towards (i) trespassers, (ii) licensees, and (iii) invitees, held that, although the public used the railway premises with a right to be there, yet there was no higher duty owing to them by the railway company on that account, and said ([1915] 1 K.B. at p. 592):

> "There is nothing either in principle or authority to show that, when a person comes reasonably and properly upon the premises of another as of right, as distinguished from by invitation, there is any higher obligation on the person on whose premises he comes than exists in the case of a person who invites another on to his premises."

The Court of Appeal held, therefore, that, unless there is a concealed trap of which the injured person had no notice, he could not recover. I cannot reconcile that decision with *Miller* v. *Hancock* (3) if *Miller* v. *Hancock* (3) laid down that a lessor was under an absolute obligation to a stranger.

Norman v. *Great Western Rail. Co.* (9) seems to me inconsistent with any such view as that, and therefore I cannot reconcile it with the view which Scrutton, J.,

took of *Miller* v. *Hancock* (3). But there is one observation I desire to make with regard to *Norman* v. *Great Western Rail. Co.* (9). If I thought that BUCKLEY, L.J., when he referred to persons going on premises as of right, intended to include persons who had a contractual right, it would simplify my task in the present case, because, if that observation of BUCKLEY, L.J., applied to a tenant in the circumstances of the present case, I should only have to say that in a case like this a trap must be proved and that otherwise the plaintiff must fail. But I do not think that BUCKLEY, L.J., intended that observation to apply to a case where there is a contractual right to go on the premises.

It was said in *Miller* v. *Hancock* (3) that there was an implied obligation on the lessor to keep the common access to the premises in a safe condition. I take that to be a contractual obligation. It appears to me to be impossible to hold otherwise. A lessor who lets rooms to a tenant and provides a common staircase which the tenant must use must come under an implied contractual obligation to keep the access in a reasonably safe condition, otherwise the tenant cannot enjoy the use of the rooms which he has contracted to take. In the present case I think the tenant not only had a right, in the sense that he was not a trespasser, to go on the premises, but he had a right arising out of his contract—a right which he could compel the lessor to observe. In those circumstances the question arises: Has the tenant, first of all, a right to treat the lessor as having entered into an absolute obligation to keep the staircase safe? I think not. I differ, with hesitation, from SCRUTTON, J., but I cannot think that I ought to treat his judgment in *Hart* v. *Rogers* (1) as binding on me, in view of the fact that *Dobson* v. *Horsley* (7) was not cited to him, and of the fact that the view which he took appears to me to be inconsistent with the view taken by the Court of Appeal in *Dobson* v. *Horsley* (7), and with the other cases which I have referred to. The second question, therefore, is whether the tenant has a right to sue the lessor for damages if he proves that the lessor was negligent in allowing the steps to be out of repair, even though the defect was visible and obvious. In other words, is the lessor merely under an obligation to avoid exposing the tenant to a trap, or is he liable if, through want of care, he allows the premises to be in an unsafe condition? In my opinion, the latter is the correct view. I do not see how a lessor who has impliedly undertaken to keep the access reasonably safe can avoid liability by proving that the tenant knew that the steps were old, worn, and defective. That fact may be a good ground for the conclusion that the plaintiff was guilty of contributory negligence, but I must hold that that in itself affords no answer to the action.

It has been contended for the plaintiff that the Housing, Town Planning, &c., Act, 1909, imposes an absolute obligation on the lessor in a case like this. Section 14 of that Act provides:

> "In any contract made after the passing of this Act for letting for habitation a house or part of a house at a rent not exceeding [a certain amount according to locality] there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation."

Section 15 (1) says:

> "The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation."

It has been argued for the plaintiff that this provision applies if part of a house is let and another part is unfit for human habitation, and it is further said that a house is not "fit for human habitation" if the steps are out of repair and dangerous. I do not agree with that argument. I do not think that the Act has any application to a case like this. It would be stretching the language of the Act to say that it imposes an obligation on the lessor to keep the steps in repair whether he could or could not know that they were defective, and that it was intended to give the

tenant a right of action which at common law he did not possess in a case where the house is fit for human habitation in the ordinary sense, but where the steps have become defective.

On the evidence I think that the defendant had ample opportunity to ascertain that the steps needed repair, and I think his negligence has been proved. I do not think that the defendant has proved contributory negligence on the part of the plaintiff. If it was necessary for the plaintiff to prove that there was a concealed trap, I think he has done so.

Judgment for plaintiff.

Solicitors: *Clifford, Turner & Hopton*; *Mills, Lockyer & Mills.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

FEUERHEERD *v.* LONDON GENERAL OMNIBUS CO., LTD.

[Court of Appeal (Pickford, Bankes and Scrutton, L.JJ.), July 30, 1918]

[Reported [1918] 2 K.B. 565; 88 L.J.K.B. 15; 119 L.T. 711; 62 Sol. Jo. 753]

Discovery—Privilege—Production of document—Statement made by plaintiff to defendants' agent under misapprehension.

In an action for damages sustained by the plaintiff, a passenger in a taxicab which was in collision with the defendants' omnibus, application was made by the plaintiff for the production of a statement which the plaintiff had made to the defendants' claims inspector. The plaintiff alleged that the statement was made in the mistaken belief that the inspector was a representative of her solicitor. The defendants refused to produce the statement on the ground that it was privileged.

Held: the statement was privileged because it was made for the purpose of taking professional advice in view of anticipated proceedings, and the fact that it was made under a misapprehension did not place it outside the scope of the privilege.

Tobakin v. *Dublin Southern District Tramways Co.* (1), [1905] 2 I.R. 58, not followed.

Per Pickford, L.J.: The privilege is the privilege of the litigant and it is either a privilege for something communicated to his solicitor for his benefit or it is a privilege so as not to disclose the materials of his defence; in either case the privilege is quite independent of the intention of the person who makes the statement.

Notes. Considered: *Seabrook* v. *British Transport Commission*, [1959] 2 All E.R. 15.

As to legal professional privilege, see 12 Halsbury's Laws (3rd Edn.) 39 et seq.; and for cases see 18 Digest (Repl.) 90 et seq. For communications in the presence of opposite party, see ibid. 114, 115.

Cases referred to:

(1) *Tobakin* v. *Dublin Southern District Tramways Co.*, [1905] 2 I.R. 58; 38 I.L.T. 166; 18 Digest (Repl.) 118, **505.*

(2) *Anderson* v. *Bank of British Columbia* (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 24 W.R. 624; 724; 3 Char. Pr. Cas. 212, C.A.; 18 Digest (Repl.) 102, *863.*

(3) *Southwark Water Co.* v. *Quick* (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 26 W.R. 341, C.A.; 18 Digest (Repl.) 91, *752*.

Also referred to in argument:

Friend v. *London, Chatham and Dover Rail. Co.* (1877), 2 Ex.D. 437; 46 L.J.Q.B. 696; 36 L.T. 729; 42 J.P. 70; 25 W.R. 735, C.A.; 18 Digest (Repl.) 112, *947*.

Pacey v. *London Tramways Co.* (1876), 2 Ex.D. 440; 46 L.J.Q.B. 698; 2 Char. Pr. Cas. 86, C.A.; 18 Digest 112, *946*.

Appeal by the plaintiff from an order of LUSH, J., in chambers.

The plaintiff brought an action against the defendants, the London General Omnibus Co., Ltd., for damages for personal injuries sustained by her when the taxicab in which she and her sister-in-law, Miss Feuerheerd, were travelling was in collision with an omnibus of the defendants in consequence of the negligence of the defendants' driver. The plaintiff asked for production of certain documents, which included a joint statement, dated Jan. 7, 1918, made by the plaintiff and Miss Feuerheerd to a claims inspector acting for the defendants. The defendants objected to produce the documents as being communications of a confidential nature prepared with a view to litigation anticipated, and which had arisen in this action, and which communications were made for the purpose of being laid before their solicitors for the defence of the action. The plaintiff applied by summons for an order for production of the joint statement, dated Jan. 7, 1918, and filed an affidavit in support, in which she said, inter alia, that previously to Jan. 7, 1918, she had made arrangements to meet her solicitor at the rooms of Miss Feuerheerd for the purpose of discussing the matter in regard to the accident and giving him their detailed statements in reference thereto. Upon the arrival of the plaintiff at the rooms occupied by Miss Feuerheerd she found that her sister-in-law was then already engaged with a man who was taking down a statement from her, and stated that Miss Feuerheerd had given some information as to the accident. He then asked the plaintiff some questions in reference to the matter of her injuries, and at the same time continued asking Miss Feuerheerd further questions. After writing the statement he asked them to sign it, which they did. Just before the end of the interview, and while he was putting his papers together, the plaintiff went out of the room, the maid having announced another visitor, whom the plaintiff ascertained to be the representative of her solicitors. When the maid announced the name of the solicitor's representative the person who had been taking the statement hurriedly packed up his papers and left. The plaintiff said that during the interview she was under the impression that she had been speaking to the representative of her solicitors. Miss Feuerheerd, who joined in the affidavit, stated, inter alia, that if she had known that the man was a claims inspector of the defendants she would not have made a statement to him. Both the plaintiff and Miss Feuerheerd stated that no prior intimation had been given them that anyone representing the defendants would call upon them. LUSH, J., reversing the master, refused to make an order for the production of the joint statement. The plaintiff appealed.

B. Campion for the plaintiff.

Harold Brandon for the defendants.

PICKFORD, L.J.—This is an appeal with regard to the production of a document under very unusual circumstances. There was a collision between a taxicab and an omnibus belonging to the defendants. Two ladies were in the taxicab, they intended to bring an action against the defendants, and one of them has now brought an action in which this question arises. Soon after the accident a gentleman, who is the claims inspector of the defendants, called on these ladies, the plaintiff in this action and her sister-in-law. It so happened that the ladies were expecting their own solicitor, and, as they say in their own affidavit, they, under the impression that this gentleman was their own solicitor, made a statement to him and signed it. He took that to his employers, the defendants, and the question is whether they ought to produce it.

I should like at once to say that if it were proved that that statement was obtained by any sort of deceit on the part of the gentleman who took it, I should have no hesitation in saying that no privilege could be claimed for it, on the broad ground that a man cannot claim privilege for anything done by the fraud of his agent; but there is no such case, in my opinion, proved here. There are matters in the ladies' affidavit which may be pointed to as suggesting suspicion against the gentleman who took the statement, and I should be more satisfied myself if we had had his account of the matter on oath. I am told by counsel for the defendants that he offered to produce such an affidavit in the court below, but the judge thought it unnecessary; and therefore it does not seem to me to be the fault of the defendants or their agent that such an affidavit was not filed or produced before us. I should have been more satisfied myself if the whole matter had been cleared up, but it is enough to say I do not think that any deceit is proved. There may be suggestions, but that is all; there is not any proof, and therefore we must take it as being a statement honestly obtained. We know from experience in litigation that the claims inspectors of insurance companies or large companies like the defendants do constantly see persons who are expected to bring actions against them for the purpose of discussing terms of settlement, or for other purposes, and they do so, sometimes saying who they are, and sometimes not. In this case it appears that the gentleman did not say who he was, but he got the statement, and the assistant secretary of the omnibus company has sworn that that statement was obtained for the purpose of laying it before the solicitors of the defendants for their information, "for the defence of the action then anticipated and apprehended and since begun, to wit, this action, and for the purpose of obtaining for or furnishing to the said solicitors information as to how and of whom evidence in the said action could be obtained, and as to the nature of such evidence or otherwise for the use of the said solicitors to enable them to conduct the defence of the said action and to advise the defendant company in reference thereto." According to the ordinary practice that evidence is conclusive. It is suggested by the plaintiff that that is not correct. I should have thought that it was obviously correct, and that there was no doubt that, whether entitled to privilege or not on other grounds, that was the reason for which the statement was obtained. I cannot see any reason to doubt it, and therefore we must take it that that is correct.

If that be correct, is the lady entitled to say that the statement is a document which must be disclosed? On this point the greater part of the argument has rested upon this, that the principle of privilege for statements of this kind is, that the statement must have been intended by the person who made it to be made for the benefit of the principle of any person who took it. I cannot find a reason for this principle at all. It seems to me the point is clearly and correctly stated in BRAY ON DISCOVERY at p. 406:

> "There are two different points of view from which the subject has been regarded, or rather perhaps two different tests which have been applied. In some cases and by some judges the question has been as to whether the person concerned in the preparing, sending, or receiving the documents, or oral communications, could be considered as performing duties which properly devolved upon the professional adviser; in other cases, and with other judges, the question has been whether the documents or oral communications should be considered as evidence or materials for the brief, or rough notes for such evidence or materials. The former view has been perhaps generally dwelt upon by equity judges, the latter view principally in the common law courts: see JAMES, L.J., in *Anderson* v. *Bank of British Columbia* (2) (2 Ch.D. at p. 652)."

Then he goes on to say:

> "The principles underlying these views are different."

Then he describes the principles which underlie these views. I cannot find either in the statement which is, I think, correctly taken from the case referred to, or

in the discussion of the principles that underlie those propositions, anything pointing to this, that a part of the protection must depend upon the intention of the person who made the statement. The privilege is the privilege of the litigant, and it is either a privilege for something communicated to his solicitor for his benefit or it is privilege so as not to disclose the materials of defence; in either case the privilege is quite independent of the intention of the person who makes the statement.

Applying those principles to this case, it seems to me that this document, which is the statement of these two ladies, is privileged on that ground. No doubt there is a decision in the Irish Court of Appeal which is the other way in the case of *Tobakin* v. *Dublin Southern District Tramways Co.* (1). In that case it was a statement made at the request of the inspector of the defendant company by the plaintiff in the action, and GIBSON and BOYD, JJ., and the Irish Court of Appeal held that that document must be produced. GIBSON, J., says ([1905] 2 Ir.R. at p. 60):

> "Are the defendants at liberty to say that they will not allow the plaintiff to see this document so signed on the ground that it is a privileged communication which they got from him for the purposes of litigation? Stated in that bald form, the proposition is repugnant to common sense."

I cannot enter into a discussion as to whether one person's view of common sense is always the same as another's; it is a question of the Rules of Court which we are discussing, and whether they are common sense or not is immaterial. Then GIBSON, J., goes on to give an instance and says (ibid.):

> "Suppose they had a receipt signed by the plaintiff alleged to be in settlement of the action for a certain sum, that would be a document which would have come into existence for the purpose of avoiding the litigation. Could the defendants claim privilege for such a document?"

With the greatest respect to the learned judge, in that case the receipt would be put in as a defence to the action, and it has to be produced as a matter of course; it would be pleaded. Then GIBSON, J., goes on to say (ibid. at p. 61):

> "My view of the question is that the plaintiff has got an interest in the paper as well as the defendants. He is bound by it; and, if he is not to see it, he may be taken by surprise at the trial."

I do not know whether the fact that the plaintiff has got an interest in the document is a matter which decides whether or not it comes within the Rules of Court as to privilege. In my opinion, it does come within the Rules of Court and therefore it is privileged. The decision of the Divisional Court in Ireland was affirmed by the Court of Appeal, but there are no reasons given by the Court of Appeal for their decision, and therefore I am not able to ascertain upon what principle they acted. I have the greatest respect for the decisions in the Irish Courts, but I do not know whether their rules as to privilege are exactly the same as ours or not. I dare say they are, but I do not think we are bound to follow that decision when it conflicts, as I think it does, with the provisions of the rules as to privilege in this court and the decisions which have been given upon those rules. For these reasons I think that the appeal fails and must be dismissed with costs.

BANKES, L.J.—I agree. LUSH, J., apparently, by the note he appended to the order he made, preferred to act upon the authority of the case of *Southwark Water Co.* v. *Quick* (3) in the Court of Appeal in England rather than the decision of the Irish Court of Appeal in *Tobakin* v. *Dublin Southern District Tramways Co.* (1), there being no report of the judgment of the Court of Appeal in the Irish case. I think the view which LUSH, J., took was quite right. It has been pointed out quite clearly by BRETT, L.J., in *Southwark Water Co.* v. *Quick* (3), that if a document has come into existence merely as materials for the brief or merely for the purpose of being laid before the solicitor for his advice or consideration, it is a

privileged document; and in this case, upon the affidavit sworn on behalf of the defendants and upon the facts as the plaintiff herself must admit them, it seems perfectly obvious that this document came into existence merely for the purpose of being laid before the solicitor of the defendants for his advice or for his consideration. It is said that that rule does not apply in this case, because these ladies made this statement under a misapprehension. It does not come to any more than that, their misapprehension being that they were speaking to their own solicitor and not to the representative of the defendants. In my view, that makes no difference, and it is immaterial for this purpose whether the person who was under the misapprehension is a mere witness or an actual plaintiff, or an intended plaintiff. Of course, the case would be quite different if the person who was making the statement was not merely under a misapprehension, but was under a misapprehension wrongfully or improperly induced by the person to whom the statement was made. That is not this case. Dealing merely with the case as that of a person who has made a statement under a misapprehension, that, in my view, does not take the case out of the rule I have referred to.

SCRUTTON, L.J.—I agree. As we are coming to a contrary conclusion from that which was arrived at by the Irish Court of Appeal, I should like to give my judgment in my own words. This is a case of a collision between an omnibus and a taxicab, and there were two passengers in the taxicab. A person who, we are told, although there is no affidavit to that effect, is a claims inspector of the omnibus company went to call on the persons who were in the taxicab to get information from them as to the circumstances under which the accident occurred. It so happened, in fact, that those two ladies were on that morning expecting their own solicitor, and when the claims inspector called he was shown up to them, they being under the impression that he was their solicitor, and they answered the questions he put to them; he took down a statement which apparently he read to them, and they signed it.

The question is whether that document is privileged from production now that one of those ladies has brought an action against the omnibus company. If it were the case that that statement was obtained by any untrue representation on the part of the claims inspector a very different state of things would arise, but, having read the ladies' affidavit carefully, and assuming that they have, in conjunction with their legal adviser, stated every relevant fact, I am unable to find any evidence that the statement they made when they were called upon was induced by anything done by the claims inspector; and, that being so, there was no statement obtained by what counsel for the plaintiff has called a trick, using the word "trick" in a sense I do not quite understand. According to the English rules of procedure which govern this question, if a party to the proceedings swears that a document was obtained by his agent for the purpose of pending litigation for submission to his solicitor, for litigation anticipated or actual, the oath is conclusive. I have known, as regards such an affidavit, a question to be raised at the trial as to the document being produced, but I have never known of such a statement in an affidavit to be investigated by the court. One hopes that assistant secretaries of these big companies appreciate, when their solicitors put an affidavit of documents before them, they are speaking to a number of facts on which their statement is to be founded and which they must investigate before they swear to them; but that is the attitude of the court towards the affidavit that the party makes in the matter of discovery. It is argued that even if it is the fact that the statement is made by one party for the purpose of submission to his solicitor for use in pending litigation, the attitude of the party from whom the information is obtained makes a difference. Counsel for the plaintiff has stated that it makes all the difference that the person who made the statement that was taken down did not know that the statement was to be used for submission to the solicitor in the litigation. I am quite unable to see how the attitude of the party from whom the information is derived affects the matter at all. The question is not what the

party thought when he gave the information that is recorded, but for what purpose the party who made the record which is claimed to be privileged made it.

A second point argued was that, even if that were not so, it made a difference that the statement was made by the person who was ultimately a party to the litigation. I cannot understand what difference that makes so long as the record is made by a person who is making it for the purpose of litigation and for submission to the solicitor for advice. That is the principle on which the English courts have always acted. The Irish case, *Tobakin* v. *Dublin Southern District Tramways Co.* (1), which decides the other way has not very satisfactorily been reported for our purpose. No reasons or judgment of the Court of Appeal are given at all, and there is only one judgment in the court below in Ireland. GIBSON, J., after stating the facts, which are similar to these, except that there was not, apparently, any misapprehension on the part of the man who made the statement, says ([1905] 2 Ir.R. at p. 60):

> "Are the defendants at liberty to say that they will not allow the plaintiff to see this document so signed on the ground that it is a privileged communication which they got from him for the purposes of litigation? Stated in that bald form, the proposition is repugnant to common sense."

I agree it would be desirable if all proceedings in these courts were governed by common sense; but, as a matter of fact, they are governed by a thousand pages of the ANNUAL PRACTICE, and it is from the rules in the ANNUAL PRACTICE and the numerous authorities explaining them that we have to see whether a case comes under a particular form of procedure or not, and it is on the rules and authorities interpreting them that we have to consider this case. Then GIBSON, J., says (ibid.):

> "Suppose they had a receipt signed by the plaintiff alleged to be in settlement of the action for a certain sum, that would be a document which would have come into existence for the purpose of avoiding the litigation. Could the defendants claim privilege for such a document?"

I should answer, as the judge answered, of course they could not, because there the document was being used as evidence of the settlement of the action, and you cannot use that document as evidence of settlement and at the same time withhold it from the view of the other party. Then he goes on (ibid. at p. 61):

> "My view of the question is that the plaintiff has got an interest in the paper as well as the defendants. He is bound by it."

I am afraid I do understand that. The agent of the omnibus company makes a record on paper; that is his record, and, if the witness did not sign it, there would be no question, I suppose, that the witness had no right to see it afterwards. All that happened was that the witness put his signature on the company's paper; but how it could be said that that gave him an interest in the paper I cannot understand; and when the judge goes on to say that if he is not allowed to see it he might be taken by surprise at the trial, he would also be taken by surprise if he had not spoken the truth in making the statement or at the trial; but, if he spoke the truth on both occasions, he would not be likely to be taken by surprise. For these reasons I am not able to agree with the reasoning of the Irish court. The rules in Ireland may be different, but, if they are the same as in England, the course of the English authorities appears to me to be quite in conflict with this decision, and we should not be able to follow it. For these reasons I agree the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. Norris & Co.*; *Joynson-Hicks, Hunt, Moore & Cardew.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

PAYZU, LTD. *v.* HANNAFORD

[KING'S BENCH DIVISION (Darling, A. T. Lawrence and Avory, JJ.), May 13, 1918]

[Reported [1918] 2 K.B. 348; 87 L.J.K.B. 1017; 119 L.T. 282; 82 J.P. 216; 34 T.L.R. 442]

Master and Servant—Contract of service—Termination—No provision in contract as to notice—Implication of term that reasonable notice must be given.

Where a contract of service for an indefinite period is silent as to the notice required to be given by either party to terminate the employment, a term will be implied in the contract that a reasonable notice must be given. What is a reasonable notice is a question of fact depending on the circumstances of the case.

Notes. As to notice required to be given by servant to terminate contract of service where no agreement as to notice, see 25 HALSBURY'S LAWS (3rd Edn.) 489–491; and for cases see 34 DIGEST 64 et seq.

Case Stated by a metropolitan magistrate.

The respondent, Doris Hannaford, was summoned under the Employers and Workmen Act, 1875, for that she, being employed by the appellant company at a weekly wage of 35s., left the appellants' employ without giving one week's notice, whereby the appellants suffered damage. The appellants claimed as damages 35s. less one day's wages, 5s. 10d.

On the hearing of the summons the following facts were proved or admitted. The appellants were a firm carrying on business as blouse manufacturers at 41, Foley Street, W. On Friday, Nov. 30, 1917, the managing director of the appellant company, Mr. John Stuart, verbally engaged the respondent as a machinist at the weekly wage of 35s. Nothing was said on either side as to any notice to be given in order to determine the contract. It was the custom of the appellant company to pay their employees each Saturday for the week ending the previous day. The respondent worked for the appellants from Nov. 30, 1917, up to Jan. 12, 1918. She was paid her wages week by week, and on the last-named date she was paid for the week ending Friday, Jan. 11, 1918. The respondent never returned to work after Jan. 12, 1918, and she never gave any notice to the appellants. By reason of the respondent's failure to continue her work the appellants had suffered damages in their business.

On behalf of the appellants it was contended that in a contract of service there is an implied term in every case, unless there is an express agreement to the contrary, that a reasonable notice shall be given by either party desirous of terminating the service to the other side, and that if no such notice is given the party who is damnified is entitled to damages for breach of such terms of the contract.

The learned magistrate was of opinion that, upon the facts set out in the Case Stated, there was no implied term of the contract of service that notice should be given, and he therefore dismissed the complaint.

Head for the appellants.

The respondent appeared in person.

DARLING, J.—In my opinion the appeal in this case should be allowed. The learned magistrate has decided that, in the case of a weekly hiring, where nothing is said as to the giving of notice in order to terminate the contract of employment, there is no implied term that notice shall be given by either side. In other words, he has decided that a workman may leave his employment, or an employer may dismiss his workman, without giving any notice. That finding is, in my view, contrary to the general rule of law, which is that in the case of a contract of employment between an employer and an employee there must be a reasonable

notice given in order to terminate the same. There is evidently some doubt as to the contract of hiring in this case, for from what the respondent herself has stated she claims that she was paid by the day and not by the week. Moreover, the learned magistrate seems to have lost sight of the fact that the respondent worked on the Saturday before she left—that is, on the first day of a new week—and if the view taken by the magistrate was the correct one, it would follow logically that if the respondent had worked each day of that week up to Thursday, the employers could have dismissed her on the Thursday without notice and without paying her anything for the part of the week in which she had worked. In point of fact, the employers did pay her for the Saturday on which she worked, because they deducted the wages for that day from the damages claimed by them. The Case must be remitted to the learned magistrate in order that he may consider whether this was a weekly or a daily hiring. If he comes to the conclusion that the hiring was a daily one, then the respondent was only bound to give one day's notice, and the damages claimed will have to be reduced accordingly.

A. T. LAWRENCE, J.—I agree. The learned magistrate was wrong in holding that the contract of employment between the appellants and the respondent could be terminated without notice. The proper view is that a reasonable notice must be given in any case, and it will depend upon the circumstances of the case what the length of that notice shall be. Here the learned magistrate has found that there was a weekly hiring, but he has disregarded the fact that the respondent worked upon one day of the new week, and it is impossible to hold that she was then entitled to leave without notice unless one also holds that the appellants, the employers, would have been entitled to dismiss her in the middle of a week without notice and without paying her for that part of the week during which she had worked. That is not, as I have said, a correct view of the law. Where there is a hiring for a week the contract is entire for the week. The contract involves a promise of service on the one side and an obligation to employ and to pay on the other side. To terminate the service during the week is manifestly a breach of the contract, and the utmost that the law can imply in order to give some elasticity to the contract is a right to determine the same upon a reasonable notice being given.

AVORY, J.—I am of the same opinion.

Case remitted.

Solicitor: *W. H. Martin & Co.*

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

SPETTABILE CONSORZIO VENEZIANO DI ARMAMENTO E NAVIGAZIONE *v.* NORTHUMBERLAND SHIPBUILDING CO., LTD.

[COURT OF APPEAL (Warrington, Duke and Atkin, L.JJ.), July 14, 15, 1919]

[Reported 88 L.J.K.B. 1194; 121 L.T. 628]

Contract—Repudiation—Issue of writ—Intention of party issuing writ not to perform contract—Claim for declaration as to rights of parties.

For there to be an effective repudiation of a contract the party seeking to repudiate must make quite plain his intention not to perform the contract. It is possible that a writ might be issued in such circumstances as to make it plain that the party issuing the writ does not propose to perform the contract whatever the decision of the court. But in ordinary circumstances where a party to a contract issues a writ which in effect asks the court to determine the rights of the parties—e.g., a writ claiming against the other party rescission of the contract on the ground of fraud or misrepresentation, and, alternatively, a declaration that the contract was null and void, or had been frustrated, and was at an end—the conclusion to be drawn is that he is bound to perform the contract if the court so decides and that the issue of the writ cannot be taken to be an absolute repudiation.

Per ATKIN, L.J.: The action for a declaration is one of the most valuable contributions that the courts have made to the commercial life of this country. Questions of great difficulty arise between commercial men. The procedure is now open to them by which they can come to a court and in a very short time have those disputes resolved. It would be a serious disadvantage if it were thought that a writ issued in such circumstances could expose the party having recourse to it to an action for damages on the footing that he had broken his contract.

Notes. Considered: *Peter Dumenil & Co.* v. *James Ruddin, Ltd.*, [1953] 2 All E.R. 294; *James Shaffer, Ltd.* v. *Findlay Durham and Brodie*, [1953] 1 W.L.R. 106. Referred to: *Howard* v. *Pickford Tool Co.*, [1951] 1 K.B. 417.

As to repudiation of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 203–205; and for cases see 12 DIGEST (Repl.) 377–386.

Cases referred to:

(1) *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (1904), 9 Com. Cas. 289; 41 Digest 302, *1642*.

(2) *Hochster* v. *De La Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, *2960*.

(3) *Frost* v. *Knight* (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 20 W.R. 471, Ex. Ch.; 12 Digest (Repl.) 380, *2973*.

(4) *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460; 55 L.J.Q.B. 162; 54 L.T. 629; 50 J.P. 694; 34 W.R. 238; 2 T.L.R. 249, C.A.; 12 Digest (Repl.) 377, *2961*.

(5) *Bradley* v. *H. Newsum, Sons & Co., Ltd.*, ante p. 625; [1919] A.C. 16; 88 L.J.K.B. 35; 119 L.T. 239; 34 T.L.R. 613; 14 Asp.M.L.C. 340; 24 Com. Cas. 1, H.L.; 12 Digest (Repl.) 384, *2999*.

Also referred to in argument:

Mersey Steel and Iron Co. v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, *2966*.

Freeth v. *Burr* (1874), L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 22 W.R. 370; 12 Digest (Repl.) 378, *2970*.

Guaranty Trust Co. of New York v. *Hannay & Co.*, [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 21 Com. Cas. 67, C.A.; 30 Digest (Repl.) 174, *239*.

Appeal by the defendants from an order of BAILHACHE, J.

The facts appear in the judgment of WARRINGTON, L.J.

Sir John Simon, K.C., and *Douglas Hogg, K.C.* (with them *W. A. Jowitt*) for the defendants.

R. A. Wright, K.C. (with him *Claughton Scott*) for the plaintiffs.

WARRINGTON, L.J.—This is an action brought by an Italian company, who are shipowners, against a company in England, who are shipbuilders. The plaintiffs claim specific performance of six contracts, each for the building by the defendants of a steamship for the plaintiffs. The defendants, whatever other defences they may have, asserted that the contracts had come to an end by the absolute repudiation thereof on the part of the plaintiffs which was duly accepted by the defendants. By an order made upon the summons for directions it was directed that that question should be tried, and a day was fixed for that trial, limited to the question whether there were subsisting contracts. That issue came before BAILHACHE, J., and he decided, in favour of the plaintiffs, that there were subsisting contracts, and made a declaration accordingly. It is from that order that the defendants appeal.

In the year 1917, between the months of June and October, the six contracts in question were made. Each contract was for the building of a steamship, and each contract contained this provision, which is in cl. 4 of the specimen contract:

> "The said steamer shall be built when builders obtain permission from the government to do so, and shall be completed ready for her trial trip at sea as soon as practicable, and shall be delivered to the purchaser off the river Tyne after the trial trip."

The point of that provision is that the shipbuilders did not bind themselves to build the steamship at or within any particular time, but only when they had obtained permission from the government. Each contract further provided for the payment of a considerable sum in each case upon the signing of the contract, those several sums together amounting, we are told, to upwards of £140,000. Nothing happened till December, 1918, when the defendants received the necessary permission from the government to build one of the ships. It happened to be that which is the subject of the last of the six contracts. On Dec. 24 the defendant wrote to the plaintiffs' firm in Italy:

> "We have now much pleasure in advising you that we have received permission from the Controller-General of Merchant Shipbuilding to proceed with the work on No. 246 and we will, therefore, do all in our power to expedite delivery in accordance with the contract."

The answer to that was a letter of Jan. 27, 1919, which is said by the defendants to be an absolute repudiation of the contract. It is addressed to the defendants by an advocate in Rome, Francesco Montefredini:

> "The Consorzio Veneziano di Armamento E Navigazione—my clients—have instructed me to acknowledge receipt of your two letters of Dec. 19 and 24, 1918, and inform you that they have already instructed Messrs. William A. Crump & Son (17, Leadenhall Street, London), to act legally against you as the six contracts are at an end and also to act against Messrs. Fisher, Alimonda & Co. (112, Fenchurch Street, London), for the extra price and commission which they have received by working on the good faith of the buyers."

I do not know what that means. It is enough to say that Messrs. Fisher, Alimonda & Co. appear to have been the brokers who had been acting between the parties. On Feb. 5 that letter was answered by Messrs. Deacon & Co., the solicitors for the defendants, and they say this:

> "We note that you have instructed Messrs. W. A. Crump & Son, and we shall await communication from these gentlemen. But in the meanwhile we think

it right to inform you that so far as we are conversant with the matter, you have no possible right to terminate the contracts."

The next event was a letter on Feb. 8 from Messrs. William A. Crump & Son to the defendants, stating that they had been instructed to proceed against them with reference to the six contracts and asking to be referred to the defendants' solicitors. On Feb. 13 the defendants' solicitors were served with a writ. It was a writ against the defendants and against the brokers, and the writ claimed as against the first defendants rescission of the six contracts, and, alternatively, a declaration that the contracts were null and void, or had been frustrated, and were at an end. The writ further claimed as against both defendants damages for misrepresentation in connection with the contracts, suggesting that the ground for rescission was a ground founded on fraud or misrepresentation. As against the defendants, the brokers, the writ claimed return of certain moneys paid and further or other relief. That writ in effect claimed that on one ground or another the plaintiffs were entitled to be relieved from any liability under the contracts. On May 1 there came the letter which is said to be an acceptance of an absolute repudiation still capable of being accepted. It was in these terms:

"On behalf of the defendants, the Northumberland Shipbuilding Co., Ltd., we beg to give you notice that, as the plaintiffs, by issuing the writ in this action and also by their letter of Jan. 27 last, persist in treating the contracts as at an end, the defendants will not proceed further with the construction of the ship No. 246, for which permission to build was obtained from the Shipping Controller, nor with the construction of the other five ships under the contracts entered into in June and October, 1917, and they will, accordingly, counterclaim in this action for damages for repudiation of the contracts."

On May 16 the then pending action was discontinued, and on May 26 the present action was commenced.

Bailhache, J., has decided in favour of the plaintiffs upon the ground that, treating the letter of Jan. 27 by itself as an absolute repudiation of the contracts and treating the letter of May 1 as an acceptance of that repudiation, it was no longer open to the defendants so to accept that repudiation, because the issue of the writ, which had intervened on Feb. 13 had amounted to a withdrawal of the previous repudiation and the assumption by the plaintiffs of a fresh attitude—namely, that of asking for the decision of the court whether they were or were not bound by the contract. I think that the question may be determined on another ground—which is, that there never was any actual repudiation of the contract on the part of the plaintiffs such as might have been accepted by the defendants. To examine that I go back to the letter of Jan. 27 to see what that letter really means. I am not forgetting the point, of which a good deal was made on behalf of the defendants, that that letter was written in answer to their intimation that they were prepared to go on with the building of the ship No. 246. I need not read the letter again, but I may remark that it tells the defendants that Messrs. Crump had been instructed to act legally against them. As to that there is no mistake about it. It also tells them the object of the legal proceedings which Messrs. Crump are to take. That object is to have it established that, as the defendants believe to be the case, the contracts are at an end. It seems to me that that is not telling the defendants that whatever happens, whatever is the true state of the case, whether the contracts are binding on the plaintiffs or not, they will not perform them; but that they have instructed their solicitors to take proceedings with the object of having it determined that the contracts are not binding upon the plaintiffs and are at an end, and what the nature of the proceedings is the defendants will see when they receive a communication from those solicitors. Could the defendants immediately on receiving that letter have treated that as an actual repudiation and have accepted it so as to give them the right to bring an action for damages for what has sometimes been called an anticipatory breach? If I am right, I think that it is clear they could not. And it is noticeable that

when Messrs. Deacon & Co. received that letter they did not treat it as being an absolute repudiation of the contract, but they treated it as being what I think it was, an intimation of the pending legal proceedings and of the kind of object with which those legal proceedings were to be started. Messrs. Deacon & Co. said:

> "We note that you have instructed Messrs. William A. Crump & Son, and we shall await a communication from these gentlemen. But in the meanwhile we think it right to inform you that, so far as we are conversant with the matter, you have no possible right to terminate the contracts."

That only means to say that the defendants' solicitors are looking forward to receiving a communication from Messrs. Crump which will specify the relief that the plaintiffs intend to ask by the contemplated proceedings, but they warn them that, if the relief sought is to terminate the contracts, they have a defence, as they believe, which will prevent the plaintiffs from obtaining that relief. If that is so, the main question which has been argued here—namely, whether there was any withdrawal of the previous absolute repudiation—does not arise. But I think that it is desirable to say that, in my opinion, where one party to a contract conceives that he is no longer bound by the contract or has a right to have it rescinded or declared null and void, and issues a writ for the purpose of obtaining that which he believes to be his right, he does not by that mean to repudiate the performance of the contract in any event. It seems to me that he submits to perform it if the court, as the result of the action, comes to the conclusion that he is bound to perform it, and it cannot be taken to be an absolute repudiation.

I think that that view of the effect of issuing a writ claiming a declaration is the only view which is consistent with the judgment of CHANNELL, J., in *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (1), which has been cited to us. It is true that in that case it was a continuing contract. The learned judge points out this:

> "I think [the plaintiffs] are entitled to a declaration as to whether or not the contract is binding upon them. They are not bound at their peril to refuse to perform it and then to be liable to heavy damages for not performing it for the space of the next year and a half. If they are wrong, they would be liable for damages down to the time of the judgment of the court, while they are refusing to perform: But upon the court saying that they were bound, they would then say: 'We will now go on with it for the remainder of the time.' I think that that is a sufficient reason."

That is to say, CHANNELL, J., assumes there, quite independently of the actual breach, the issue of a writ claiming a declaration that the plaintiffs are not bound in the future is not an actual repudiation, and if the decision is against them they would be bound to go on. For these reasons I think that the judgment of BAILHACHE, J., is right and that this appeal ought to be dismissed with costs.

DUKE, L.J.—The question on which BAILHACHE, J., pronounced his interlocutory judgment in this case arose upon a letter of the defendants of May 1 in this year, a letter in which the defendants assumed that there was then on the part of the plaintiffs a declaration of their determination in no event to be further bound or to be bound by the contracts between them, and, assuming the existence of that offer, an acceptance by the defendants of that offer on the part of the plaintiffs. The matter had to be determined by the learned judge in the court below with regard to two main transactions between the parties. In the first place, it was with regard to correspondence which took place at the end of January and the beginning of February in this year, and then with regard to the issue of a writ by the plaintiffs, which followed upon that correspondence, and the conduct of the parties consequent upon the issue of that writ. It has to be borne in mind that the affirmation of the question which was to be determined by BAILHACHE, J., was upon the defendants; they had to satisfy the learned judge that there was an offer

or declaration on the part of the plaintiffs such as they purported to have acted upon, and that while that offer was open to them they had acted upon it. The learned judge has found the contrary of that proposition, and it might be enough to say that he was not satisfied upon transactions not perfectly clear in themselves to accept the affirmative proposition for which the plaintiffs contended.

With regard to the correspondence at the end of January and the beginning of February, 1919, I confess that until a late stage in the case my mind was fully seised of a proposition which had been made to us that the plaintiffs had admitted in the court below, and that it was a conclusive admission between the parties that there had been on Jan. 27, 1919, an unconditional proffer of repudiation on the part of the plaintiffs of any liability on their part under these contracts. But when one comes to read the letter and to observe what was the conduct of the parties upon it, I think that it seems very clear that the plaintiffs' advocate in Rome was by no means taking the dangerous and unqualified position which the defendants assume that he was taking. I think that what he said in effect was that the plaintiffs put the matter into the hands of their solicitors, who would communicate with you, the defendants, but that it would be upon the footing that the plaintiffs were no longer bound by the contracts, and that they were at an end. To that statement by the legal adviser in Rome of the plaintiffs, the defendants' legal adviser in this country replied that they would await the communication of the plaintiffs' legal advisers in London. They awaited that communication, and it took the form of a writ.

Great questions have arisen as to what is the possible effect of that writ in point of law, and what ought to be taken to be its effect, having regard to the dealings E of the parties upon the footing of the writ. I should be by no means prepared to assent to a proposition that that writ might not evidence such a repudiation of the contracts as would warrant acceptance by the defendants to the writ of the proffered repudiation so as to bring them within the effect of cases like *Hochster* v. *De La Tour* (2) and *Frost* v. *Knight* (3) and *Johnstone* v. *Milling* (4). I can conceive quite distinctly proceedings being taken which would properly have that F effect and would properly be held to have that effect, but it is not necessary to decide that matter in this case. First of all, with regard to the writ, it takes an exceedingly ambiguous form. It is not of the explicit character which is required to establish an unconditional proffer of repudiation of a contract. I will not say that it faces two ways, because it faces every way. You have to see in such a state of the case what the parties thought about it. Looking at the transactions G and without prying into negotiations without prejudice, I have come to the conclusion that the defendants did not treat the writ as such an unconditional proffer of repudiation as would have entitled them to declare themselves no longer bound by the contracts. If the two letters of Apr. 17, from the defendants to the plaintiffs, and the letter of Apr. 22, from the plaintiffs to the defendants are referred to, I think that that conclusion follows. It has to be borne in mind that on H Apr. 17 the defendants had said that the plaintiffs were to proceed with the action in its ambiguous form, which might decide that there was a contract or might decide that there was none, and which might put one or another of the parties partly right or both of them partly right or one of them absolutely wrong. It has further to be borne in mind that on Apr. 22 the plaintiffs' solicitors had accepted that view of the matter and said that they would propose to continue with the I action and as soon as the sittings commenced to apply for an adjournment of the trial of that ambiguous set of proceedings. I think, therefore, that whatever had been the true view as to the previous state of the matter, the defendants were not entitled on May 1, and after no further communication with the plaintiffs, to say point blank that the matter was at an end and that there were no contracts between them. I think that that was a departure from, first of all, a set of negotiations, and then a set of submissions to have a decision by the court of the matters which were open between them—a departure which the defendants were not entitled to take. I agree with what has been said as to the effect of the judgment of CHANNELL,

J., in *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (1), affirmed in this court. That ruling entitles parties to assume that they may come to the court in a properly framed action and obtain the decision of the court as to what the rights are in respect of the matter in dispute. It seems to me that in the present case the plaintiffs and the defendants during April and May, 1919, were treating this litigation as a litigation proceeding on a footing stated by CHANNELL, J., in that case, and, in that view of the matter, the defendants were not entitled on May 1 to declare that they accepted as a renunciation of the contracts communications which had passed between them at an earlier stage in the transaction. I, therefore, agree that this appeal should be dismissed.

ATKIN, L.J.—I agree. The question in the present case is whether or not on May 1 there had been, and was, such a repudiation of the contracts by the plaintiffs as entitled the defendants to accept it and say that the contracts were at an end. On the question of repudiation it is unnecessary to consider some of the interesting questions that have been raised in this discussion—namely, whether or not an anticipatory repudiation is in itself a breach of contract, as was said by SIR ALEXANDER COCKBURN in *Frost* v. *Knight* (3), or is not in itself a breach of contract, as was said by BOWEN, L.J., in *Johnstone* v. *Milling* (4). Nor is it necessary to consider whether the right of the person who received such a repudiation is to elect within a reasonable time whether he is to accept it or whether he is not, with the consequences which follow upon election. Here one has merely to consider the question whether or not there was a repudiation.

A repudiation has been defined in different terms—by LORD SELBORNE as an absolute refusal to perform a contract; by LORD ESHER as a total refusal to perform it; by BOWEN, L.J., in *Johnstone* v. *Milling* (4) as a declaration of an intention not to carry out a contract when the time arrives, and by LORD HALDANE in *Bradley* v. *H. Newsum, Sons & Co., Ltd.* (5) as an intention to treat the obligation as altogether at an end. They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract. The question is whether that has been established in the present case, and the suggestion is that you have to look at the letter of Jan. 27, together with the writ in this action. It is suggested that the letter of Jan. 27 amounted by itself to such an intimation of the intention by the plaintiffs not to perform the contracts. For the reasons that have been given it appears to me that that is not the true view of that letter. It was written by a legal adviser of the plaintiffs in Rome, and it appears to me to point quite clearly to a future communication that is going to be made by the plaintiffs' legal advisers in London. It further appears to me that the intimation to the other side is that they must await a communication from the legal advisers in London, whatever the form may be; it may relate to legal proceedings or it may not. I think that it was so understood, and rightly so understood by the legal advisers of the defendants, and when the intimation came from the legal advisers in London it came in the form of a writ. Therefore, it appears to me that the question is whether or not it can be said when that writ was received that the plaintiffs had intimated quite plainly that they were not going to perform their contracts. The writ takes the form of asking for a declaration as to the rights of the parties. I agree that it asks for alternative declarations, and it asks for relief in addition to declarations. But the substance of it appears to me to be that the plaintiffs are asking the court to declare whether or not they are any longer bound by the contracts. It appears to me that that is an entirely different thing from an intimation by the plaintiffs that they in any event are not going to perform the contracts. It is something quite different from a repudiation. So far from expressing the intention of the parties not to perform the contracts, it appears to me to leave it to the court to say whether or not the contract is to be performed, and if the court says it is, then it impliedly states that it will be performed. I think, therefore, there was no repudiation of the contract.

I can conceive of a case where a writ may be issued in such circumstances, possibly combined with other declarations of the rights of the parties, as to make it plain that the party issuing the writ, in any event and notwithstanding the decision of the court of law, does not propose to perform the contract. In such a case as that I have very little doubt but that the court might infer that there was a repudiation which might be accepted. But in ordinary circumstances it appears to me that you cannot draw the inference from the issue of a writ asking the court to determine disputes that the parties themselves do not intend to perform the contract. This form of action is, I think, one of the most valuable contributions that the courts have made to the commercial life of this country. It has been developed very much in recent times, partly, no doubt, because the difficulties arise more acutely in modern times, when parties in commerce are given to binding themselves over long periods of time on stringent terms in contracts. No doubt questions of great difficulty arise between commercial men, and there are great uncertainties whether a contract between them will be performed or whether it will put them in the very gravest difficulty unless the dispute can be determined by the courts. The procedure is now open to them by which they can come to a court and in a very short time have those disputes resolved. That they can do without exposing themselves to the risk of having to take a definite course in repudiating a contract, which, if it is wrong, may involve them in a very large sum of money. It would be a very serious disadvantage, to my mind, if it were thought that a writ issued in such circumstances could expose the party having recourse to such a writ to an action for damages upon the footing that he had broken his contract. I think if such a course is taken the court ought to be very slow indeed to assume that there is any intention on the part of the party who comes to the court to break his contract however the court may decide. That is my view of the present case. I think that the letter of Jan. 27, 1919, cannot be read by itself. Even if it did amount to a repudiation of the contracts, my mind goes entirely with the judgment delivered by the learned judge in the court below. I should myself have come to the conclusion that after the issue of the writ the repudiation, if there was one, no longer continued, and that the intention of the parties must be judged by what they have expressed in their reference to the court. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Deacon & Co.*; *William A. Crump & Son.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

NORRIS *v.* NORRIS AND SMITH

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), January 22, 28, 1918]

[Reported [1918] P. 129; 87 L.J.P. 119; 118 L.T. 507; 34 T.L.R. 224; 62 Sol. Jo. 585]

Divorce—Costs—Co-respondent—No knowledge that respondent wife was married when adultery first committed—Subsequent adultery after knowledge—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict., c.* 85), *s.* 34.

The divorce court may condemn in costs a co-respondent found guilty of adultery with the respondent although at the time when he first committed adultery with her he did not know that she was a married woman, he having continued to commit adultery with her after he acquired that knowledge.

Notes. The Matrimonial Causes Act, 1857, has been repealed: a general jurisdiction as to costs is now conferred on, inter alia, the Divorce Division by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1).

Considered: *Sweeting* v. *Sweeting and Rowlands* (1919), 36 T.L.R. 15; *Butterworth* v. *Butterworth and Englefield*, *Collins* v. *Collins and Harrison*, *Barratt* v. *Barratt and Fox*, *Howell* v. *Howell and Walker*, *Adams* v. *Adams and Ward*, *Ellworthy* v. *Ellworthy and Ledgard*, [1920] P. 126. Followed: *Burne* v. *Burne and Helvoet*, [1920] P. 17.

As to payment of costs by co-respondent, see 12 HALSBURY'S LAWS (3rd Edn.) 402–405; and for cases see 27 DIGEST (Repl.) 572–577. For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 486.

Case referred to:

(1) *Bilby* v. *Bilby and Harrop*, [1902] P. 8; 71 L.J.P. 31; 86 L.T. 123; 27 Digest (Repl.) 576, *5333*.

Petition by a husband for dissolution of marriage on the ground of the respondent wife's adultery with the co-respondent.

The respondent filed no answer. The co-respondent filed an answer containing a general denial. He, however, gave evidence at the trial admitting the adultery, but stating that at its commencement he did not know the respondent was a married woman. Adultery was established by independent evidence to the satisfaction of the court as having occurred at a later date when the co-respondent had knowledge.

Skinner for the petitioner.

Bickmore for the co-respondent.

Cur. adv. vult.

Jan. 28, 1918. **HILL, J.**—I pronounce a decree nisi in this case. In the matter of costs s. 34 of the Matrimonial Causes Act, 1857 [now replaced by the Supreme Court of Judicature (Consolidation) Act, s. 50 (1)] gives the court an unfettered discretion. There are certain established rules of practice which guide the court in the exercise of this discretion. Counsel for the co-respondent has argued that a co-respondent is never condemned in costs if at the time when the adultery commenced he was ignorant that the respondent was a married woman, even though with this knowledge he subsequently continues to commit adultery with her. I do not think that this sweeping proposition correctly states the practice of the court. SIR FRANCIS JEUNE, P., in *Bilby* v. *Bilby and Harrop* (1) correctly states the practice that a co-respondent who has found out too late to repair the wrong that the woman with whom he is living is a married woman, ought not because he does not thereupon desert her necessarily to be condemned in costs. The learned President was, however, there dealing with a case where the wife had begun an adulterous connection with the co-respondent some years after the time when she had left her husband. In the circumstances of the above case I can recognise the

fairness of the principle laid down by SIR FRANCIS JEUNE, and I agree with him. I do not, however, think that the practice of this court extends any further. In other cases the conduct of the co-respondent must be judged on the particular facts, and if a co-respondent commits acts of adultery with knowledge the court is not prevented from condemning him in costs merely because he has also committed adultery without knowledge. If this were not so a co-respondent against whom adultery with knowledge is proved might always escape by a confession of earlier adultery without knowledge.

In the present case the co-respondent did not know in 1914, but he knew in 1915 and in 1916. The decree nisi will be with costs against the co-respondent.

Solicitors: *D. Figur & Co.*; *Peet & Manduell.*

[*Reported by* GEOFFREY C. TYNDALE, ESQ., *Barrister-at-Law.*]

MOUL *v.* CROYDON CORPORATION AND ANOTHER

[KING'S BENCH DIVISION (Avory and Lush, JJ.), May 31, 1918]

[Reported 88 L.J.K.B. 505; 119 L.T. 318; 82 J.P. 283; 34 T.L.R. 473; 16 L.G.R. 595]

Highway—Non-repair—Nonfeasance—Road paved with wood blocks—Swelling as result of heavy rainfall.

A road in the district of the defendants as highway authority which had been properly paved by them with wood blocks became dangerous owing to the blocks bulging and swelling as a result of heavy rainfall. A motor omnibus, while being driven without negligence along the road, hit a portion of the wood paving which had bulged and was thereby caused to swerve into an electric standard, the plaintiff, a passenger in the omnibus, being injured. The defendants knew of the dangerous condition of the road several days before the accident. In an action by the plaintiff claiming damages for misfeasance,

Held: the lack of repair of the road arose from nonfeasance and not from misfeasance, and, therefore, the defendants were not liable.

McClelland v. *Manchester Corpn.* (1), [1912] 1 K.B. 118, explained.

Notes. As to liability of highway authority for nonfeasance and misfeasance in the repair of the highway, see 19 HALSBURY'S LAWS (3rd Edn.) 149 et seq.; and for cases see 26 DIGEST (Repl.) 418 et seq.

Case referred to:

(1) *McClelland* v. *Manchester Corpn.*, [1912] 1 K.B. 118; 81 L.J.K.B. 98; 105 L.T. 707; 76 J.P. 21; 28 T.L.R. 21; 9 L.G.R. 1209; 26 Digest (Repl.) 428, *1313.*

Appeal by the defendants, the highway authority, from a decision of the learned judge sitting at the Croydon County Court.

The particulars of negligence alleged against the defendants were as follows: It was the duty of the said defendants, as highway authority, to maintain the said main road at the place in question in a fit state for the safe user thereof by members of the public passing along the said road in vehicles. Previously to Aug. 1, 1917, the defendants had caused wood pavement to be placed on the said road. The said defendants, in breach of their said duty, constructed the said wood pavement of improper and unsuitable materials and in a negligent and unskilful manner, so that

on the said date and at the said place the said wood pavement formed an obstruction in the said road, and by reason thereof the said road was in a dangerous condition and unfit to be used by vehicles, whereby the plaintiff was injured as aforesaid.

The county court judge delivered judgment as follows: I find there was no negligence on the part of the driver of the omnibus, having regard to the character of the obstruction—the bulging of these wood blocks. It was a dull day and the time just at dusk, so that the obstruction would have been extremely difficult to see. I am satisfied that the evidence does not show there was any failure on the part of the driver of the omnibus to exercise reasonable care. I am satisfied that the immediate cause of the accident was the dangerous condition of the road. I have indicated that I am quite satisfied in this case that the accident was solely due to the fact that the road, at the point in question, and for a space extending some distance on either side, was in a very dangerous condition, and had been for some days past. The corporation have made use of material for the making of this road which, to their knowledge, is likely to behave as this wood pavement did behave prior to and about the time when this accident happened. If the weather is very wet, the borough road surveyor has told us, he knows perfectly well that the wood pavement is liable to bulge. I am quite satisfied that the bulging at this particular point had taken place some little time before. Therefore it appears to me that circumstances had arisen which imposed on the corporation the duty of taking adequate steps to deal with the dangerous condition of this road, a condition which had arisen, no doubt, from the excessive rain that there had been. I am satisfied that there was an omission on their part to fulfil the duty incumbent upon them to take adequate steps to deal with the condition of the road; that is to say, either to put it in a safe condition or to fence it off so as to protect the public who are using the road. In these circumstances it seems a case of misfeasance and not nonfeasance. There must be judgment for the plaintiff for £40.

Patrick Hastings for the highway authority.
F. O. Robinson for the plaintiff.

AVORY, J.—The plaintiff obtained in the county court a judgment against the Croydon Corporation for damages alleged to have been sustained by her in consequence of an accident that happened to an omnibus, in which she was travelling, coming into contact with a portion of the wood paving of the road which had risen or bulged, causing an obstruction to the wheel of the omnibus, which resulted in the omnibus swerving into a standard post and the plaintiff being injured.

[His Lordship read the judgment of the county court judge, and continued:] It is clear, to my mind, that the judge intended to hold that there was misfeasance on the part of the local authority in not putting the road into a safe condition or in not fencing it off so as to protect the public who were using the road. I wish to deal with that ground of his judgment in the first place, before I say anything on another ground upon which counsel for the plaintiff suggested that it might be supported. It seems to me that the ground upon which the judge gave judgment cannot be supported for this reason: What is complained of on the part of the plaintiff is, in my opinion, a case of nonfeasance on the part of the highway authority, and not a case of misfeasance. In other words, it is a case of the non-repair of a highway; and, for this purpose, I can see no distinction between a highway which has become defective in consequence of the wood pavement bulging in certain places and a highway which has become defective in consequence of the surface having worn away, or sunk away, so that it is in holes in some places. In either event it is a case in which the highway calls for repair. It seems to me to be simply a case of non-repair for which a highway authority is not liable. It was suggested that a passage in the judgment of Lush, J., in *McClelland* v. *Manchester Corpn.* (1) would support the judgment of the judge as he delivered it, namely ([1912] 1 K.B. at p. 127):

> "You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the

omission therefore it was nonfeasance. Once establish that the local authority did something to the road and the case is removed from the category of nonfeasance. If the work were imperfect and incomplete it becomes a case of misfeasance and not nonfeasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all."

I am clearly of opinion that these words were never intended to apply to such a case as the present, and that they were not intended to apply to such a case is clear from the preceding paragraph, which is in these words:

> "If a highway authority, therefore, leave a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution which, if taken, would have made the work done safe instead of dangerous."

Those words show that the subsequent paragraph was intended to apply to the facts of that particular case, which was a case of the construction by a local authority of a dangerous highway—dangerous in the manner in which it was constructed, seeing that it led without any warning or fence to a precipice down which any person might fall who was driving or walking in the dark—and the part of this judgment which, it seems to me, does apply to the present case is that small passage:

> "If a highway authority leave a road alone and it gets out of repair, there is no doubt that no action can be brought, although damage ensues."

The present case seems to be a case of a highway authority leaving a road alone, and of it getting out of repair. I can see no distinction between omitting to repair a bulging road, or an excrescence in a road, and the case of omitting to repair a hollow or a depression.

But then it is suggested that in the present case this judgment might be supported on the ground that the original construction of the road was negligent or improper—that it was improperly constructed with wood pavement, and that there was evidence that wood pavement is liable to bulge in exceptional or very heavy rain. I may quote what I thought was a very appropriate expression used by counsel for the plaintiff in argument. He said this was a case of misfeasance in the construction of the road because wood pavement, when it was laid, possessed certain potentialities of danger. In my opinion, all pavement when laid possesses certain potentialities of danger. In the present case I can find no evidence—and when I say no evidence, I mean no evidence upon which any verdict could be founded or judgment founded—that the use of wood paving in the present case was improper, so as to justify anyone in saying that the construction of this road was in its inception negligent. It may be that wood paving is liable to bulge with heavy rain; whatever material is used, there is a potentiality of danger owing to its becoming worn away, owing possibly to heavy rain displacing the foundations of the road or interfering with the even surface of it. But I cannot myself find any evidence in the present case which would justify us in holding that the local authority were guilty of neglect in the original construction of this road, and it is quite certain the learned county court judge never intended to base his judgment on any such ground. Counsel for the plaintiff was placed somewhat in a dilemma when he put this forward on being asked whether he contended that the local authority would be liable under such circumstances whenever any bulging of the wood pavement took place, quite apart from their omission to fence it or take any subsequent steps. At first—and I think wisely—he hesitated to affirm that

proposition—I think wisely because I think it could not be supported; that is to say, that in the present day a local authority, a highway authority, should be liable to an action for damages because they have laid down wood pavement which subsequently became defective either from bulging or from a depression in the road. Then if that cannot be supported counsel for the plaintiff is driven to say their liability depends upon their subsequent omission to repair it. But the moment he is driven to say that, he then comes into conflict with a long series of authorities which have held that the highway authority is not liable to an action for damages for non-repair of the highway. In my opinion the evidence in this case is that it was a case of non-repair by the local authority of a highway, and for that reason the judgment of the county court judge cannot be supported and must be reversed.

LUSH, J.—I agree. If one thing is clear in these cases it is this: That a highway authority can only be successfully sued for damages, through the highway under their control being dangerous, when it can be shown that that danger was caused by their doing work on the highway badly or improperly. If the damage were caused—I may use the words I used in *McClelland's Case* (1)—because they chose to do nothing at all to the road, they are not liable. I endeavoured to make it clear in *McClelland's Case* (1), and I hoped I had succeeded, that it may still be true to say that damage resulted through the highway authority doing work badly, although the immediate cause of the accident was their omission to take some steps which they ought to have taken. A highway authority make up a road, and, to make it safe, a certain thing requires to be done. They do not do that thing and the road is unsafe in consequence. Of course, in one sense, it is true to say that the accident happens through that omission to take the necessary steps, but in substance it happens through their not properly completing the work they have done; and in truth, in a case like that, they are guilty of misfeasance, notwithstanding it was an omission to do a certain act which was the immediate cause of the accident. That is all I meant to say, and what I thought I had said, in *McClelland* v. *Manchester Corpn.* (1). There was unquestionably here some faint evidence by Mr. Parker that the defendants had not done the work of construction as they ought to have done, but I do not think he proved that there was an imperfect construction of the road. The learned judge certainly did not accept that evidence as correct, if that is what Mr. Parker meant. It seems to me clear, looking at the whole of the evidence, that it could not have been found as a fact that this road had been imperfectly constructed at the time it was constructed with those wood slabs. The judge does not say so. If that be what the judge intended to say, it would have been irrelevant to go on and point out that years afterwards the defendants ought to have taken some precaution, because if the road were imperfectly made up at the time, any accident which was the natural consequence of the imperfect work would have been an accident for which the defendants would have been responsible. The judge does not put his judgment on that ground at all. What he does say, as I understand his judgment, is this: That if a highway authority use materials which to their knowledge will some day or other require repair, and do not repair the road when the repair becomes necessary, that omission should be called an act of misfeasance. There, with great respect, I fail to follow the judge's reasoning. Once assume this road is properly made up —and it clearly was as the judge, in my opinion, found—then there is an end of the case, unless it could be shown that the defendants afterwards interfered with the road, and through the imperfect way in which they did that subsequent work the accident occurs. The judge did not find that after the road was constructed the defendants interfered with it, and turned it from a safe to a dangerous road. He puts his judgment solely upon the ground that afterwards—and it was years afterwards—they omitted to repair it. That is only another way of saying this was nonfeasance. And it was nothing but nonfeasance, and, therefore, in my opinion, the judgment cannot be supported.

I wish to guard myself from saying anything which would suggest that if a highway authority chooses to make up or repair a road, or a section of a road, there may not arise a case in which they may be liable if they leave one spot, one part of the road which they do repair, in a dangerous condition to their knowledge. The case put during the argument as an illustration—if a highway authority chooses to maintain a road in repair, and do work on that road, a case may arise in which it may be necessary to consider whether, if deliberately leaving one hole open and confining their repair to another, of doing one-half of the road and not the other, they can shelter themselves under this doctrine that it is a case of mere nonfeasance as regards the hole they do not repair—I say I express no opinion in regard to that, because this case was not put on any such ground. I do not quite see how it could have been. I have only added that because I did not wish it to be thought that it necessarily follows that a road authority is justified in making up one-half of a road and leaving the other half in a dangerous condition.

Appeal allowed.

Solicitors: *Robert J. Clark*, Croydon; *Smith, Rundell, Dods & Bockett*, for *John M. Newnham*, Town Clerk, Croydon.

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

Re ANDERSON. HALLIGEY *v.* KIRKLEY

[Chancery Division (Sargant, J.), April 29, 1919]

[Reported [1920] 1 Ch. 175; 89 L.J.Ch. 81; 122 L.T. 261]

Will—Construction—Widow of testator to be at liberty "to use and enjoy" residence "for own personal use and occupation" and furniture therein—Residence never occupied—Sale of residence and furniture—Right of widow to income from proceeds of sale—Settled Land Act, 1882 (45 & 46 *Vict.*, *c.* 38), *s.* 2 (5).

By his will the testator provided that his widow should during life or widowhood be entitled "to use and enjoy for her own personal use and occupation" his residence and the furniture therein. The widow never lived in the house, and it was sold by the trustees. In the conveyance, to which the widow was a party, it was recited that she had signified her intention of not wishing to use the house as a residence and was willing to renounce that right.

Held: the widow was given an option, liberty or licence to occupy the house personally, and that right did not entitle her to let the house and receive the rent; before the widow could claim to be a tenant for life, or a person having the like powers, under s. 2 (5) of the Settled Land Act, 1882, she must have exercised that option by informing the trustees that she desired to occupy the house personally; and, therefore, she was not entitled to the income from the proceeds of the sale of the house or furniture.

Notes. Section 2 (5) of the Settled Land Act, 1882, has been replaced by s. 19 of the Settled Land Act, 1925 (see 23 Halsbury's Statutes (2nd Edn.) 55).

As to the extent of the right, given by will, of a life interest for the use and occupation of a house, see 34 Halsbury's Laws (2nd Edn.) 336; and for cases see 44 Digest 957.

Cases referred to:

(1) *Rabbeth* v. *Squire* (1859), 4 De G. & J. 406; 28 L.J.Ch. 565; 34 L.T.O.S. 40; 7 W.R. 657; 45 E.R. 157, L.C.; 44 Digest 957, *8105*.

(2) *May* v. *May* (1881), 44 L.T. 412; 44 Digest 958, *8108*.
(3) *Mannox* v. *Greener* (1872), L.R. 14 Eq. 456; 27 L.T. 408; 44 Digest 958, *8107*.
(4) *Re Boyer's Settled Estates*, [1916] 2 Ch. 404; 85 L.J.Ch. 787; 115 L.T. 473; 60 Sol. Jo. 680; 40 Digest (Repl.) 796, *2772*.
(5) *Re Baroness Llanover's Will*, *Herbert* v. *Freshfield*, [1902] 2 Ch. 679; 72 L.J.Ch. 72; 87 L.T. 647; 51 W.R. 89; 18 T.L.R. 752; affirmed, [1903] 2 Ch. 16; 72 L.J.Ch. 406; 88 L.T. 648; 51 W.R. 418; 19 T.L.R. 338; 47 Sol. Jo. 385, C.A.; 40 Digest (Repl.) 794, *2756*.

Adjourned Summons taken out by the plaintiffs, as trustees of C. W. Anderson's will and as trustees and executors of James Kirkley's will, for the determination of the question whether, on the construction of Kirkley's will, his widow was entitled, during her widowhood, to the whole or any and what part of the income arising from the investment of the proceeds of sale of (a) so much of the Cleadon Park estate as was included in the description of "my residences, including Cleadon Park," and (b) the motors, carriages, carriage horses, household goods, stores, and household and other effects which were in or about the residence Cleadon Park at the time of Kirkley's death, and which had been, or might from time to time be, sold.

C. W. Anderson, who died in 1906, by his will made in 1897 appointed his cousin, James Kirkley, executor and trustee thereof, and gave all his reality and residuary personalty unto and to the use of Kirkley, upon trusts for sale and conversion, payment out of the proceeds of funeral and testamentary expenses, debts and legacies, and investment of the surplus. The trustee was to hold the residuary moneys and the investments thereof upon trust to pay the income to James Kirkley during his life, and, after the death of the survivor of the testator's wife and Kirkley, the testator directed that the trust premises should be held upon such trusts and in such manner as Kirkley should by deed or will appoint, so only that every such appointment should be made in favour of some child or grandchild of Kirkley. In default of appointment, there was a trust for the child or children of Kirkley, and then followed a proviso under which he had power, notwithstanding the trusts thereinbefore contained subsequently to the trusts in his own favour for life, by deed or will to appoint the annual income, to accrue due after the decease of the survivor of himself and the testator's wife, of the trust premises or any part thereof to any wife surviving him for her life or for any estate determinable before or on her death. Anderson's wife predeceased him, and on his death Kirkley, as tenant for life, entered into possession of the estate. This comprised a mansion house and the grounds occupied therewith, containing about 9 acres, called Cleadon Park, about 138 acres of land adjoining, and the farm buildings thereon, known as Cleadon Park Farm, and also a considerable quantity of furniture and other household effects in or about the mansion house. Kirkley died on May 26, 1916, having by his will, made in 1909, appointed executors and trustees. By the same instrument, in exercise of the powers for that purpose given by Anderson's will, Kirkley directed and appointed that the trustees for the time being of the will (thereinafter called "the Anderson trustees") should from and after his death stand possessed of the trust premises subject to the power of appointment (thereinafter called "the Anderson estate") upon trust out of the annual income thereof to pay to his wife, Agnes Emily Kirkley, so long as she should remain his widow, the sum of £6,000 per annum (reducible to £500 per annum if she married again), and, subject thereto during the life of his said wife to pay and divide the balance, if any, of such income unto and amongst all his children living at his death who should attain twenty-one. Then followed a special direction to the Anderson trustees and his own trustees that during her life or widowhood his wife, Agnes Emily Kirkley, should "be at liberty to use and enjoy" all or any of his residences, including Cleadon Park, "for her own personal use and occupation," and also all the motors, carriages, carriage horses, garages, coach-houses, stables, wines, household goods, stores, and all household and other effects

in or about such residence or residences. Kirkley made a codicil to his will and by para. 3 he recommended, without imposing any legal or binding obligation on the persons concerned, that Cleadon Park should be retained as a family residence, and by cl. 7 he bequeathed his household furniture, plate, and other articles of that kind which might be in or about any house or houses he should be occupying as his residence or residences at the time of his decease upon trust that his wife should be permitted to use and enjoy the same during her widowhood, the trustees keeping an inventory thereof. Kirkley at the time of his death had no residence except Cleadon Park, which was still in his personal occupation. The farm had been let to a tenant. Kirkley left surviving him his wife Agnes Emily Kirkley and also six children, all of whom attained the age of twenty-one years. Shortly after Kirkley's death his widow ceased to occupy the mansion house and grounds known as Cleadon Park, and they remained unlet and unoccupied until they were sold. In December, 1918, the Anderson trustees sold the same house and grounds and also the farm to the corporation of South Shields for £13,814, and by an indenture dated Dec. 21, 1918, and made between the trustees of the first part, Mrs. Kirkley of the second part, and the corporation of the third part, the property sold was conveyed to the corporation. This deed recited both the wills; that Mrs. Kirkley had signified her intention of not wishing to use Cleadon Park according to the terms of the will and was willing to renounce such right and to join in the conveyance in manner thereinafter appearing; and that the vendors, in exercise of their powers as trustees, had agreed to sell the fee simple of the Cleadon Park Estate, and the purchaser had contracted to purchase the same. The deed witnessed that the vendors conveyed as trustees in exercise of their powers under Anderson's will and of all other powers, and that Mrs. Kirkley, in pursuance of her intention aforesaid, confirmed and released unto the purchasers in fee simple. The purchase money was attributed, as to about £5,788 to the house and grounds, and as to the balance of about £8,026 to the farm. After Kirkley's death the same trustees sold furniture, included in the Anderson estate, at Cleadon Park for about £700. The remaining furniture and household effects at Cleadon Park were removed and either sold by Mrs. Kirkley or stored.

Heckscher for the plaintiffs.
Alexander Grant, *K.C.*, and *R. L. Ramsbotham* for the widow.
Tebbs for the remaindermen.

SARGANT, J. [after stating the questions raised by the summons and the facts, and that upon the true construction of Kirkley's will and codicil the gift of chattels and effects did not, in his opinion, apply to such of the chattels and effects as formed part of the estate of Anderson, but that, if the gift in the codicil did include those chattels and effects, he did not think that any real difference was caused by that circumstance, continued:] What happened after Mr. Kirkley's death was this: Mrs. Kirkley shortly afterwards—the exact time is not stated, but I understand that it was within six weeks or two months—ceased to occupy Cleadon Park. I understand she went to live at Hastings, or at any rate is living there now. Cleadon Park has since then remained unlet and unoccupied. It is clear that she did not avail herself of the opportunity given to her by her husband's will of personally occupying his residence. In December, 1918—rather more than two and a half years after Mr. Kirkley's death—the trustees of Mr. Anderson's will sold the whole of the Cleadon Park estate (comprising both the mansion house and the farm) to the corporation of the county borough of South Shields. The purchase price was between £14,000 and £15,000, and of that price roughly about £6,000 represented the value of the mansion house, which the widow had the right of occupying, and about £8,000 or £8,500 represented the value of the farm. [HIS LORDSHIP then referred to the conveyance, and particularly to the recitals and witnessing part of it, and continued:] At the same time a certain amount of furniture, which formed part of what had been left by Mr. Anderson as part of the effects which the widow had the right to enjoy together with the mansion house, was sold, and the purchase

money for that, £700 or £800 or thereabouts, has been received by the trustees, but a very much more valuable part of the furniture, which I am told may be of the value of £15,000, has been retained by the trustees, and the widow has had the use and enjoyment of that down to the present time. It may be, however, that some of that will be sold in the future, and what I have to decide with regard to the furniture affects not only the insignificant portion which has been sold but also the much larger portion which remains unsold. The widow claims to be entitled (i) to the income of the £6,000 or thereabouts which represents the purchase money of the mansion house; (ii) to the income of the proceeds of sale of the furniture that has already been sold; and (iii) to the income of the proceeds of sale of any furniture that may hereafter be sold.

I have to consider the case, first of all, apart from the Settled Land Act, 1882, and, secondly, with regard to any alterations in the law alleged to be introduced as the result of that Act. As regards the law independently of the Act, it seems to me that the terms of Kirkley's will are perfectly plain, and that he has merely given to his widow, in addition to the annuity of £6,000 a year, an option, liberty or licence to occupy personally by herself any one or more of his residences, but has not given her anything beyond a personal right of occupation. Does such a gift of a personal right of occupation carry with it the right to let to another person and to receive the profits of the letting or the right in case of a sale to receive the income of the proceeds of sale as an equivalent or substitution for the right of personal occupation? In my judgment, neither on principle nor on authority can such a claim be sustained. The very clear words of the will, looking at the question apart from authority, prescribe that the lady is to have the right of personal use and occupation; the words are "shall be at liberty to use and enjoy all or any of my residences for her own personal use and occupation." It appears to me quite clear that those words, apart from the decisions, merely give her a personal right to live in the house—to reside in it—if she thinks fit. Whether, if she were living in the house generally, permanently, that would preclude her from letting it for short periods furnished is a question which has not arisen and which I do not consider at all.

Is there anything in the authorities cited to displace that view? In my judgment, there is not. The authorities rather support the conclusion at which I have arrived. In *Rabbeth* v. *Squire* (1) Lord Chelmsford, L.C., decided that a gift by will of the joint use and occupation of lands did not require personal use and occupation but permitted the donees to let the lands. But he pointed out that that was the effect of the gift of the use and occupation, and especially that there was nothing in the terms of the other parts of the will that would reduce that general right to a right of personal use and occupation. It seems to me to be quite clear that if, either in consequence of the context or by virtue of the terms of the original gift, what had passed to the claimant had been the right of personal use and occupation, the decision of Lord Chelmsford would have been the other way. In the same way, in *May* v. *May* (2) Fry, J., decided that a power given to a testator's wife to reside in the testator's house did not include a right to her to let the house and receive the profits. On the other hand, in *Mannox* v. *Greener* (3) a "free occupancy" of a house was held to allow letting; but that does not seem to be so analogous to the present case as the others which I have dealt with. The reasoning in *Rabbeth* v. *Squire* (1) and the decision in *May* v. *May* (2) really render it disputable that a gift of a right personally to use and reside in a house cannot carry with it the right to live elsewhere and to let the house and receive the rents.

Then comes the question whether any difference has been made by the Settled Lands Acts, 1882–1890. It appears to me, that, before the widow could claim to be a tenant for life, or a person who had the powers of a tenant for life, with reference to this residence, it was necessary for her to exercise the option or right which was given to her, of residence in the house. If she had told the trustees that she had desired to reside in it and had proceeded to reside in it, I think she

would probably from that time forward have been in the position of a person who was tenant for life, or a person having the powers of a tenant for life—probably a tenant for life. The case would, in my opinion, have then been within *Re Boyer's Settled Estates* (4) and also within the much more important decision in *Re Baroness Llanover's Will* (5), in which later case it appears on the facts that the lady had ever since the death of the testatrix been residing in the house in question. But in the present case everything that the widow has done has been in the direction of declining to avail herself of the privilege or option given to her by the will. As soon as was reasonably possible she ceased to reside in the house. She has left it empty and unoccupied ever since; she has resided elsewhere; and when the sale came to be negotiated she concurred in a deed which expressly stated that she had signified her intention of not wishing to use Cleadon Park as a residence according to the terms of Mr. Kirkley's will, and that she was willing to renounce such right. It appears to me under those circumstances that she is in the same position with regard to the house as if the testator had never given her this option or right of personal residence. She has not chosen to avail herself of it —no doubt for very good reasons. It may well be that residence in a house of that character may carry with it pecuniary obligations rendering it undesirable that she should avail herself of the privilege of occupation, and turning that privilege if exercised into what might be serious detriment to her. In my opinion, therefore, the foundation on which any argument under the Settled Land Acts could be based does not exist, and I can find nothing, either in the will or in the Settled Land Acts, which has the effect of giving to her, in substitution for the privilege conferred on her by the will, the right to receive the income of the proceeds of sale of the house.

The question as to the furniture which has already been sold appears to me to stand in the same position. Here again the widow was given the right of personal enjoyment, and it was probably intended that she should use the furniture in conjunction with the house. Her rights as regards the furniture are rights of personal enjoyment only, and on the furniture being sold it appears to me that her rights vanish, and that she does not get a corresponding right to enjoy the income of the proceeds of sale. It may be that, with regard to the much more valuable furniture which has been retained unsold, and which the widow is enjoying at present, she is in a position, in case she does not wish to keep the whole of that furniture, to make some arrangement with the remaindermen—which will have to be sanctioned by the court so far as it relates to the interests of those who are under disability—under which, if the furniture is sold, the income of the proceeds shall be hers during the rest of her life. But that is an entirely different matter with which I am not now dealing.

Solicitors: *Halligey & Co.*; *R. E. Hill.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

MANBRE SACCHARINE CO., LTD. *v.* CORN PRODUCTS CO., LTD.

[KING'S BENCH DIVISION (McCardie, J.), November 7, 8, 15, 1918]

[Reported [1919] 1 K.B. 198; 88 L.J.K.B. 402; 120 L.T. 113; 35 T.L.R. 94; 24 Com. Cas. 89]

Sale of Goods—Contract—C.i.f. contract—Payment against shipping documents—Loss of goods—Tender of documents by seller with knowledge of loss—Right of buyer to reject documents.

A seller under a c.i.f. contract who has shipped the appropriate goods in the appropriate manner under a proper contract of carriage and has obtained the proper documents for tender to the buyer can effectively tender the documents even though at the time of tender he knows that the goods have already been lost, since under a c.i.f. contract the buyer is covered against the risk of loss by the policy of insurance delivered to him by the seller for which document he has bargained.

Re Olympia Oil and Cake Co., Ltd. and Produce Brokers Co., Ltd. (1), [1915] 1 K.B. 233, explained.

Sale of Goods—Contract—C.i.f. contract—Policy of insurance—Tender—Assurance that policy has been issued and is in seller's possession—Right of buyer to policy covering only goods mentioned in bills of lading and invoices.

Under a c.i.f. contract the seller is bound to tender to the buyer a proper policy of insurance, together with the other documents required under such a contract, and this obligation is not fulfilled by the mere assurance that a policy has been issued and is in the possession of the seller. Moreover, a buyer under a c.i.f. contract is entitled to demand from the seller a policy of insurance which covers, and covers only, the goods mentioned in the bills of lading and invoices.

Hickox v. *Adams* (2) (1876), 34 L.T. 404, applied.

Notes. Applied: *Diamond Alkali Export Corpn. v. Fl. Bourgeois*, [1921] All E.R.Rep. 283. Referred to: *Re Moore and Landauer*, [1921] All E.R.Rep. 466; *Ballantine* v. *Cramp and Bosman*, [1921] All E.R.Rep. 579; *The Grabbiano*, [1940] P. 166; *May and Hassell, Ltd.* v. *Exportles of Moscow* (1940), 45 Com. Cas. 128.

As to tender of documents under a c.i.f. contract, see 34 HALSBURY'S LAWS (3rd Edn.) 171; and as to the terms of the policy of insurance tendered, see ibid., 169. For cases on tender of documents under c.i.f. contracts, see 39 DIGEST 576 et seq.

Cases referred to:

(1) *Re Olympia Oil and Cake Co., Ltd. and Produce Brokers Co., Ltd.*, [1915] 1 K.B. 233; 84 L.J.K.B. 281; sub nom. *Olympia Oil and Cake Co., Ltd.* v. *Produce Brokers Co., Ltd.*, 111 L.T. 1107; 12 Asp.M.L.C. 570; 19 Com. Cas. 359, D.C.; 39 Digest 492, *1091*.

(2) *Hickox* v. *Adams* (1876), 34 L.T. 404; 3 Asp.M.L.C. 142, C.A.; 39 Digest 580, *1832*.

(3) *Re Knight and Tabernacle Permanent Benefit Building Society*, [1892] 2 Q.B. 613; 62 L.J.Q.B. 33; 67 L.T. 403; 57 J.P. 229; 41 W.R. 35; 8 T.L.R. 783; 4 R. 67, C.A.; 2 Digest (Repl.) 582, *1136*.

(4) *Produce Brokers Co., Ltd.* v. *Olympia Oil and Cake Co., Ltd.*, [1917] 1 K.B. 320; sub nom. *Olympia Oil and Cake Co.* v. *Produce Brokers Co.*, 86 L.J.K.B. 421; 116 L.T. 1; 33 T.L.R. 95, C.A.; 39 Digest 491, *1088*.

(5) *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp.M.L.C. 389, H.L.; 39 Digest 560, *1677*.

(6) *Biddell Bros.* v. *E. Clemens Horst Co.*, [1911] 1 K.B. 214; 103 L.T. 661; 27 T.L.R. 47; 16 Com. Cas. 8; reversed, [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; 27 T.L.R. 331; 55 Sol. Jo. 383; 12 Asp.M.L.C. 1, C.A.; reversed sub nom. *E. Clemens Horst Co.* v. *Biddell Bros.*, [1912] A.C. 18;

81 L.J.K.B. 42; 105 L.T. 563; 28 T.L.R. 42; 56 Sol. Jo. 50; 12 Asp.M.L.C. 80; 17 Com. Cas. 55, H.L.; 39 Digest 575, *1801*.

(7) *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*, *Theodor Schneider & Co.* v. *Burgett and Newsam*, [1915] 2 K.B. 379; 84 L.J.K.B. 1673; 113 L.T. 185; 31 T.L.R. 351; affirmed, [1916] 1 K.B. 495; 85 L.J.K.B. 665; 114 L.T. 152; 32 T.L.R. 186; 60 Sol. Jo. 156; 13 Asp.M.L.C. 235; 21 Com. Cas. 174, C.A.; 12 Digest (Repl.) 446, *3376*.

(8) *C. Groom, Ltd.* v. *Barber*, [1915] 1 K.B. 316; 84 L.J.K.B. 318; 112 L.T. 301; 31 T.L.R. 66; 59 Sol. Jo. 129; 12 Asp.M.L.C. 594; 20 Com. Cas. 71; 39 Digest 576, *1802*.

(9) *Re Weis & Co., Ltd. and Credit Colonial et Commercial Antwerp*, [1916] 1 K.B. 346; sub nom. *C. Weiss & Co., Ltd.* v. *Credit Colonial et Commercial, Antwerp*, 85 L.J.K.B. 533; 114 L.T. 168; 13 Asp.M.L.C. 242; 21 Com. Cas. 186; 39 Digest 547, *1571*.

(10) *Sanders Bros.* v. *Maclean & Co.* (1883), 11 Q.B.D. 327; 52 L.J.Q.B. 481; 49 L.T. 462; 31 W.R. 698; 5 Asp.M.L.C. 160, C.A.; 39 Digest 595, *1936*.

(11) *Furness, Withy & Co.* v. *Rederiakt Banco*, [1917] 2 K.B. 873; 87 L.J.K.B. 11; 117 L.T. 313; 62 Sol. Jo. 25; 14 Asp.M.L.C. 137; 41 Digest 413, *2571*.

(12) *Orient Co., Ltd.* v. *Brekke and Howlid*, [1913] 1 K.B. 531; 82 L.J.K.B. 427; 108 L.T. 507; 18 Com. Cas. 101, D.C.; 39 Digest 580, *1833*.

(13) *Ralli* v. *Universal Marine Insurance Co.* (1862), 4 De G.F. & J. 1; 31 L.J.Ch. 313; 6 L.T. 34; 8 Jur.N.S. 495; 10 W.R. 278; 1 Mar.L.C. 194; 45 E.R. 1082, L.JJ.; 29 Digest 91, *492*.

(14) *Bowes* v. *Shand* (1877), 2 App. Cas. 455; 46 L.J.Q.B. 561; 36 L.T. 857; 25 W.R. 730; 5 Asp.M.L.C. 461, H.L.; 39 Digest 425, *564*.

(15) *Jackson* v. *Rotax Motor and Cycle Co.*, [1910] 2 K.B. 937; 80 L.J.K.B. 38; 103 L.T. 411, C.A.; 39 Digest 451, *787*.

Also referred to in argument:

Landauer v. *Asser*, [1905] 2 K.B. 184; 74 L.J.K.B. 659; 93 L.T. 20; 53 W.R. 534; 21 T.L.R. 429; 10 Com. Cas. 265, D.C.; 29 Digest 91, *493*.

Tamvaco v. *Lucas* (1862), 3 B. & S. 89; 3 F. & F. 110; 31 L.J.Q.B. 296; 6 L.T. 697; 10 W.R. 733; 1 Mar.L.C. 231; 122 E.R. 34, Ex. Ch.; 39 Digest 577, *1808*.

Yangtze Insurance Co. v. *Lukmanjec*, [1918] A.C. 585; 87 L.J.P.C. 111; 118 L.T. 736; 34 T.L.R 320; 14 Asp.M.L.C. 296, P.C.; 29 Digest 88, *463*.

Action in Commercial List tried by McCardie, J.

The plaintiffs claimed damages for breach of contract to deliver goods. The defendants had entered into two c.i.f. contracts for the sale and delivery of a quantity of American pearl starch and corn syrup. The price included war risk insurance, and payment was to be net cash against documents upon presentation. Deliveries were made of part of the goods under the contracts, but the balance was sunk by a German submarine. The defendants duly delivered to the plaintiffs the shipping documents in respect of the goods which were lost; but the plaintiffs, on learning that the vessel on which the goods had been shipped had been sunk by a German submarine, rejected the documents. The defendants were aware of the loss of the goods before tendering the documents to the plaintiffs.

No policy of insurance was included in the documents tendered to the plaintiffs, but the defendants had insured a large consignment of goods, which included the goods sold to the plaintiffs; and they wrote a letter to the plaintiffs, informing them that a policy had been taken out covering the whole consignment, and that the plaintiffs would be held covered by that policy. The defendants contended that in view of previous dealings between the parties such a letter was sufficient.

The facts are fully stated in the judgment.

D. M. Hogg, K.C., and *Jowitt* for the plaintiffs.

MacKinnon, K.C., *G. A. Scott*, and *Stuart Bevan* for the defendants.

Cur. adv. vult.

Nov. 15, 1918. **McCARDIE, J.,** read the following judgment.—This action is brought to recover damages for the breach of two c.i.f. contracts. The first contract is dated Oct. 16, 1916. The material words are these:

"We have this day sold you the following goods: 4,000 280 lb. bags American pearl starch, price 14s. 6d. per cwt., c.i.f. London, including war risk insurance. Shipment Dec.-Jan., 1916–17 (sellers' option). Terms net cash against documents upon presentation."

The second contract is dated Nov. 13, 1916. The material words are these:

"We have this day sold you the following goods: 900 barrels Globe 3a crystal corn syrup, price 20s. 6d. per cwt., c.i.f. London, including war risk insurance. Shipment Dec.-Feb., 1916–17 (sellers' option). Terms net cash against documents upon presentation."

On Feb. 17, 1917, the plaintiffs wrote to the defendants asking for deliveries of starch and syrup under the contracts. On Feb. 20 the defendants replied that they had no tidings of any goods on the way for the plaintiffs. On Mar. 14, 1917, however, the defendants wrote the following letter to the plaintiffs:

"Dear Sirs,—Five hundred and forty barrels Globe 3a corn syrup, 560 220 lb. bags American pearl starch, 180 140 lb. bags ditto. We hereby hold you covered by insurance for the amount of £4,322 in accordance with the terms of policy of insurance in our possession, re shipment ex steamship *Algonquin*.—Yours, &c., Corn Products Co., Ltd."

Enclosed in the letter were certain bills of lading for starch and syrup shipped on the *Algonquin*. The letter also contained two invoices. The first (so far as material) was as follows:

"Mar. 14, 1917: 560 220 lb. bags American pearl starch, 186 140 lb. ditto, 1,332 cwt. 2 qrs. at 14s. 6d., £966 1s. 3d. net cash against documents upon presentation, c.i.f. London, steamship *Algonquin*."

The second (so far as material) was as follows:

"Mar. 14, 1917: 540 barrels crystal corn syrup, cwt. 3,273.0.20 at 20s. 6d., £3,355 0s. 2d. Net cash against documents upon presentation, c.i.f. London, steamship *Algonquin*."

The total of the two invoices was substantially the sum of £4,322 mentioned in the above letter of Mar. 14, 1917. Upon receiving the above letter and documents the plaintiffs at once replied to the effect that they could not accept them as a delivery against the contract for the following reasons: (i) That the *Algonquin* was sunk by either a submarine or mine on Mar. 12, 1917. (ii) That the defendants were aware of such fact before they wrote their letter on Mar. 14. In answer to the letter the defendants stated (in substance) that the reasons given by the plaintiffs for refusing the documents were inadequate in law. The defendants made no further tender. In the early part of February, 1917, the defendants had shipped on the steamship *Algonquin*, then at New York, a large quantity of goods, including the goods mentioned in the two invoices sent to the plaintiffs on Mar. 14. The plaintiffs, I may mention, abandon (for reasons not material to state) any point as to the starch having been shipped at the beginning of February, 1917, instead of the period Dec.-Jan., 1916–17. Upon the whole of the goods so shipped the plaintiffs effected several policies of insurance in London with various insurance companies. Each policy was free of particular average. The value at which the pearl starch was insured was about 35s. per cwt., as compared with 14s. 6d. per cwt., the contract price to the plaintiffs. This figure of 35s. was approximately the market value of the starch at the date of the insurance. The value at which the syrup was insured was about 40s. per cwt. as compared with 20s. 6d. per cwt., the contract price to the plaintiffs. The figure of 40s. was approximately the market value of the syrup at the date of the insurance. The market price of starch and syrup

steadily rose from the end of 1916, and in the middle of March, 1917, the figures respectively were 40s. 9d. and 42s. The *Algonquin* sailed from New York on Feb. 15. She was sunk on Mar. 12. The defendants were aware of the fact prior to Mar. 14.

The first question arising can be briefly stated as follows: Can a vendor, under an ordinary c.i.f. contract, effectively tender appropriate documents to the buyer in respect of goods shipped in a vessel which at the time of tender the vendor knows to have been totally lost? In opening the case, counsel for the plaintiffs submitted that the answer to this question was No, and he relied upon *Re Olympia Oil and Cake Co., Ltd. and Produce Brokers Co., Ltd.* (1). If that case so decides, and if it be still a binding authority, I should feel bound to follow it, inasmuch as the judgments were given by three learned judges sitting as a Divisional Court after full argument and consideration. It has undoubtedly been the view of many lawyers and of many commercial men that the *Olympia Case* (1) was a decision to the effect submitted by counsel for the plaintiffs. It has been assumed that the contract there in question was in fact a c.i.f. contract, and some colour is perhaps given to the assumption by the words of one of the members of the court appearing in [1915] 1 K.B. at p. 239. But in the course of his argument before me, counsel for the defendants has produced a print of the actual contract discussed before the Divisional Court in the *Olympia Case* (1), and it is now clear beyond all doubt that the bargain there in question was not a c.i.f. contract at all. On the contrary it was possessed of certain characteristics inconsistent with and opposite to a c.i.f. bargain. The terms of the agreement were of a special nature. At the close of the case before me counsel for the plaintiffs, expressly and frankly conceded that the document in the *Olympia Case* (1) was not a c.i.f. contract, and he stated that he would not further rely on that decision as possessing any relevance to the point before me. In view of the fullness with which that decision was discussed in argument, it is perhaps desirable to add that the *Olympia Case* (1) cannot now, I think, be treated as a binding decision even upon the actual terms of the contract there considered. No direct appeal was possible from the judgments I have referred to, inasmuch as the Special Case then before the court was a consultative one only under s. 19 of the Arbitration Act, 1889: see *Re Knight and Tabernacle Permanent Benefit Building Society* (3). But the subsequent history of the dispute was remarkable. It is narrated by Scrutton, L.J., in *Produce Brokers Co., Ltd.* v. *Olympia Oil and Cake Co., Ltd.* (4). From the observations of Scrutton, L.J., ([1917] 1 K.B. at p. 331), which were concurred in by Lord Cozens-Hardy, M.R., and Warrington, L.J., I deem it reasonably clear that in the view of the Court of Appeal the opinion of the Divisional Court in *Re Olympia Oil and Cake Co., Ltd. and Produce Brokers Co., Ltd.* (1) was incorrect. The matter before me must therefore be considered independently of that case.

The nature of a c.i.f. contract has been described by Blackburn, J., in *Ireland* v. *Livingston* (5) ([1892] L.R. 5 H.L. at pp. 406–7), by Hamilton, J., in *Biddell Bros.* v. *E. Clemens Horst Co.* (6) ([1911] 1 K.B. at p. 220) and by Kennedy, L.J., in his dissenting judgment in the Court of Appeal in the same case (ibid. at p. 955). The judgment of Kennedy, L.J., was approved by the House of Lords. I conceive that the essential feature of a c.i.f. contract as compared with an ordinary contract for the sale of goods rests in the fact that performance of the bargain is to be fulfilled by delivery of documents and not by the actual physical delivery of goods by the vendor. All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods. The position and rights of the parties are stated with great clearness in Scrutton and Mackinnon on Charterparties (8th Edn.), p. 167, in the notes to art. 59.

In *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (7) Scrutton, J., described a c.i.f. contract as being a sale of documents relating to goods and not a sale of goods. But when the Court of Appeal considered that case ([1916] 1 K.B. at pp. 510, 514) Bankes and Warrington, L.JJ., commented on the language of

SCRUTTON, J., and indicated their view that a c.i.f. contract is a contract for the sale of goods to be performed by delivery of documents. But I respectfully venture to think that the difference is one of phrase only. For in reality, as I have said, the obligation of the vendor is to deliver documents rather than goods—to transfer symbols rather than the physical property represented thereby. If the vendor fulfils his contract by shipping the appropriate goods in the appropriate manner under a proper contract of carriage, and if he also obtains the proper documents for tender to the purchaser, I am unable to see how the rights or duties of either party are affected by the loss of ship or goods, or by knowledge of such loss by the vendor prior to actual tender of the documents. If the ship be lost prior to tender, but without the knowledge of the seller, it was, I assume, always clear that he could make an effective proffer of the documents to the buyers. In my opinion, it is also clear that he can make an effective tender even though he possessed at the time of tender actual knowledge of the loss of the ship or goods. For the purchaser in case of loss will get the document he bargained for, and if the policy be that required by the contract and if the loss be covered thereby, he will secure the insurance moneys. The contingency of loss is within and not outside the contemplation of the parties to a c.i.f. contract. The views I have expressed are, I feel, in full accord with the observations of ATKIN, J., in *C. Groom, Ltd.* v. *Barber* (8) as to the requirements of a c.i.f. contract, and with the judgment of BAILHACHE, J., in *Re Weis & Co., Ltd. and Credit Colonial et Commercial Antwerp* (9). I therefore hold that the plaintiffs were not entitled to reject the tender of documents in the present case, upon the ground that the *Algonquin* had, to the knowledge of the defendants, sank prior to the tender of documents. This view will simplify the performance of c.i.f. contracts and prevent delay either through doubts as to the loss of ship or goods or through difficult questions with regard to the knowledge or suspicion of a vendor as to the actual occurrence of loss.

In view of my decision on the first point, it becomes necessary to consider further contentions of counsel for the plaintiffs. It is clear, of course, that the plaintiffs are not by their rejection of the tender on an insufficient ground precluded from supporting the rejection on other and valid grounds: see BRETT, M.R., in *Sanders Bros.* v. *Maclean & Co.* (10); and see BAILHACHE, J., in *Furness, Withy & Co.* v. *Rederiakt Banco* (11).

The second ground upon which counsel supported the rejection by the plaintiffs of the defendants' tender was that no policy of insurance was amongst the proffered documents. In my opinion, this point is clearly valid. Under an ordinary c.i.f. contract the vendor is obviously bound to tender a proper policy of insurance together with the other documents required. This obligation is clearly indicated by the various judgments I have already referred to when dealing with the nature of a c.i.f. contract. The policy must be tendered even if the goods have safely arrived at the time of tender: see *Orient Co., Ltd.* v. *Brekke and Howlid* (12), per LUSH and ROWLATT, JJ. In the present case the defendants tendered no policy of insurance at all. They merely made the following statement in their letter of Mar. 14, 1917.

> "We hereby hold you covered by insurance for the amount of £4,322 in accordance with the terms of policy of insurance in our possession re shipment ex steamship *Algonquin*."

This, as counsel for the plaintiffs tersely said, was the mere assurance that a policy had been issued and not the policy of insurance itself. It was suggested on behalf of the defendants that the letter amounted either to an equitable assignment of the insurance moneys to the extent of £4,322 or to a declaration of trust to such amount in respect of those invoices. Even if this suggestion be well founded there is a wide difference between an actual policy of assurance transferable to the plaintiffs as contemplated by s. 50 (3) of the Marine Insurance Act, 1906, and such a letter as that of the defendants here. The plaintiffs, I hold, were clearly entitled to a policy and not to mere assertions by the defendants that a policy existed and

that the defendants would hold the plaintiffs covered. Even if the defendants had tendered the policies actually held by them I should still have held the tender bad. For they were policies which covered a quantity of goods outside those mentioned in the bills of lading and invoices sent to the plaintiffs. In my opinion, a purchaser under a c.i.f. contract is entitled to demand as a matter of law a policy of insurance which covers and covers only the goods mentioned in the bills of lading and invoices. This, I think, was settled by the decision of the Court of Appeal, consisting of Lord Cairns, Lord Coleridge, C.J., and Mellish, L.J., in *Hickox* v. *Adams* (2). Unless the purchaser gets a policy limited to his own interests he would become one only of those who are interested in the insurance, and he is entitled, in my view, to refuse to occupy a position which may give rise to obvious complications: see per Turner, L.J., in *Ralli* v. *Universal Marine Insurance Co.* (13) (6 L.T. at p. 37).

I should have dealt with the above points in few words only but for the fact that counsel for the defendants boldly and vigorously argued that a vendor's duty under a c.i.f. contract, whatever it may have been in former times, had been modified by recent practice amongst insurance men. It may be that the requirements of a c.i.f. contract can be altered by generally established custom. For inasmuch as the meaning of such a contract was created by custom, it may likewise, I presume, be altered by custom. But the evidence of a modifying custom must be clear indeed ere the well-known incidents of such a bargain as a c.i.f. contract can be changed. Here the defendants naturally abandoned any attempt to prove a general custom which could lessen their primâ facie obligation to the plaintiffs. It was then suggested, however, that a usage or practice between the parties themselves had cast upon the plaintiffs the obligation to accept the letter of Mar. 14, 1917, in lieu of an actual and appropriate policy of assurance. In my view such contention cannot be sustained. It is true that in many prior c.i.f. transactions between the parties the plaintiffs had abstained from asking for an actual policy. The absence of objection was based on two reasons: (i) On the fact that in every such case the vessel had arrived before documents were tendered by the defendants; and (ii) on the further fact that the position and financial standing of the defendants was such as to render the plaintiffs undesirous of insisting on their legal rights. But the letter sent by the defendants in their previous transaction was in a wholly different form to the letter in the present case. It was as follows:

> "Dear Sirs (here are set out particulars of the goods, &c.),—We hereby hold you covered by insurance for the amount of £ in accordance with the terms of the Providence Washington Insurance Co.'s certificate of insurance in our possession re shipment ex steamship .—Yours faithfully, Corn Products Co., Ltd."

The defendants therefore entirely fail to prove any usage between the parties which could modify their obligation under the c.i.f. contracts here in question. I need not dwell upon the incidental fact that the policies here taken out by the defendants were all f.p.a. The possible consequences of this are obvious.

The above observations suffice to dispose of the case. But two other points were argued before me. Counsel for the plaintiffs submitted that the tender in respect of the starch was in any event bad inasmuch as the contract was for the sale of starch in 280 lb. bags, whereas the starch shipped by the defendants was, as appears from the invoice, partly in 220 lb. bags and partly in 140 lb. bags. Counsel for the defendants argued that the words "280 lb. bags" were not a material part of the bargain. But, in my opinion, it is clear that such words were an essential part of the contract requirements. They constitute a portion of the description of the goods. The size of bags may be important in view of sub-contracts or otherwise. A man may prefer to receive starch either in small or large or medium bags. If the size of the bags was immaterial, I fail to see why it should have been so clearly specified in the contract. A vendor must supply goods in accordance with the contract description and he is not entitled to say that another description of

goods will suffice for the purposes of the purchaser: see s. 13 of the Sale of Goods Act, 1893; *Bowes* v. *Shand* (14), per LORD BLACKBURN (2 App. Cas. at pp. 480, 481); and *Jackson* v. *Rotax Motor and Cycle Co.* (15). The tender by the defendants of starch in bags other than 280 lb. was a failure to comply with their contract. The final point arose upon the fact that the defendants in their letter of Mar. 14, 1917, stated that they held the plaintiffs covered to the extent of £4,322—i.e., the invoice amount only of the goods comprised in the bills of lading sent to the plaintiffs. This raised a question as to the extent of a vendor's obligation to insure goods under an ordinary c.i.f. contract. At what figure is he bound to insure? As the matter is one of general and great practical importance I think it better that it should be decided in a case where it calls for direct determination. The plaintiffs succeed for the reasons I have previously indicated and judgment will therefore be entered in their favour for the sum of £5,262 with costs.

Judgment for plaintiffs.

Solicitors: *Drake, Son & Parton*; *Neve, Beck & Kirby.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

WILLIAM ALEXANDER & SONS *v.* AKTIESELSKABET DAMPSKIBET HANSA AND OTHERS

[HOUSE OF LORDS (Viscount Finlay, Viscount Cave, Lord Dunedin, Lord Shaw and Lord Wrenbury), July 7, 8, 29, 1919]

[Reported [1920] A.C. 88; 88 L.J.P.C. 182; 122 L.T. 1; 35 T.L.R. 709; 63 Sol. Jo. 788; 14 Asp.M.L.C. 493; 25 Com. Cas. 13]

Shipping—Carriage by sea—Cargo—Discharge—Time for discharging—100 standards of timber a day—"Provided steamer can discharge at this rate"—Delay owing to shortage of labour.

A charterparty provided that the charterers were to unload the cargo of timber at the rate of 100 standards per day, "always provided steamer can . . . discharge at this rate." Owing to the shortage of labour at the port of discharge the ship was detained beyond the number of lay days. In an action by the shipowners for demurrage,

Held: the general rule established by the authorities was that, if the charterer had agreed to load or unload within a fixed period of time, he was answerable for the non-performance of that engagement, whatever the nature of the impediment resulting in that non-performance unless it was covered by exceptions in the charterparty, or arose through the fault of the shipowner or those for whom he was responsible; to avoid the application of the general rule the language of the exceptions must be absolutely clear; in the present case (LORD WRENBURY dissenting) the proviso in the charter must be read as referring to a defect peculiar to the ship as a ship, e.g., inadequacy of her equipment and mechanical facilities and appliances for unloading cargo, and not to any such external or adventitious circumstance as a shortage of the labour needed to discharge the cargo; and, therefore, the shipowners were entitled to recover.

Notes. Considered: *Cantiere Navale Triestina* v. *Russian Soviet Naphtha, Export Agency*, [1925] All E.R.Rep. 530; *United States Shipping Board* v. *Strick*, [1926] A.C. 545. Applied: *Leeds Shipping Co.* v. *Duncan Fox & Co.* (1932), 37 Com. Cas. 213; *Steamship Induna Co., Ltd.* v. *British Phosphate Comrs., The Loch*

Dee, [1949] 1 All E.R. 522. Referred to: *Ambatielos* v. *Anton Jurgens Margarine Works* (1922), 38 T.L.R. 294; *United States Shipping Board* v. *Durrell*, [1923] 2 K.B. 739; *Re Ropner Shipping Co. and Cleeves' Western Valleys Anthracite Collieries* (1927), 137 L.T. 221.

As to discharge of cargo, see 30 HALSBURY'S LAWS (2nd Edn.) 336 et seq., 515 et seq.; and for cases see 41 DIGEST 539 et seq.

Cases referred to:

(1) *Budgett & Co.* v. *Binnington & Co.*, [1891] 1 Q.B. 35; 60 L.J.Q.B. 1; 63 L.T. 742; 39 W.R. 131; 7 T.L.R. 15; 6 Asp.M.L.C. 592, C.A.; 41 Digest 534, *3609*.

(2) *Northfield Steamship Co.* v. *Compagnie L'Union des Gaz*, [1912] 1 K.B. 434; 81 L.J.K.B. 281; 105 L.T. 853; 28 T.L.R. 148; 17 Com. Cas. 74; 12 Asp.M.L.C. 87, C.A.; 41 Digest 570, *3944*.

(3) *Hansen* v. *Donaldson & Sons* (1874), 1 R. (Ct. of Sess.) 1066; 11 Sc.L.R. 590; 41 Digest 563, *3882i*.

(4) *Randall* v. *Lynch* (1809), 2 Camp. 352; 170 E.R. 1181, N.P.; 41 Digest 578, *4025*.

(5) *Postlethwaite* v. *Freeland* (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 28 W.R. 833; 4 Asp.M.L.C. 302, H.L.; 41 Digest 539, *3666*.

Also referred to in argument:

Love and Stewart, Ltd. v. *Rowtor Steamship Co., Ltd.*, [1916] 2 A.C. 527; 86 L.J.P.C. 1; 115 L.T. 415; 13 Asp.M.L.C. 500, H.L.; 41 Digest 310, *1712*.

Thiis v. *Byers* (1876), 1 Q.B.D. 244; 45 L.J.Q.B. 511; 3 Asp.M.L.C. 147; sub nom. *Tiis* v. *Byers*, 34 L.T. 526; sub nom. *Thiess* v. *Byers*, 24 W.R. 611; 41 Digest 540, *3676*.

Porteus v. *Watney* (1878), 3 Q.B.D. 534; 47 L.J.Q.B. 643; 39 L.T. 195; 27 W.R 30; 4 Asp.M.L.C. 34, C.A.; affirming sub nom. *Straker* v. *Kidd*, *Porteus* v. Watney, 3 Q.B.D. 223; 41 Digest 563, *3880*.

Aktieselskabet Dampskibet Gimle v. *Garland and Rogers, Ltd.* (1917), 2 Sc.L.T. 254.

Armitage v. *Insole* (1850), 14 Q.B. 728; 19 L.J.Q.B. 202; 14 L.T.O.S. 439; 14 Jur. 619; 117 E.R. 280; 12 Digest (Repl.) 483, *3600*.

New Steam Tug Co. v. *McClew* (1869), 7 Macph. (Ct. of Sess.) 733; 41 Digest 675, *p*.

Mackay v. *Dick* (1881), 6 App. Cas. 251; 29 W.R. 541, H.L.; 12 Digest (Repl.) 489, *3676*.

Abchurch Steamship Co., Ltd. v. *Stinnes*, [1911] S.C. 1010; 48 Sc.L.R. 865; [1911] 2 S.L.T. 72; 41 Digest 563, *3882iii*.

Dampskibsselskabet Danmark v. *Poulson & Co.*, [1913] S.C. 1043; 41 Digest 562, *3868v*.

Appeal by the defenders, charterers of the steamship *Hansa*, from an interlocutor of the Second Division of the Court of Session in Scotland affirming an interlocutor of the Lord Ordinary (LORD HUNTER) in an action for demurrage brought against the defenders by the respondents, owners of the ship.

Condie Sandeman, K.C., and *Douglas Jameson* (both of the Scottish Bar) for the appellants.

MacKinnon, K.C., and *J. Anderson Maclaren* (the latter of the Scottish Bar) for the respondents.

The House took time for consideration.

July 29, 1919. The following opinions were read.

VISCOUNT FINLAY.—This is a claim by shipowners for demurrage under a charterparty. The Lord Ordinary decided in favour of the pursuers (now respondents) and the Second Division affirmed his decision. The questions arising on this appeal from their affirmance are two—(i) as to the general nature of the obligation

imposed upon a charterer by a clause providing for discharge in a fixed number of days; and (ii) as to the meaning and effect of the words at the end of the marginal note in this charterparty: "always provided steamer can load and discharge at this rate."

The appellants are the charterers and the respondents the owners of the steamship *Hansa*. By the charterparty the vessel was to load at Archangel a cargo of timber and proceed with it to Ayr. The third clause in the charterparty so far as material is as follows:

> "The cargo to be loaded and discharged *at the rate of not less than* 100 *standards per day, counting from steamer's arrival at the respective ports and notice of readiness given in writing during business hours and permission to load granted, whether berth available or not, always provided that steamer can load and discharge at this rate. . . .*"

The words in italics form the marginal note and there is a provision in the charter that

> "should the steamer be detained beyond the time stipulated as above for loading or discharging demurrage shall be paid at £70 per day and pro rata for any part thereof."

If the discharge at Ayr had been carried out at the rate of 100 standards per day, the time occupied would have been six and one-third days. Owing to a scarcity of labour at the port, the discharging, which began on Nov. 17, was not completed until 6 p.m. on Dec. 2. By the custom of the port the discharge was a joint operation. It was the duty of the shipowners to put the cargo on the quay and of the charterers to remove it thence. Both the shipowners and the charterers employed the same stevedore for this work and, as he could not get enough men, delay took place alike as regards the placing of the cargo on the quay and its removal thence. The appellants, having been sued by the respondents for demurrage at the stipulated rate, urge that they are not liable, as the ship was not in a position to put the cargo on to the quay at the stipulated rate, owing to the same cause, scarcity of labour, which prevented the appellants from removing it. Lord Hunter, the Lord Ordinary, rejected this contention. He said:

> "It is well settled that where a merchant has undertaken to discharge a ship within a fixed number of days he is liable in demurrage for any delay of the ship beyond that period unless such delay is attributable to the fault of the shipowner or those for whom he is responsible. The risk of delay from causes for which neither of the contracting parties is responsible is with the merchant."

The Second Division, consisting of the Lord Justice-Clerk, Lord Dundas, Lord Salveson and Lord Guthrie, were unanimously of the same opinion. Lord Dundas said that, in view of the authorities, if Mr. Sandeman's appeal for the appellants was to succeed it must be in the House of Lords.

On this appeal a great many cases were cited laying down the rule that, if the charterer has agreed to load or unload within a fixed period of time (as is the case here for certum est quod certum reddi potest), he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible. I am here adopting in substance the language used by Scrutton, L.J., in his work upon charterparties and bills of lading, art. 131. Of the authorities I will mention only *Budgett & Co.* v. *Binnington & Co.* (1), and I refer especially to the judgment in that case given by Lord Esher. Although no authority upon the point was cited which would in itself be binding upon your Lordships' House, there has been such a stream of authority to the same effect that I think it would be eminently undesirable to depart in a matter of business of this kind from the rule which has been so long applied, even

if your Lordships felt any doubt as to the propriety of these decisions in the first instance. I myself have no doubt as to their correctness and I understand that this is the opinion of all your Lordships. It seems to me that the appeal on this point must fail.

With regard to the construction of the concluding words of the marginal note, the motive of the charterers for desiring the insertion of these words is immaterial. The question is, what is the true meaning of the words themselves. As regards all mechanical facilities and appliances the steamer was equipped for delivery at the rate mentioned in the charterparty. It was owing to the shortage of labour that she was unable so to deliver. It was forcibly contended that it was for the ship to provide the labour as well as the appliances; that appliances without labour are of no use, and that it is a condition of the charterer's liability in terms of the marginal note that the steamship should be in a position to discharge at the stipulated rate, having men and appliances alike. I do not think that this meaning should be read into the words of this proviso. The Court of Appeal in *Northfield Steamship Co.* v. *Compagnie L'Union des Gaz* (2) took the view that such words should be read as referring merely to the physical capacity of the ship for discharging, and that where the inability to discharge was due to want of labour without fault on the part of the shipowner or of his servants, the charterer would not be protected by such words. I think they were right. If it had been intended that mere inability on the part of the ship to find labour should excuse the charterer, much clearer words would have been employed. The terms used are not sufficient to work such a departure from the well-established rule that the charterer is excused from delivery in the stipulated fixed time only when he is prevented from doing his part by the default of the shipowner. He is not excused by the fact that the shipowner, as well as himself, was prevented, without any fault on his part, from doing his share of the work. I think that this appeal should be dismissed with costs. **VISCOUNT CAVE** authorises me to say that he concurs in the judgment I have just read.

LORD DUNEDIN.—The general question of the construction of a contract to load and discharge a vessel within a certain date is too well settled to be unsettled now. In the words of Mr. Bell (Principles 432):

> "When lay-days and demurrage are stipulated the shipper's obligation is absolute not to detain the ship beyond the days, and he will be liable for damage although occasioned by causes over which he has no control."

The only real question in this case is as to the effect of the third clause in the charter. As to this I agree with the learned judges of the court below. It is, I think, impossible to draw any distinction between any of the various kinds of agencies which are not within the control of the ship, any one of which may delay the loading or unloading. If, therefore, the clause in question were given the most expanding meaning it would certainly reverse the ordinary legal result of the stipulation as to lay-days. I agree with the Lord Justice-Clerk that if that was meant it would have to be effected by unambiguous words. If, on the other hand, the clause is to have a restricted meaning, then I agree that it must refer to some defect peculiar to a ship as a ship. So construed it is not without its use, for I do not agree with what has been urged, namely, that if the clause were not there, and the ship's hatches were such that unloading within the days was not possible, the ship could not insist upon demurrage. In such a case I think the general rule would apply, the charterer having taken upon himself to guarantee the discharge within a certain number of days. Such a case is distinct from a case of actual fault on the part of the master hampering discharge. I should only in conclusion mention *Hansen* v. *Donaldson & Sons* (3), upon which the appellants placed great reliance. I think that decision can be well supported, but only in one view—namely, that the master was able to get extra assistance, and did not get it. Whether that was a true view of the facts matters not. The Lord Justice-Clerk

in one passage shows, I think, that a case of the present sort was not in his view to be ruled by that decision. He says (1 R. (Ct. of Sess.) at p. 1070):

> "Until . . . the shipmaster, not being prevented by an external or adventitious circumstance, was prepared to give delivery there could be no detention of the vessel in the sense of the charterparty."

Shortage of available labour is an external and adventitious circumstance. LORD ORMIDALE speaks of culpable delay on the part of the ship in putting out the cargo, and that this is the true view of the case seems to follow from the fact that both the Lord Justice-Clerk and LORD ORMIDALE accepted the general law as to the charter guaranteeing the unloading in a certain time as settled by the cases. I think the appeal should be dismissed.

LORD SHAW.—I concur. I am of opinion that the judgments of the courts below are correct, and that the demurrage of £490 is due. No question is raised in the appeal as to the calculations upon which this sum is reached, but it is admitted that the lay-days were exceeded by seven, these lay-days being calculated in the proportion of 100 standards per day of the total cargo of 630 standards. The question in the case arises upon cl. 3 of the charterparty and these words therein:

> "The cargo to be loaded and discharged at the rate of not less than 100 standards per day, counting from steamer's arrival at the respective ports and notice of readiness given in writing during business hours and permission to load granted, whether berth available or not, always provided the steamer can load and discharge at this rate."

It is admitted that notice of readiness to discharge was duly given by the ship on her arrival at Ayr on Nov. 17, 1915. The reason in fact why the ship was not discharged within the lay-days is admittedly stated accurately in the examination of the witness Kenny, who was charged by both parties to make arrangements for the discharge of the ship:

"Q. Did you get for the ship all the men that you could get?—A. All that I could find round about; any old man who was knocking about I employed and put him on ship work. . . . The complaint then really was a fewness of men, shortage of labour. Apart from that I never heard anything said on the subject."

As applied to facts like these the law is perfectly well settled. In *Randall* v. *Lynch* (4) LORD ELLENBOROUGH stated the position in law which has never been departed from (2 Camp. at p. 355):

> "I am of opinion that the person who hires a vessel, detains her, if at the end of the stipulated time he does not restore her to the owners. He is responsible for the various vicissitudes which may prevent him from doing so."

This proposition was repeated in ampler words by LORD SELBORNE in *Postlethwaite* v. *Freeland* (5) (5 App. Cas. at p. 608):

> "There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo when a ship which has been chartered arrives at its destination and is ready to discharge lies (generally) upon the charterer. If by the terms of the charterparty it is agreed to discharge it within a fixed period of time that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing to time and which cause the ship to be detained in his service beyond the time stipulated."

This law has been applied over and over again and is too settled to be shaken. The risk of vicissitudes which prevent the loading or discharge of cargo within the stipulated lay-days lies unconditionally with the charterer. This is the prescription of the general law. To avoid its application either (i) the contract of parties must be absolutely clear; or (ii) it must be established that the failure of the charterer's duty arose from the fault of the shipowners or those for whom they are

responsible. The law of Scotland is identical with that of England on this topic. Mr. Bell is as clear as the English judges quoted, when he says in his Principles:

> "When lay-days and demurrage days are stipulated, the charterer's obligation is absolute not to detain the ship beyond the days; and he will be liable for the demurrage or for the loss arising from detention although occasioned by circumstances over which he has no control."

Recent cases in Scotland have followed this clear rule.

But the appellants found upon *Hansen* v. *Donaldson & Sons* (3). I do not look upon that case as varying or invading the principle. In so far as it may be held to do so—and some of the language of the Lord Justice-Clerk (Moncrieff) is not very clear—the decision must, in my humble opinion, be reckoned a bad one. But, in truth, the decision was one upon fault, and to prevent a person from claiming damages or a remedy under contract in respect of circumstances which he himself has brought about is a principle of much wider application in law than in regard to shipping. Lord Ormidale, however, cleared up the point in his opinion when, after quoting Mr. Bell as above, he comments as follows upon the passage (1 R. (Ct. of Sess.) at p. 1072):

> "He does not mean to say and does not say that the merchant or consignee is liable for the consequences of detention caused by fault on the part of the ship; or, in other words, by the culpable or undue delay of those in charge of the ship in putting out the cargo."

It was on this latter ground that *Hansen's Case* (3) was decided. It is admitted in the present case that no fault attaches to the shipowners. The responsibility for delay and consequent damage is accordingly with the charterers. It would have been with them under the general law supposing wind and weather had been such as to prevent discharge of cargo, and even under this special charterparty it is expressly provided that the unloading days have to count, "whether berth available or not." It is not disputed that the vessel was of a capacity and had equipment to enable the proviso to be complied with—namely, that the "steamer can load and discharge at this rate." A proviso of that description cannot be construed in a general sense so as to wipe out the well-known obligations and responsibilities which rest upon the charterer. The inability to discharge is an inability of the steamer in the more limited sense of a reference to the vessel itself, its equipment, or the like. And the meaning of the clause is that, suppose, for instance, the charterer was ready and able to discharge at 100 standards per day, but, on account of the ship's defect or lack of equipment, her maximum discharge could only be fifty standards a day, then, of course, in such a case the position of the ship is just the same in result as if by deliberate fault of those in charge of her the performance of the charterer of his obligations had been prevented. Construed in any broader sense the proviso would wipe out the obligation, and this can never be allowed.

LORD WRENBURY. This is the charterers' appeal from an interlocutor holding them liable for demurrage. There arise two points for decision—first, whether, if the charter had not contained the proviso presently stated, the charterers would have been liable; and, secondly, whether, if the first question be answered in the affirmative, the charterers are protected by the proviso "always provided steamer can load and discharge at that rate." The charter provides as follows:

> "The cargo to be loaded and discharged at the rate of not less than 100 standards per day with customary steamship dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports,"

&c. For the moment I stop there. The cargo was 630 standards, and by arithmetical computation, therefore, although not by definition of lay-days in so many words, the charterers were entitled to six and one-third lay-days. The action is for demurrage at per day in excess of that time. The vessel was detained for

thirteen and one-third days. The cause of delay in discharge was shortage of labour at the port of discharge.

The general rule is that the duty of providing sufficient means for the discharge of the cargo lies upon the charterer. The party who has contracted to unload within a specified time must bear the loss occasioned by any excess of time although the delay is not occasioned by any default on his part. But this, of course, is subject to any provision to the contrary in the charter. In the absence of such a provision the charterer contracts, not to do his best to deliver, but to deliver. In the charter so far as I have quoted it I find nothing to relieve the charterer from this contractual obligation. If the charter had not contained the proviso, I think the charterer would have been liable.

The second question is whether he is relieved by the proviso. The words are: "always provided steamer can load and discharge at this rate." It was admitted by the shipowners that it was the duty of the ship to dump the cargo on the quay. The witness Steele, who was agent for the ship at Ayr, acting as he says "of course for the ship," endeavoured to obtain, but failed to obtain, sufficient labour. When the ship had dumped the cargo on the quay it was the cargo-owner's duty no doubt to keep the quay from being blocked with timber. There was no default by the cargo-owner in that respect. The ship was never kept waiting on the shore gang. The timber was promptly removed whenever landed on the quay. In these circumstances, the question is as to what is the meaning of the words "provided steamer can" discharge. The language is, of course, elliptical. It must refer not merely to the structural capacity of the steamer, e.g., that she has only certain hatch ways and no more, but also to at least the mechanical appliances with which she is fitted, e.g., that she has only certain engines and of certain horse power and no more. I see no reason why it should not refer also to the labour which is to work the mechanical appliances. Suppose the power were electric, but the motors were out of order. The steamer then I conceive cannot discharge. How does this differ from the case where the motors are in order, but there is no man to pull a lever and start the power? Or suppose the power was steam, but there was neither stoker nor engineer. The machinery is not machinery for any effective purpose, unless it can be operated. Then, does the case differ when the machinery can be worked, but there is no manual labour to introduce the goods to the machinery and cause it to operate upon them, and again to disengage the goods and set the machinery free to operate upon further goods? All these are, to my mind, similar in kind. The steamer whose ability is the test, must, I think, be a structure, plus a control which will give life to that which without it is powerless and which will make it an apparatus capable for giving discharge. Discharge is a word which involves activity, not merely passive existence. If the expression is to be thus understood, the contract is that the charterer will discharge at 100 standards a day, provided that the steamer is such as regards (a) her structure; (b) her engine and mechanical power; (c) such labour to utilise these mechanical appliances as it is for the steamer to supply as that she "can discharge" (i.e., admitted dump on the quay) 100 standards a day. This, I think, is the meaning of the proviso. The delay was caused by the deficiency of the labour above called (c). The proviso cast upon the ship the responsibility for this deficiency. The result is, in my opinion, that the proviso has relieved the charterers from a liability which would otherwise have rested upon them. For these reasons, I think that the appeal should be allowed.

Solicitors: *Ince, Colt, Ince & Roscoe* for *John W. & G. Lochkart*, Solicitors, Ayr, and *Dove, Lockhart & Smart*, S.S.C. Edinburgh; *Botterell & Roche* for *Lucas, Hurry, Galbraith & Macpherson*, Writers, Glasgow, and *Macpherson & Mackay*, S.S.C., Edinburgh.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law*.]

JONES *v.* TRINDER, CAPRON & CO.

[Court of Appeal (Swinfen Eady and Bankes, L.JJ.), April 15, 1918]

[Reported [1918] 2 Ch. 7; 87 L.J.Ch. 330; 119 L.T. 100; 62 Sol. Jo. 486]

Practice—Document—Order for removal from file and destruction—Subsequent use of copy in other proceedings—Legality.

Where an order has been made directing that a document be removed from the file and destroyed, the order does not extend to a copy of the document unless it is expressly or by implication made to do so, and a copy may properly be used subsequently in other proceedings, e.g., as an exhibit in support of an objection to a person's being admitted as a solicitor.

Solicitor—Admission to Roll—Objection—Allegations of forgery in earlier proceedings—Document supporting allegations—Order for destruction of document in previous proceedings—Use of copy to support objection—Solicitors Act, 1888 (51 & 52 *Vict.*, *c.* 65), *s.* 10.

By the terms of a letter dated Dec. 13, 1911, J., managing clerk for T. C. & Co., a firm of solicitors, undertook not to solicit clients of the firm after leaving the firm's employment or to divulge knowledge acquired in such employment. In 1915 J. left T. C. & Co. and became articled to another solicitor. In February, 1916, T. C. & Co. brought an action to restrain J. from breaches of his undertaking. A motion was brought, and to an affidavit made in the motion J. exhibited the original letter with alterations in the undertakings in his own favour, which purported to be initialled by T. C. & Co. In their affidavits T. C. & Co. alleged that these alterations were forgeries. No order was made upon the motion, but the letter was deposited in court with liberty to either party to take photographs of it. When the action came on for trial it was settled, and on July 28, 1916, an order was made containing a wider undertaking than that in the terms of the letter. The order further provided that the letter was to be destroyed and certain affidavits relating thereto were to be taken off the file. In February, 1918, J., having completed his articles and passed his examinations, applied to be admitted as a solicitor. T. C. & Co. lodged an objection against his admission as a solicitor and exhibited copies of the affidavits which had been ordered to be taken off the file and a photograph of the letter which had been destroyed.

Held: as the order for destruction of the letter and for the removal of the affidavits from the file did not expressly or by implication extend to any copies of these documents, it did not preclude their being used to support objections to J. being admitted as a solicitor.

Notes. The Solicitors Act, 1888, has been repealed. Section 3 (3) of the Solicitors Act, 1957, replaces s. 10 of the 1888 Act. For the Solicitors Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 1053.

As to removal of documents from the file, see 30 Halsbury's Laws (3rd Edn.) 418; and for cases see 22 Digest (Repl.) 559. As to objection to admission as solicitor, see 31 Halsbury's Laws (2nd Edn.) 63, 64; and for cases see 42 Digest 22, 23.

Case referred to in argument:

The Moorcock (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, *5274*.

Appeal from an order of Neville, J., on a motion for an interlocutory injunction.

In December, 1911, the plaintiff, Jones, negotiated with the defendants, Trinder, Capron & Co., to enter their service as solicitor's clerk. Ultimately an agreement was come to between them that he should enter their service, and that agreement was evidenced by a letter from Trinder, Capron & Co., dated Dec. 13, 1911, and

stating the terms of the employment and the plaintiff's answer accepting the terms. On Jan. 2, 1912, the plaintiff entered the service of Trinder, Capron & Co., and remained with them for several years. On Mar. 27, 1915, he left the employment, having procured himself to be articled with another solicitor for three years under the rule enabling a clerk who has served as such for ten years, to be admitted as a solicitor after having been articled for that period: see now Articled Clerks Regulations, 1957, Sched. I, 4. In February, 1916, Trinder, Capron & Co. had cause to complain that the plaintiff had broken his agreement with them, and they alleged that he was either soliciting, or acting for, clients of theirs, or for people who had been clients of theirs, contrary to his agreement, and brought an action to restrain him. The writ was issued on Feb. 17, 1916, and they set out in their statement of claim the contract under which he had agreed not to do what they alleged he had done and was doing. In his defence the plaintiff denied the alleged contract. He set out in his defence the letter containing the terms, showing in facsimile an alteration that had been made after the letter was written, the effect of the alteration being to strike out from the letter the term that he was alleged to have broken. According to the letter as written it was: "You agree that you will not for a period of ten years after leaving our employ act either directly or indirectly for any person, firm, or company who may have been a client of ours prior to your leaving our employ. . . ." Those passages were alleged by Trinder, Capron & Co. to have been in the letter as originally written, and it is admitted by the plaintiff that they were in the letter as originally written. He, however, set up that on Jan. 2, 1912, when he entered their service, by agreement between himself and Trinder, Capron & Co., that clause was struck out, and initialled by both parties, and he, therefore, denied that there was any agreement that he was not to act as he had. Trinder, Capron & Co. denied that the alteration was made by them or by their authority, and that the initials against it, purporting to be the initials of their firm, were placed by them or by anyone with their authority. By an interlocutory order the letter was ordered to be lodged or deposited in court, and either party was to be at liberty to take copies and extracts, including photographic copies of it. Both parties took photographic copies. When the action came on for trial it was settled, an order dated July 28, 1916, being made by the judge by consent. The effect of the order was that the plaintiff gave an undertaking in considerably wider terms than the terms of the letter as it originally stood before it was altered. He was also ordered to pay the costs of the action. Trinder, Capron & Co. were asked, but refused, to withdraw the charge that they made against him. The order further provided:

> "That the affidavits mentioned in the schedule hereto be taken off the file. And . . . that the letter dated Dec. 13, 1911, . . . be delivered out of court to the plaintiffs (Trinder, Capron & Co.) and the solicitors for the defendant (Jones) for destruction."

In February, 1918, the plaintiff, having completed his articles and passed his examinations, applied to be admitted as a solicitor. Trinder, Capron & Co. lodged an objection against his admission and exhibited copies of the affidavits ordered to be taken off the file and a photograph of the letter which had been destroyed. Thereupon the plaintiff began the present action, and then moved for an interlocutory injunction to restrain Trinder, Capron & Co. from using the documents. Neville, J., held that the use of the copies and photograph was not inconsistent with the terms of the order, dated July 28, 1916, and dismissed the motion. The plaintiff appealed.

H. S. Preston (with him *Douglas Hogg, K.C.*) for Mr. Jones, the plaintiff.

Jenkins, K.C., and *Dighton Pollock* for Messrs. Trinder, Capron & Co., the defendants.

SWINFEN EADY, L.J.—This is an appeal by the plaintiff, Mr. Charles Henry Jones, from an order of Neville, J., refusing him the relief which he sought by

way of interlocutory application. Mr. Jones has been articled and is now applying to be admitted as a solicitor. One of the defendants, Mr. Frederick Hugh Capron, a member of the firm of Messrs. Trinder, Capron & Co., has made an affidavit of certain facts for the information of the Law Society and, I apprehend, of the Master of the Rolls, before whom Mr. Jones's application to be admitted a solicitor will come, and by whom it has to be dealt with. Under s. 10 of the Solicitors Act, 1888, it is provided that:

> "A person who has obtained from the society a certificate of having passed a final examination, may apply to the Master of the Rolls to be admitted as a solicitor, and thereupon the Master of the Rolls, unless cause to the contrary is shown to his satisfaction, shall by writing under his hand admit, in such manner and form as he shall from time to time direct, such person to be a solicitor."

By this statute the matter is committed to the Master of the Rolls to determine whether an applicant shall or shall not be admitted as a solicitor, and the Master of the Rolls is bound to admit a properly qualified applicant as a solicitor unless cause to the contrary is shown to his satisfaction. For the information, therefore, of the Master of the Rolls, by whom Mr. Jones' application must be dealt with, there is an affidavit of certain facts within the knowledge of the deponent, Mr. Capron, and there are with it copies of certain affidavits, and a photographic copy of a certain letter.

Mr. Jones complains of such conduct, and he asks this court to determine that, having regard to an order made on July 28, 1916, in litigation between Messrs. Trinder, Capron & Co. and himself, and to the terms of that order, Mr. Capron and his firm were not justified in making use of the documents or of the information, or in supplying the particulars to the Law Society, or in making an affidavit to be used before the Master of the Rolls, and he seeks to have an injunction to restrain Messrs. Trinder, Capron & Co. from making use for any purpose whatever of the document and affidavits. That is the form of the injunction that is sought. Counsel for Mr. Jones in argument has not placed his case so high as that, and for certain purposes he concedes that the affidavits and the letter may be used; but, although that is the form of the injunction that he asks, at the Bar he only seeks to have restrained the user of the affidavits and the letter for the purpose of Mr. Jones' pending application to be admitted as a solicitor. That is the only purpose for which it is contemplated that these documents are to be used, and that is the matter between them. The writ in the action also asks for a declaration that the defendants, Messrs. Trinder, Capron & Co., having committed a breach of the obligation imposed upon them by the order made in the action and the agreement not to make use of the documents, must be taken to have repudiated the agreement, and it asks for a declaration that the plaintiff, Mr. Jones, is accordingly no longer bound by the agreement. That is not relief that he could ask, and he has not asked for, on this motion. This is only an appeal from the refusal of the judge to grant an injunction on an interlocutory application. Mr. Jones further says that in any case there is a matter to be tried, and that the court ought, having regard to the facts that are proved, to grant an interlocutory injunction restraining any such user until the trial of the action.

[HIS LORDSHIP stated the facts, and continued:] It will be observed that the order first directs the affidavits mentioned in the schedule to be taken off the file. Then it follows, according to the practice of the court, that those affidavits are destroyed, that is to say, the affidavits, being taken off the file, are not returned to the party who files them, but they are destroyed by the officer of the court. Office copies of the affidavits had in the meantime been taken, and each office copy is marked as being "cancelled as such," that is to say, it is no longer to be regarded as an office copy of an affidavit, because the original affidavit is no longer on the file, indeed, no longer in existence; but there is no order that all office or other copies of the affidavits were to be destroyed. And so with regard to the letter.

The original letter is to be delivered out of court for destruction. There is no order, however, at all with regard to the destruction of the photographic copies which had been taken by both sides, or of any other copies. The position, therefore, is that the original letter and the original affidavits are destroyed. The affidavits having been taken off the file are destroyed, but there is no order for destruction, or no order relating to any user that may be made of either copies of the affidavits or copies of the letter. Under those circumstances Mr. Jones says, first, that it must be treated as an implied term of the agreement embodied in the order of the court that no use was to be made of the copies of the affidavits or the copies of the letter, but at the Bar the case is not put so high as that. It is conceded that there is nothing to prevent, at all events, some user being made of the affidavits and the letter, and counsel for Mr. Jones, who has said all that can be said on his behalf, and has put the facts very fully before us, has urged that the purposes for which these copies of the affidavits and the copy of the letter may be properly used by Messrs. Trinder, Capron & Co. are limited to, first, purposes of public justice, and, secondly, for the protection of the character of Messrs. Trinder, Capron & Co. if assailed. That is to say, in the latter case they may use them as a weapon of defence, but not as a weapon of offence. Further, he still says that, if there is no such term to be implied as a term of the agreement, it was a breach of faith for Messrs. Trinder, Capron & Co. to use the documents for supplying information to the Law Society for the purpose of its being laid before the Master of the Rolls.

A very serious charge was made in the action. The plaintiffs in the action, Messrs. Trinder, Capron & Co., were applied to and were pressed to withdraw the charge, and they declined to do so, and upon that the defendant, Mr. Jones, was willing to settle the action upon the terms that I have mentioned, which I need not detail again. What room is there for implying any term that no use was to be made whatever in future of any copy of the affidavits or of any copy of the letter? Messrs. Trinder, Capron & Co. by refusing to withdraw the charge showed that they were insisting upon it. They accepted Mr. Jones' settlement of the action, but there was nothing whatever to bind Messrs. Trinder, Capron & Co. to withdraw the charge, and no admissions that the charge was unfounded or in any way inaccurate. They simply declined to withdraw it, of which conduct Mr. Jones had notice. I am of opinion that the whole bargain between the parties must be treated as expressed in the order of the court, and that there was no implied term in the agreement that no use except for limited purposes was to be made of any copy of the affidavits or of the letter. Again, I can see no breach of faith in the user which Messrs. Trinder, Capron & Co. have made of the documents. They are solicitors, and, as such, officers of the court, and, in accordance with what they have conceived to be their duty, upon the application of Mr. Jones to be admitted a solicitor, an application which has come to their knowledge and of which they are fully cognisant, they have communicated to the Law Society, with the view of laying before the Master of the Rolls, such facts as they say are within their knowledge, and which are contained in their affidavits, in order that the Master of the Rolls may have those facts before him in exercising his judgment as to whether Mr. Jones should or should not be admitted a solicitor. In my opinion, there is nothing in the course of the action or in the order which either expressly or by any fair inference precludes Messrs. Trinder, Capron & Co. from taking that course which as honourable members of an honourable profession they have deemed it their duty to take. It is the practice of the court, when the necessity arises, to order not only the destruction of the original of a document but likewise of all copies of it, and of all extracts from it, and also there are many instances in which the court goes further and restrains parties from communicating in any way the contents of the document. In proper cases orders to that effect have been, can be, and will be made. There is no order to that effect here. The only order is to destroy the original letter, and to take the affidavits off the file. Counsel for Mr. Jones has urged, if any use whatever is made of any copy of the

affidavits or any copy of the letter, what was the advantage of taking the affidavits off the file, or of destroying the original letter? It is quite clear that difficulties are thereby placed in the way of anyone else obtaining either copies of the affidavits or of the letter, or any information contained in the affidavits or the letter. They are no longer accessible as of course to parties applying. In my judgment, Mr. Jones wholly fails to make out on the present application any title even to interim relief, and I agree with the view the learned judge in the court below took that the motion for an injunction wholly fails. In my opinion, the appeal should be dismissed with costs.

BANKES, L.J.—I agree. It seems to me that NEVILLE, J., was perfectly right in refusing to make any order for an interlocutory injunction upon the facts as they were presented to him, and it is unnecessary for me to go through the earlier history of the case, but only to take up the story at the point where Mr. Jones, having passed his final examination, makes application to be admitted as a solicitor. Thereupon Messrs. Trinder, Capron & Co. show cause, as they were entitled to do. I say nothing to prejudice any further discussion as to the effect of the order, but the statute contemplates that persons may show cause if they think a proper occasion arises. On Feb. 28, 1918, Messrs. Trinder, Capron & Co. write to Mr. Jones telling him what they have done. They do not do it behind his back; they tell him what they have done, and they enclose a copy of the notice of objections to the admission, "which we have sent to the registrar, with copies of the affidavits and exhibits." What was the position of Mr. Jones under those circumstances? Cause was shown against his being admitted as a solicitor, and it seems to me, though I am not familiar with the practice, that it is impossible to suppose that Mr. Jones would not have a right to apply for an opportunity of being heard in opposition to the case that was made against him by Messrs. Trinder, Capron & Co. In other words he has the opportunity, the second opportunity, of challenging the correctness of Messrs. Trinder, Capron & Co.'s view as to his conduct in reference to the alteration of the letter. He does not do that, but he takes time for consideration, and, after the lapse of a fortnight or so, he launches this motion on Mar. 13, 1918, the mischief having been done; and the motion asks for an injunction, not setting aside or recalling anything that Messrs. Trinder, Capron & Co. have done, but that until the trial of the action or further order they shall be restrained from using or making use for any purpose of any copies, photographs, or extracts. There was no reason to suppose that they intended to make any other use of these documents than the one they had already made, and what Mr. Jones was complaining of was the use they had already made of the documents, and, so far as that might possibly do him any harm, he had the opportunity of going and stating his view and convincing the Master of the Rolls, if he could, that he was an innocent man. In those circumstances it seems to me hopeless to ask the court to interfere by an interlocutory injunction to prevent something which has already been done. Upon those grounds, without saying a word as to whether or not there is any possibility of success upon the other branch of the action, which seems to me to raise a question of much more importance to Mr. Jones if he could establish it, namely, that Messrs. Trinder, Capron & Co., having committed a breach of the obligation imposed upon them, have repudiated the agreement and freed him from his undertaking, without saying anything upon that as part of my judgment, although possibly I may have, by some interlocutory observations, shown that I have formed an opinion, it seems to me that the appeal must fail and be dismissed with costs.

Appeal dismissed.

Solicitors: *W. W. Stocken*; *Trinder, Capron & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

WINTERBOTHAM, GURNEY & CO. *v.* SIBTHORP AND COX

[COURT OF APPEAL (Swinfen Eady, Bankes, L.JJ., and Eve, J.), February 22, 25, 26, 1918]

[Reported [1918] 1 K.B. 625; 87 L.J.K.B. 527; 118 L.T. 605; 62 Sol. Jo. 364]

B

Court of Appeal—Jurisdiction—Review of jury's verdict—Evidence such that contrary verdict only one reasonably possible—Entry of judgment for appellant—R.S.C., Ord. 58, r. 4.

Although the Court of Appeal ought to be exceedingly careful in interfering with the verdict of a jury—and particularly when the court is asked to give a decision contrary to the finding of a jury—yet, where it is manifest that all the facts of a case have been ascertained and the evidence is such that there is only one verdict which could possibly be reasonably given, the court is not confined to sending the case for a new trial, but it is their duty to decide according to the rights of the parties and to enter judgment accordingly, whether on an appeal by the plaintiff or on one by the defendant.

C

D

Paquin, Ltd. v. *Beauclerk* (1), [1906] A.C. 148, applied.

Notes. As to the powers of the Court of Appeal on the hearing of an appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 468–477; and for cases see DIGEST (Practice) 782–786.

Cases referred to:

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(1) *Paquin, Ltd.* v. *Beauclerk*, [1906] A.C. 148; 75 L.J.K.B. 395; 94 L.T. 350; Digest (Practice) 783, *3466*.

(2) *Millar* v. *Toulmin* (1886), 17 Q.B.D. 603; 35 L.J.Q.B. 445; reversed (1887), 12 App. Cas. 746; 57 L.J.Q.B. 301; 58 L.T. 96, H.L.; Digest (Practice) 783, *3462*.

(3) *Allcock* v. *Hall*, [1891] 1 Q.B. 444; 60 L.J.Q.B. 416; 64 L.T. 309; 39 W.R. 443; 7 T.L.R. 260, C.A.; Digest (Practice) 783, *3464*.

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(4) *Skeate* v. *Slaters, Ltd.*, [1914] 2 K.B. 429; 83 L.J.K.B. 676; 110 L.T. 604; 30 T.L.R. 290, C.A.; Digest (Practice) 783, *3467*.

Also referred to in argument:

Toronto Rail. Co. v. *King*, [1908] A.C. 260; 77 L.J.P.C. 77; 98 L.T. 650, P.C.; Digest (Practice) 600, *2409*.

G

Appeal by the plaintiffs from an order made by LUSH, J., in an action tried by him with a special jury.

The facts appear in the judgment of SWINFEN EADY, L.J.

Sir Ernest Pollock, K.C., and *Herbert Smith* for the plaintiffs.

C. M. Pitman for the defendants.

H

SWINFEN EADY, L.J.—This is an appeal by the plaintiffs, and they ask for judgment or a new trial of the action, which was tried before LUSH, J., and a special jury. Upon the findings of the jury the judge gave judgment for the defendants, and from that the plaintiffs appeal.

The action is brought upon an acceptance of a bill of exchange drawn by the defendant Sibthorp upon and accepted by the defendant Alaster Wharton Cox, endorsed to the plaintiffs, and the plaintiffs claim upon the bill. The defendant Cox pleaded and proved that the acceptance of the bill was obtained from him by fraud. The reply of the plaintiffs was that they were holders for value without notice of the fraud, and upon those issues the action went to trial. The judge put these certain questions to the jury: "Was the defendant Cox induced by fraud to accept the bill?—Answer: Yes. Did the plaintiffs give value for the bill?—Answer: Yes. Did they give it in good faith?—Answer: No." Upon that judgment was given. Under the Bills of Exchange Act, 1882, s. 90, a thing is deemed

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to be done in good faith within the meaning of the Act where it is in fact done honestly, whether it is done negligently or not, so that the finding of the jury that the plaintiffs did not give value in good faith means that they did not give it in fact honestly within the meaning of the statute. The appeal of the plaintiffs is based upon this, that the verdict of the jury was utterly unreasonable, and not only was there no evidence whatever of absence of good faith on their part, but all the evidence tended in the exactly opposite direction; their case is that they proved to demonstration that they acted in good faith, and they ask this court to say, having regard to the evidence adduced at the trial, that they acted in good faith notwithstanding the finding of the jury.

The facts leading up to this transaction are very simple. There was one Freeman, who was interested in one or more patents. The plaintiffs are solicitors at Cheltenham, and they and clients of theirs were interested in these patents with Freeman, and they, or some of them, had lent money to him. By an agreement of April 5, 1917, the defendant Sibthorp had agreed to finance Freeman up to the sum of £2,000. In the process of financing, the defendant Sibthorp gave Freeman a cheque. Freeman paid it into the bank, drew upon it, and the defendant Sibthorp's cheque was dishonoured, and that put Freeman in a position of difficulty. He had drawn a cheque, to meet which the cheque that he had paid in was dishonoured, so he was in want of money at once. On Saturday, April 21, he went to his solicitor, Mr. Welch, a partner in the firm of Elvy Robb and Welch. The matter was discussed, and Mr. Welch suggested that there should be communication with the plaintiffs, they being, as I have said, interested in Freeman's patent. On that Saturday there were several telephonic communications between Mr. Welch, the London solicitor, and Messrs. Winterbotham, Gurney & Co., the solicitors at Cheltenham, with regard to advancing money to Freeman, and on that day, the 21st, Mr. Welch advanced £100. This was a temporary advance, and on the same day Messrs. Winterbotham, Gurney & Co. agreed to advance to Freeman on certain conditions up to £300, and they sent a cheque for £300 to Mr. Welch, and wrote a letter which is signed by Reginald Winterbotham on behalf of his firm:

> "I write to confirm our telephone talk this morning. It is understood that if you (acting for us in this matter) can make a valid legal security from Mr. Sibthorp on the first moneys coming to him from Lord Rotherham or the Earl of Lindsay we can let Mr. Freeman have up to £300, and subject to you getting security for us you were to let Mr. Freeman have £50 this morning [in fact, Mr. Welch lent him up to £100]. I do not know how the matter stands with Mr. Sibthorp's bankers, but, of course, they must clearly understand that the first moneys coming to Mr. Sibthorp from either source are to be applied in repayment of this temporary loan."

Then there is a postscript:

> "Since writing the above I have had a further talk with you, and now enclose my firm's cheque for £300 to the order of your firm, which you are not to use until you have seen Messrs. Hoare on Monday morning, and telephoned the result to us, so that we shall be satisfied as to the amount due to Hoares in front of us, as to which we are in the dark."

That refers to Messrs. Hoares, the bankers, and had reference to certain securities with Hoares. On that same Saturday an agreement was signed by the defendant Sibthorp regarding this transaction. It is in the form of a letter from him to Messrs. Winterbotham, Gurney & Co.:

> "In consideration of the sum of £300 this day advanced by you to Mr. H. H. Freeman at my request, I hereby undertake and guarantee to you the repayment of the said amount with interest thereon at the rate of 6 per cent. per annum, and in further consideration of the said payment I hereby subject and charge in your favour all sums of money and other debts due to me from Lord Rotherham subject to the prior claims thereon of Messrs. Hoare & Co.,

bankers; and I further deposit with you a bill of exchange dated April 3, 1917, for £1,000 drawn by me and accepted by A. Wharton Cox, and I hereby undertake and agree to sign any more formal or legal documents you may require for the purpose of more completely effectuating to you the security hereby given.—Yours faithfully, SHURMER SIBTHORP. Witness, JAMES REEDER WELCH."

The transaction was not completed until the Monday, when Mr. Welch received the plaintiffs' cheque and made some inquiries with regard to the acceptor of the bill, the defendant Cox. He made inquiries through his bankers, which seems to indicate that the bill might be of doubtful value, and completed the transaction, the result, therefore, being that the defendant Cox's bill, which had been obtained by the defendant Sibthorp, was endorsed to the plaintiffs with other securities, and they were to hold it by way of security for £300 and interest at 6 per cent. as a temporary loan. That is the whole transaction. Cox proved at the trial, and it was so found by the jury, that the bill was obtained from him by fraud. That is the answer of the jury to the first question, and there is no dispute as to that. There is no dispute that the £300 was advanced at interest. That was the value given for the bill. Mr. Welch having received the £300, Freeman repaid out of the £300, £100 advanced to him on the Saturday, and retained the rest of the money.

The only question that remained was whether the plaintiffs were acting in good faith. No fact was elicited at the trial of any kind to throw any doubt on the good faith of the plaintiffs. Mr. Welch, the London solicitor, was called and gave an account of the transaction. All that the plaintiffs were to have was 6 per cent. interest upon their money which was advanced as a temporary loan; they were endorsees of the bill, which was up to £1,000, and they were only in it to the extent of £300. The whole of their interest in the transaction was 6 per cent. interest, and the return of their £300. When the writ in the present action was issued an application for judgment was made under Ord. 14, and the defendant Cox made an affidavit in opposition, in which he said this:

"I verily believe that the plaintiffs would not have given cash to the bills of a cadet [that is, himself] giving an hotel as his only address, and that they were aware of the circumstances under which the bill sued on was given."

That is, that he believed that they had notice of the fraud. On that a letter was written by the plaintiffs' solicitors in which they said this:

"Will you kindly give us particulars of the notice of the said fraud alleged in your clients' defence, stating whether the same was verbal or in writing; if verbal, when, where, and by and to whom given, and the effect thereof, and if in writing, particulars of the document. . . . We shall be glad to hear from you by return of post as to whether you will give these particulars or whether we shall issue an application therefor."

That was answered by saying:

"We have no desire to put your client to the expense of an application in this matter. We are unable to give particulars of the notice alleged [that is, the notice of the fraud]. By s. 30 (2) of the Bills of Exchange Act, 1882, if our client succeeds in proving the fraud he alleges, the burden of proof will be shifted, and it will be for your clients to prove that they gave value for the bill without notice of the fraud. You may, therefore, pending discovery, take the allegation of notice as a merely formal pleading, putting your clients to the proof of their bona fides."

The plaintiffs did not rest satisfied with that answer, but they interrogated the defendant Cox, and they administered this interrogatory:

"When, how, and by and to whom respectively was notice of the fraud alleged in your defence given to the plaintiffs? Identify any documents."

A The answer which was put in was this:

> "To the third interrogatory I say that the said allegation of notice is inserted in the defence as a matter of pleading and in order to put the plaintiffs to proof that they gave value for the said bill without notice of the said fraud, and that I do not know when, how, or by whom the said notice was given."

B It is quite fairly put that the defendant Cox did not allege that he had any facts within his knowledge that would assist in proving that the plaintiffs had notice of the fraud, but he put them to the proof. At the trial of the action Mr. Welch was called, and he gave the account of the transaction which I have already related. He had no notice of any irregularity with regard to it. He said that he telephoned to the plaintiffs that he could not get a bill of Lord Rotherham's,

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> "but I could have a bill of A. W. Cox, who I was told was a nephew of the Earl or Countess of Lindsay, and I was told this bill might be taken up at any moment. I had three or four conversations with the plaintiffs."

Mr. Welch having been examined and cross-examined, the evidence for the moment was treated as concluded, and then a point was made that the plaintiffs themselves had not been called as witnesses. The way in which the case was conducted was D that there were no real allegations against the plaintiffs, and, having regard to the answer to interrogatories, they thought it was unnecessary to appear. Then an application was made to the learned judge in the court below, and he allowed the plaintiffs to be called and they each went into the witness-box.

Mr. Reginald Winterbotham was the plaintiff actually concerned in the matter. His partner knew little about it, Mr. Reginald Winterbotham went into the box E and confirmed Mr. Welch's evidence. He said he had a telephone message from Mr. Welch, and in consequence the cheque for £300 was sent. Then he said that Mr. Welch had told him on the telephone that the defendant Cox was a nephew of the Earl of Lindsay, and on April 23 he authorised the £300 to be placed to Mr. Freeman's account. He knew nothing whatever of the circumstances under which the bill was obtained from Cox. He first heard when he saw a copy of the F defence, and he had never been in communication with Sibthorp. There was no communication between Messrs. Winterbotham, Gurney & Co. and the defendant Sibthorp. All the communications passed between Mr. Welch and Sibthorp. Then he said in cross-examination that he wanted Freeman to be helped:

> "I and various friends and clients had provided money for Freeman. I had G provided money for Freeman."

The partner, Mr. Walter Gurney, was called. He knew nothing of the matter. He knew nothing about the defendant Cox, and was called to prove that he too had no notice whatever of the transaction by which the bill was obtained. That was in substance the whole of the evidence. After the jury had answered the questions that were put to them, the learned judge gave judgment for the defen- H dants. He gave an unconditional stay, and he added this comment to the end of his notes: "I entirely disagree with the verdict, and see nothing to justify it."

Upon those facts the plaintiffs come to this court and ask for judgment. The defendants say that the most that this court can do is to grant a new trial, and that, however unreasonable the verdict may be, however clear the facts are, the defendants are entitled to say that the only thing by which they are bound is the I verdict of the jury. I put this to counsel: Assuming that the verdict was utterly unreasonable having regard to the evidence and one such as no reasonable men could possibly have given, there would be a new trial. Then suppose the same process continued, as it might continue. It must go on, if necessary, ad infinitum, if all the court can do is to direct a new trial and not to draw any inference of fact.

In my opinion, that is not the law. Although it has been said many times that the court ought to be exceedingly careful in interfering with the verdict of a jury —and particularly when the court is asked to give a decision contrary to the finding of a jury—yet, where it is manifest that all the facts of a case have been ascertained

and that there is only one verdict that can possibly be reasonably given, in my opinion, it is the duty of this court to draw the inference and to decide according to the rights of the parties, and that they are not confined to sending the case for a new trial. That was the result of *Paquin, Ltd.* v. *Beauclerk* (1) in the House of Lords, where *Millar* v. *Toulmin* (2) was referred to. It was a case in which a married woman had dealt with a milliner and had incurred a bill. She had given her name as Mrs. Holden, as she was then. She was Mrs. Beauclerk afterwards. She gave her name, and she was debited in the books of Paquin, Ltd., with the amount claimed. By the Married Women's Property Act, 1893, s. 1, it is provided as follows:

> "Every contract entered into by a married woman otherwise than as agent shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract."

[This section was repealed by the Law Reform (Married Women and Tortfeasors) Act, 1935, by s. 1 of which "a married woman shall . . . (b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt, or obligation. . . ."] The plaintiffs sued the lady and asked for judgment, saying that the contract was deemed to be a contract entered into with respect to and to bind her separate property. The question was whether she had not entered into the contract as agent for her husband, because, if so, it was not within the extension of the right. That was the matter which the House had to consider. Lord Loreburn, L.C., after referring to *Millar* v. *Toulmin* (2) and *Allcock* v. *Hall* (3), went on ([1906] A.C. at p. 161):

> "In that latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value. In the present case I think the Court of Appeal came to a sound conclusion. The only decisive question was whether the defendant made this contract as agent for her husband. Or, to put the same thing in other words, had she his authority, express or implied? In my opinion the evidence, which was uncontradicted and not impugned by cross-examination, leaves it beyond reasonable doubt that she did with his authority. There was no evidence the other way. That is sufficient to dispose of her case."

So the House of Lords considered the matter and drew a conclusion in fact that the evidence established that the wife acted with the husband's authority. Lord Macnaghten put the matter in this way (ibid. at p. 164):

> "The only question, as it seems to me, is whether the contract was entered into by the lady 'otherwise than as agent.' This is a question of fact. Unless the affirmative is shown the Act does not apply. In the present case, inasmuch as it has been proved that the lady had her husband's express authority to act as his agent and did so act, and it is not suggested that there was any misrepresentation on her part, I think the view of the Court of Appeal is right. No jury, I think, could properly have come to any other conclusion on the evidence."

This is a course that ought only to be followed in clear cases. In *Millar* v. *Toulmin* (2) the Court of Appeal were not entitled to substitute what was in fact their verdict for the verdict of the jury, for there was substantial evidence each

A way, as appears from the conflicting judicial decisions on the evidence in the various courts through which the case proceeded up to the House of Lords. But where the evidence is such that only one conclusion can properly be drawn, then, in my opinion, this court is bound to draw that conclusion and to enter judgment accordingly.

In the present case, when the evidence is looked at carefully, it is quite manifest B that the plaintiffs acted with transparent honesty and good faith from beginning to end. There is no motive for any misfeasance to be suggested; there is no motive for wrongdoing. The whole of their interest in the transaction was 6 per cent. on the money they advanced, which was £300 as a temporary loan. They were to get that back with 6 per cent. interest. When the facts are carefully considered there is only one conclusion that any reasonable body of men can possibly draw C from them—that is, the plaintiffs were acting in perfect honesty and in good faith. It has not been suggested that any further evidence can be obtained, and it has not been suggested that the whole of the facts of the transaction from beginning to end were not before the jury. In my opinion, the only proper course that this court can take is to enter judgment for the plaintiffs, notwithstanding the finding of the jury on the last of the three questions. The appeal will be allowed, there- D fore, with costs.

BANKES, L.J.—I agree. The only serious question really in this appeal is whether this court has jurisdiction under Ord. 58, r. 4, and, if it has jurisdiction, ought to exercise it in favour of the plaintiffs by entering judgment for them in spite of the verdict of the jury. I agree that the circumstances of this case are E somewhat exceptional. But I entertain no doubt whatever that we have the power and ought to exercise it in the particular circumstances of this case.

I need only refer very briefly to what seems to me to be material. The defendant Cox proved that his acceptance of the bill had been obtained by fraud, and, therefore, the only issue was whether the plaintiffs discharged the burden that was cast upon them of proving that they gave value in good faith for the bill. There seems F to me to be absolutely nothing which would justify any suspicion being cast on the conduct of the plaintiffs in reference to the transaction. It is not a case where a party either bought a bill or discounted a bill at a great undervalue. It is established that this firm of solicitors, the plaintiffs, had an interest in these patents of Freeman, and an interest, therefore, in the defendant Sibthorp maintaining his arrangement to finance Freeman, and it was not going out of the way of their G business to make this advance to Sibthorp for the purpose of this undertaking in which they were both jointly interested. They agreed to make the advance not with an exorbitant rate of interest at all. They merely took this bill with other bills as security for the advance that was made. It appears that inquiries were made with reference to the defendant Cox through Mr. Welch's brokers, and it was ascertained that the report with reference to him was not satisfactory, and it H appeared that, so far as this acceptance was concerned, it was treated as being of either very little value or possibly no value or practically no value. That was the position of things at the time the advance was made and the security was taken. As I understand the way in which the case was conducted, the transaction, so far as the plaintiffs themselves were concerned, was not challenged; their good faith was not challenged. But it was said that the part Mr. Welch took in the matter I was open to objection and open to criticism and suspicion. Mr. Welch was called, and, as far as I understand, two points were made with reference to his conduct. One was that it was said that he could not possibly have allowed this acceptance to be taken as security, having regard to the fact that this young man's, the defendant Cox, name appeared on the bill as acceptor with an hotel as an address. That might be a matter of comment if the bill had been taken under any circumstances other than those in which it was taken. As I have said, it was not discounted or bought. It was merely taken as security for what it was worth, and with knowledge that it was worth a very little. The other point taken, and

quite legitimately taken, by the learned counsel, was that Mr. Welch was really acting in the defendant Sibthorp's interest, and that he must have known that Sibthorp was a rogue because of the information that had been given him by the defendant Cox, or by Cox's advisers, and that Mr. Welch, with the knowledge of what was stated about the defendant Sibthorp, made up his mind that he would collect the amount of this bill from the defendant Cox and pay over the balance, after satisfying the plaintiffs, to the person whom he knew to be at any rate accused of a grave fraud—namely, the defendant Sibthorp. Apparently a great deal was made of that at the trial, and counsel put it forward here as a strong point. But, in my opinion, it rests entirely upon a misapprehension of the true effect of a letter of May 30. I considered it as carefully as I could, and I am satisfied it is a perfectly proper letter for Mr. Welch, acting on behalf of his firm, to have written in the circumstances in which it was written.

That is really a summary of the whole of the material evidence which has to be considered upon this point of view, and counsel for the defendants urges that, the onus being upon the plaintiffs, and on Mr. Welch of satisfying the jury that he acted in good faith, he failed to satisfy them, and that, it being a matter for the jury, the matter must go for a new trial. In the first place, I refuse to believe that the jury were so wanting in good sense and good feeling that they refused to believe Mr. Welch. I am satisfied in my own mind, and I think I am entitled to draw this inference, that what the jury did was to think that, if they answered this question in the way they did, they would relieve this young man of a very onerous obligation, and they would do it at practically no expense to the plaintiff's pocket because they valued this bill at practically nothing. But they did not consider sufficiently that, although it might not be at the expense of the plaintiff's pocket, it would be at the expense of their characters, which was probably much more valuable to them. I do not accept the view that the jury refused to believe Mr. Welch. But I go further and say that if the jury did refuse to believe Mr. Welch, they refused to believe him without the slightest justification, for the evidence as it is given and as it stands is such that only one inference can be drawn from it, namely, that the plaintiffs and Mr. Welch, acting on their behalf, in this matter acted in perfect good faith.

In these circumstances, that being the only inference which may be drawn however many times this case is sent to be re-tried upon the same material—and I assume that the case, if it goes back to be tried, must be tried on the same material—however many times a jury take the same view as this jury, if they happen to take that view, it will have to go back again. In my opinion, this court has jurisdiction to act under the rule which I mentioned, and I think that PHILLIMORE, L.J., in *Skeate* v. *Slaters, Ltd.* (4), exactly meets this point at a passage in his judgment where he says this ([1914] 2 K.B. at p. 446):

> "The result, I think, is that the cases lay down that when the court, to which the motion for new trial is made, sees that the verdict was wrong, and sees also that upon the admitted facts, or the only possible evidence that could be given, the verdict would be the other way, and has all the materials before it, it may conclude the case, dispense with another trial by a jury, which will either result in a verdict for the applicant or be itself set aside and so toties quoties, and at once give judgment."

I think that that statement exactly applies to the present case, although I agree that the rule is more usually applied in cases where a judgment is entered for a defendant than for a plaintiff. Still, I believe that the jurisdiction exists, and that it ought to be applied in this case.

EVE, J.—I agree. In my opinion, no evidence was forthcoming at the trial to justify the verdict of the jury, and I agree with the conclusion at which the learned judge in the court below arrived at the trial and the view which has been arrived at in this court, that upon that evidence no reasonable men could find a verdict

for the defendants. The consequence is involved that as often as a jury return that verdict, so often must the case be sent back to be re-tried. In this position it must be obvious that we ought in the interest of all persons to avoid these consequences if we can do it without departing from any authority binding upon this court. I think that we can. Indeed, I think that the cases which have already been referred to in the course of the judgments are authorities for the proposition that this court may enter judgment in cases where all the available evidence was before the court below, and where this court comes to the conclusion that no jury could properly find a different verdict.

Appeal allowed.

Solicitors: *Elvy Robb & Welch*; *Oldman, Cornwall & Wood Roberts.*

[Reported by E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

WILLIAM WHITELEY, LTD. *v.* HILT

[COURT OF APPEAL (Swinfen Eady, M.R., Warrington and Duke, L.JJ.), July 24, 25, 26, 1918]

[Reported [1918] 2 K.B. 808; 87 L.J.K.B. 1058; 119 L.T. 632; 34 T.L.R. 592; 62 Sol. Jo. 717]

Hire-Purchase—Hirer's interest under agreement—Assignment—Right of owner to damages for conversion from assignee—Clause in agreement providing that until payments complete hirer should remain bailee—Termination of bailment—Effect on rest of agreement.

By a hire-purchase agreement between the plaintiffs and the hirer relating to a piano the hirer agreed to pay a first payment of £2 13s. 11d. in consideration of the option to purchase the piano and also to pay a quarterly rent of £2 13s. 11d. until the sum of £32 7s. had been paid. It was further provided that until that sum had been paid the hirer should remain merely a bailee of the piano and that in case of any breach of the agreement the plaintiffs should be entitled to re-take the piano, but that the hirer should have the right to resume possession on paying any arrears of hire and procuring a guarantee to the satisfaction of the plaintiffs. At a time when the hirer was not in arrear with her payments under the agreement and the balance due was £18 17s. 5d. she sold the furniture in her flat, including the piano, to the defendant who took bona fide and for value and without notice of the agreement.

Held: the hirer had an interest under the agreement which was assignable and which in fact she assigned to the defendant, and, therefore, the defendant was entitled to become the purchaser of the piano on paying the £18 17s. 5d. balance due, which sum represented the damages recoverable by the plaintiffs for the conversion of the piano by the defendant.

Per WARRINGTON, L.J.: In a complex contract of this nature it by no means follows that because that part of the contract which is a contract of bailment is at an end the other part of the contract, which confers a proprietary interest, is also at an end.

Detinue—Delivery-up of chattel—Discretion of court—Exercise.

Per **Curiam**: In an action for detinue the power of the court to order the delivery-up of a chattel is discretionary and ought not to be exercised when the chattel is an ordinary article of commerce of no special value or interest,

and is not alleged to be of any special value to the plaintiff, and where damages would fully compensate. A

Notes. Considered: *Nelson Murdoch & Co.* v. *Wood* (1922), 126 L.T. 745. Applied: *Cohen* v. *Roche*, [1927] 1 K.B. 169. Distinguished: *United Dominions Trust (Commercial), Ltd.* v. *Parkway Motors, Ltd.*, [1955] 2 All E.R. 557.

As to a hirer's right to assign and an owner's right to resume possession, see 19 HALSBURY'S LAWS (3rd Edn.) 542, 543, 545–547; and as to judgment in actions for detinue, see ibid., 2nd Edn., vol. 33, pp. 78–80. For cases see 26 DIGEST (Repl.) 669, 672; 43 DIGEST 530, 531. B

Cases referred to:

(1) *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd.*, *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd., and Imperial Portland Cement Co., Ltd.*, [1902] 2 K.B. 660; 71 L.J.K.B. 949; 87 L.T. 465; 18 T.L.R. 827; 51 W.R. 81, C.A.; on appeal, [1903] A.C. 414; 72 L.J.K.B. 834; 89 L.T. 196; 19 T.L.R. 677; 52 W.R. 143, H.L.; 12 Digest (Repl.) 669, *5179*. C

(2) *British Waggon Co.* v. *Lea* (1880), 5 Q.B.D. 149; 49 L.J.Q.B. 321; 42 L.T. 437; 44 J.P. 440; 28 W.R. 349, D.C.; 12 Digest (Repl.) 662, *5128*. D

(3) *Dowling* v. *Betjemann* (1862), 2 John. & H. 544; 6 L.T. 512; 26 J.P. 531; 8 Jur.N.S. 538; 10 W.R. 574; 70 E.R. 1175; 42 Digest 445, *156*.

(4) *Fenn* v. *Bittleston* (1851), 7 Exch. 152; 21 L.J.Ex. 41; 18 L.T.O.S. 197; 155 E.R. 895; 3 Digest (Repl.) 112, *335*.

(5) *Donald* v. *Suckling* (1866), L.R. 1 Q.B. 585; 7 B. & S. 783; 35 L.J.Q.B. 232; 14 L.T. 772; 30 J.P. 565; 12 Jur.N.S. 795; 15 W.R. 13; 37 Digest 9, *43*. E

(6) *Halliday* v. *Holgate* (1868), L.R. 3 Exch. 299; 37 L.J.Ex. 174; 18 L.T. 656; 17 W.R. 13, Ex. Ch.; 37 Digest 3, *4*.

(7) *Belsize Motor Supply Co.* v. *Cox*, [1914] 1 K.B. 244; 83 L.J.K.B. 261; 110 L.T. 151; 26 Digest (Repl.) 671, *61*.

(8) *Mulliner* v. *Florence* (1878), 3 Q.B.D. 484; 47 L.J.Q.B. 700; 38 L.T. 167; 42 J.P. 293; 26 W.R. 385, C.A.; 29 Digest 19, *246*. F

(9) *Robson* v. *Drummond* (1831), 2 B. & Ad. 303; 9 L.J.O.S.K.B. 187; 109 E.R. 1156; 12 Digest (Repl.) 661, *5126*.

Also referred to in argument:

Helby v. *Matthews*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 26 Digest (Repl.) 660, *14*. G

Singer Manufacturing Co. v. *Clark* (1879), 5 Ex.D. 37; 49 L.J.Q.B. 224; 41 L.T. 591; 44 J.P. 59; 28 W.R. 170; 26 Digest (Repl.) 671, *59*.

Cramer v. *Giles* (1883), 1 Cab. & El. 151; 26 Digest (Repl.) 672, *63*.

Loerschman v. *Machin* (1818), 2 Stark. 311; 171 E.R. 656, N.P.; 43 Digest 491, *303*.

R. v. *McDonald* (1885), 15 Q.B.D. 323; 52 L.T. 583; 49 J.P. 695; 33 W.R. 735; 1 T.L.R. 465, 561; 15 Cox, C.C. 757, C.C.R.; 3 Digest (Repl.) 55, *4*. H

Wilkinson v. *Verity* (1871), L.R. 6 C.P. 206; 40 L.J.C.P. 141; 19 W.R. 604; sub nom. *Williamson* v. *Verity*, 24 L.T. 32; 3 Digest (Repl.) 63, *51*.

Brinsmead v. *Harrison* (1871), L.R. 6 C.P. 584; 40 L.J.C.P. 281; 24 L.T. 798; 19 W.R. 956; on appeal (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99, Ex. Ch.; 43 Digest 531, *668*. I

Johnson v. *Stear* (1863), 15 C.B.N.S. 330; 3 New Rep. 425; 33 L.J.C.P. 130; 9 L.T. 538; 10 Jur.N.S. 99; 12 W.R. 347; 143 E.R. 812; 43 Digest 510, *490*.

Nyberg v. *Handelaar*, [1892] 2 Q.B. 202; 61 L.J.Q.B. 709; 67 L.T. 361; 56 J.P. 694; 40 W.R. 545; 8 T.L.R. 549; 36 Sol. Jo. 485, C.A.; 3 Digest (Repl.) 118, *380*.

Appeal from an order of the Divisional Court on an appeal from Marylebone County Court.

A On Dec. 10, 1915, the plaintiffs let to a Miss Nina Nolan a piano under a hire-purchase agreement the material paragraphs of which were as follows:

"1. The hirer agrees to pay a first payment of £2 13s. 11d. on signing this agreement in consideration of the option of purchase when granted (for which credit only will be given in the event of a purchase being effected), and in addition thereto to punctually pay to the owners without previous demand the B quarterly rent of £2 13s. 11d. for the hire of the said article on Mar. 10 next, and so on quarterly on the 10th day of each succeeding month so long as the hirer sees fit to continue the hire. . . . 3. Not to remove or suffer the article to be removed without the previous written consent of the owners. . . . 5. In case of any breach of this agreement the owners shall thereupon without formal demand be entitled to re-take the said article, and for that purpose leave is C hereby given to the owners or their agents to enter any premises of which the hirer may be or appear to be tenant, occupier, or owner. 6. Any relaxation or indulgence which the owners may show to the hirer shall not in any way prejudice their strict rights under this agreement. The owner agrees that: (a) The hirer may at any time during the hire terminate the same by returning the article to the owners. (b) The hirer may become the owner of the said D article by punctually paying the rent as aforesaid, but shall remain merely a bailee until the full sum of £32 7s. has been paid. (c) Should the owners re-take the said article by notice of the terms of this agreement, the hirer shall have the right to resume the hiring, provided he pay arrears of hire up to the date of re-possession and procures a guarantee to the satisfaction of the owners and pays the expenses of and incidental to re-taking and removal of E the said article within twenty-one days after such re-possession."

In December, 1916, when she was not in arrear with her payments under the agreement and the balance due was £18 17s. 5d. Miss Nolan sold the contents of her flat to the defendant, Miss Helen Hilt, who took bona fide and for value and without notice of the agreement. On a claim by the plaintiffs in the county court F for the return of the piano and damages for its detention or, alternatively, conversion, it was decided by the learned county court judge that the true measure of damages was the amount of the instalments outstanding at the date of the sale to the defendant—which sum had been paid into court by her—and accordingly he gave judgment for that sum. The plaintiffs, who contended that they were entitled to the return of the piano or its full value, appealed to the Divisional Court (SALTER G and ROCHE, JJ.), who decided that in the circumstances the defendant only had such title to the piano as her vendor had; that, inasmuch as the sale constituted a repudiation or annihilation of the hire-purchase agreement and all its terms, the vendor had no right of any kind in the piano; and that the plaintiffs, as the owners of the piano, were entitled to the return of the piano or damages, such damages being the price mentioned in the agreement, plus something nominal for its deten-H tion. The defendant appealed to the Court of Appeal.

McCall, K.C., and *S. H. Leonard* (with them *Percy Handcock*) for the defendant. *Schwabe, K.C.*, and *Ernest Wetton* (with them *Joy*) for the plaintiffs.

Cur. adv. vult.

July 26, 1918. The following judgments were read.

I **SWINFEN EADY, M.R.**—The defendant appeals from the judgment of the Divisional Court, which reversed the judgment of the Marylebone county court.

On Dec. 3, 1916, the defendant purchased from Nina Nolan for £100 the whole contents of her flat, No. 40, College Court, including the piano, being unaware that the piano was subject to a hire-purchase agreement. She also succeeded Nina Nolan as the occupier of the flat. Nina Nolan gave a receipt for the £100 in the following form:

"40 College Court, Hammersmith.—Received of Helen G. Hilt one hundred pounds in full payment for all my furniture, piano and plate, pictures, linen,

carpets, fittings, and effects. The whole contents of this flat as set down in the following list. I solemnly declare that the property is my own and no one has any claim upon it."

The defendant in her letter to the plaintiffs dated Aug. 10, 1917, states that before purchasing she made various inquiries to ascertain that Nina Nolan had a right to dispose of all the contents of the flat; that she made inquiries of the agent, of the landlord, of his solicitor; and that she employed a person to search and see if there was any registered sale or judgment against her. She added in her letter that she had paid her hard-earned savings in all good faith, and could have taken no more precaution or used greater care than she did. At the date of this purchase it is not suggested that there had been any breach of the agreement, and four days subsequently, on Dec. 7, 1916, Nina Nolan paid to the plaintiffs £2 13s. 11d., which would become due on Dec. 10. This payment was unknown to the defendant, and it is not alleged that the defendant was then aware of the hire-purchase agreement. No further payments were made to the plaintiffs by Nina Nolan. The amount paid by her was £13 9s. 7d., and £18 17s. 5d. would, therefore, be the amount to make up the full sum of £32 7s. The plaintiffs, not receiving any further payments, made inquiries about the piano, and ascertaining that it remained in the flat, and that the defendant was the occupier, they, on Aug. 9, 1917, by letter, demanded the piano from the defendant. By the letter dated Aug. 10, 1917, to which I have already referred, the defendant explained the circumstances of her purchase. Correspondence between the parties and the respective solicitors took place, and on Sept. 20, 1917, the defendant offered to pay all the arrears of instalments then due and to continue to pay the remaining instalments, and she gave a substantial guarantee for the payment. This offer was not accepted, and on Oct. 22, 1917, the plaintiffs issued a plaint in the county court, claiming the return of the piano, which they valued at £28, with £5 damages for detaining it, and claiming in the alternative £33 damages for wrongfully converting the piano. The defendant paid into court £18 17s. 5d., being the amount of the unpaid instalments, and the costs, and set up the defence that the plaintiffs were not entitled to more than that amount.

The county court judge decided that the defendant acquired the rights of Nina Nolan under the agreement before anything was or could be done to terminate it, no instalment being then in arrear, and that the measure of the plaintiffs' damage was the amount of instalments unpaid, £18 17s. 5d., and as that sum had been paid into court, the plaintiffs were not entitled to recover anything more, and he directed judgment to be entered for the defendant. It was contended before him that Nina Nolan could not transfer any interest to the defendant, as she had fraudulently converted the piano, and was guilty of larceny. The judge did not adopt that view of the facts. The defendant said that Nina Nolan had told her that she was leaving for America. Apparently no one had any opportunity of communicating with her, or of asking for any explanation of her conduct. It did not appear that there was any defect in the title to any other of the furniture and effects included in the sale for £100. In these circumstances, it must be remembered that the appeal given by s. 120 of the County Courts Act, 1888 [see now County Courts Act, 1934, s. 105], is an appeal on a question of law, and it was not open to the Divisional Court to take a different view of the facts from that taken by the county court judge, and to find that the sale was fraudulent and amounted to a repudiation of the hire-purchase agreement. The fact that after the sale the vendor paid the next instalment to the plaintiffs would certainly not seem to indicate any intention of repudiating the agreement. But in any case the issue of fact were for the county court judge. The ground of the decision by the Divisional Court, that the sale was fraudulent, and amounted to a repudiation of the agreement, and put an end to the interest of the vendor, was not open to that court upon the finding of the county court judge. The defendant upon this appeal also contends that the judgment of the Divisional Court was erroneous upon the

measure of damages, and that the judgment of the county court judge was right in law.

The first question that arises is whether Nina Nolan had any interest under the hire-purchase agreement which she could lawfully assign. The plaintiffs insist that the agreement merely amounts to a bailment which was ended by her parting with the possession of the chattel bailed, and that the owner thereupon became entitled to its immediate return. It is not disputed that by virtue of the sale all the right, title and interest which Nina Nolan could dispose of passed to the defendant. At the date of the sale there had not been any breach of the agreement, and there was not any present right in the plaintiffs to claim the return of the piano. The agreement is not only a letting to hire of a piano; it also confers for a valuable consideration an option of purchase. Moreover, cl. 6 (c) shows that if default is made in payment of the instalments, or if for any other breach the plaintiffs re-take possession of the chattel, the hirer's interest is not thereby terminated, but the hirer has the right to resume the hiring on paying the arrears of hire up to the date of re-possession and procuring a satisfactory guarantee. Parting with the possession of the piano would not be a breach of the agreement if the piano remained in the flat and was not removed contrary to cl. 3. If Nina Nolan had let her flat furnished for three years with the piano the plaintiffs would not have been entitled on that account to re-take the piano. The whole terms of the agreement show that the contract was not merely a bailment for reward, but that it conferred an interest in the chattel in the bailee. It did not amount to a contract for sale as the hirer was not bound to purchase. But it did confer on the hirer an absolute right to purchase on complying with the provisions of the agreement.

The contract was, in my opinion, assignable by the hirer, but the assignee could only retain possession of the chattel upon the terms of the contract. There was no right to remove the piano nor has it been removed from the flat. There is no reason whatever for supposing that any personal element entered into the mind of either of the parties to the agreement, or that it would make any difference to the plaintiffs by whom the obligations of the contract were fulfilled, or that there were any grounds for taking this contract out of the well-settled general rule that the benefit of a contract is assignable in equity and may be enforced by the assignee: see *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd.* (1); *British Waggon Co.* v. *Lea* (2). The defendant, therefore, acquired all interest of the vendor, and moreover she had the right in equity to compel the vendor to pay the remaining instalments to the plaintiffs, and enforce for the benefit of the defendant all rights conferred by cl. 6 (c) of the contract.

It was urged by the plaintiffs that no rights arise under cl. 6 (c) unless and until the piano has been actually physically recalled and removed from the flat and without legal process. The plaintiffs, however, are claiming possession of the piano in this action, and the court would not and ought not to go through the idle form of ordering the piano to be delivered to them, if immediately the defendant would be entitled to an order for the re-delivery of it to her. It should be remembered that the arrears of hire and substantial guarantee were offered and refused. It would be quite wrong to say that when the defendant was willing to comply with the provisions of cl. 6 (c) she could only become so entitled if she first suffered the inconvenience of a physical removal, and if expenses of re-taking and removal were first incurred.

It follows from what I have said that the true measures of damages recoverable by the plaintiffs is not the whole value of the piano, £28, but compensation for the loss actually sustained, and, as the defendant was entitled to become the purchaser of the piano on paying £18 17s. 5d., that sum only represents the loss sustained by the plaintiff. It was urged that the plaintiffs were entitled to an order for the delivery of the piano itself. But, first, the plaintiffs sued not only in detinue, but also in trover to obtain damages for the conversion, and, secondly, the power vested in the court to order the delivery-up of a particular chattel is discretionary,

and ought not to be exercised when the chattel is an ordinary article of commerce of no special value or interest, and is not alleged to be of any special value to the plaintiff, and where damages would fully compensate. In equity, where a plaintiff alleged and proved the money value of the chattel, it was not the practice of the court to order its specific delivery: see *Dowling* v. *Betjemann* (3). A bailment may be determined by doing any act entirely inconsistent with the terms of the bailment: *Fenn* v. *Bittleston* (4). But it does not follow that, if the bailee has any further interest in the chattel of a proprietary kind, he forfeits that interest by any dealing with the chattel not warranted by the terms of the bailment. There is no foundation for such a notion: *Donald* v. *Suckling* (5); *Halliday* v. *Holgate* (6). In these circumstances I am of opinion that the appeal should be allowed and the judgment of the county court judge restored.

WARRINGTON, L.J.—I am of the same opinion. The real question which we have to determine is whether under this agreement the hirer, on Dec. 3, 1916, had an interest assignable, and in fact assigned that interest to the defendant. The agreement refers to a specific ascertained chattel. It describes the nature of the transaction as being an option to purchase. The first payment was to be made in consideration of the option to purchase therein granted.

I need not read the agreement. But the nature of the interest which was taken by the hirer appears to me clearly to be this. First, a right to retain possession of the chattel so long as she performed the conditions of the agreement to be performed on her part. Secondly, an option to purchase the chattel exercisable by payment of the instalments provided for by the contract. Thirdly, in case of failure to pay an instalment or breach of any other of the provisions on her part contained in the agreement, and possession thereupon taken by the plaintiffs, to have restored, first, her right to possession, and, secondly, the option of purchase which I have already described upon performing the conditions prescribed by the agreement. That, in my opinion, was the interest of the defendant. The general property in the chattel, no doubt, remains in the plaintiffs, but that general property in it was qualified and limited by the contractual interest conferred by the agreement upon the defendant.

Was that interest assignable? In my opinion it clearly was. It is unnecessary to do more than to refer to what was said by Lord Macnaghten in *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd.* (1) and to a similar statement made by Lord Lindley in the same case. Lord Macnaghten says ([1903] A.C. at p. 420):

> "It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee."

Lord Lindley in the same case (ibid. at p. 423) says:

> "My Lords, if the above agreement had been with an ordinary individual his interest would, on his death, have passed to his executors or administrators; or if he had become bankrupt, his trustee would have claimed it and sold it for the benefit of his creditors. It follows that on the same supposition he could have assigned such interest in his lifetime."

It would be incumbent upon the plaintiffs, if they sought to dispute the proposition that this agreement was assignable, to put forward something which would take the case out of the general rule. That it was quite impossible for them to do. The agreement, therefore, or, rather, the contractual interest of the defendant in the chattel by virtue of the agreement, was assignable in equity. The result of that is not, of course, to give to the assignee any interest greater or other than that which was possessed by the assignor. But the effect is to give to the assignee as between him and the other contracting party exactly the same interest as that which the assignor had as between himself and the other contracting party.

The next question which has to be answered is: Was that interest in fact assigned? As to that there can be no doubt. The agreement was in general terms

for the sale to and purchase by the defendant from Miss Nolan of all the furniture, including the piano, which was on Dec. 3 in the flat. It is quite true that Miss Nolan had not at that time the entire property in that particular article of furniture, the piano, but she had an interest. And as between her and the purchaser who had to pay there can be no doubt that such interest as she had in fact had would pass by the agreement to the purchaser. The interest, therefore, of the hirer, as I have described it, became vested in the purchaser, the present defendant. How did that qualify the right of the plaintiffs to this chattel? In my opinion, the rule is as stated by CHANNELL, J., in *Belsize Motor Supply Co., Ltd.* v. *Cox* (7) ([1914] 1 K.B. at p. 252):

> "Where the defendant has an interest in the goods and chattels converted then the measure of damages is the value of the plaintiff's interest as between himself and the defendant."

In the present case the value of the plaintiffs' interest as between themselves and the defendant was clearly the amount of the unpaid instalments. Those unpaid instalments were paid into court, and, in my judgment, the plaintiffs in the action of conversion had no right to recover anything more than that sum. But the plaintiffs say that they are suing in detinue, and that they are entitled to have the chattel itself delivered up. The answer to that seems to me to have been given in the judgment of the Master of the Rolls, and I do not propose to add anything further except to point out that it is not true in this case that the plaintiffs were simply suing in detinue. The plaintiffs were suing in detinue and in conversion, and by so suing they gave to the defendant the option of taking them at their word and paying into court the amount of the damages properly recoverable in an action of conversion. That is what she did.

I have only one word to add with regard to the judgment of the Divisional Court. In my opinion, with the greatest respect, the Divisional Court was wrong in assuming, without a finding of fact on the part of the county court judge, that the contract was a fraudulent contract on the part of Miss Nolan. I think it is quite consistent with the facts of this case that she never intended to commit any fraud at all, but intended to give to the purchaser such interest as she had. Certainly there is no ground for the suggestion that she intended to commit any fraud as against the plaintiffs. Secondly, I desire to say that, in my judgment, with all respect, the learned judges of the Divisional Court ignored for the purposes of their judgment the complex nature of this contract, treating it as a contract of bailment simply, and nothing else. If it had been a contract of bailment simply, then it may be that an act of the bailee inconsistent with the bailment would have put a complete end to that contract. A very good example of that is found in *Mulliner* v. *Florence* (8) which was referred to by the plaintiffs. That was a case of a deposit of articles with an innkeeper, the agreement being destroyed, as one would expect, by parting with possession, which was the essence of the agreement. But in a complex contract of this nature it by no means follows that because that part of the contract which is a contract of bailment is at an end the other part of the contract, which confers a proprietary interest, is also at an end. In my opinion, the judgment of the county court judge was right, and ought to be restored, while that of the Divisional Court must be reversed.

DUKE, L.J.—I agree with the judgments which have been delivered and I should add nothing if it were not that this court is reversing the judgment of the Divisional Court. I differ from that judgment because I attribute a value which the learned judges of the Divisional Court did not to the option of purchase which Nina Nolan acquired under her agreement with the plaintiffs.

The main question in the present case is whether the interest so acquired was assignable. The opinion of LORD MACNAGHTEN upon which the judgment of the House of Lords proceeded in *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd.* (1) sets forth the general rule that the benefit of a contract

is assignable in equity and may be enforced by the assignee, and recognises also the principle that where in an executory contract the personal skill of a party or personal confidence reposed in a party is involved in the due performance of the contract on his part, that party cannot assign the benefit of the contract as against the party who is to have the benefit of such personal skill or to have the performance of the contract conditioned by such personal confidence. The assignability of contracts extends to a contractual relationship as intimate as that of landlord and tenant. But it does not extend to cases where personal performance is of the essence of the contract: *Robson* v. *Drummond* (9); *British Waggon Co.* v. *Lea* (2); 5 Q.B.D. at p. 153, per COCKBURN, C.J. It was hardly disputed in the present case that the plaintiff's interest under the contract could have been assigned. No reason was shown either for supposing that in the case of the death of the hirer her legal personal representative could have been lawfully denied the benefit of the option to purchase. In the Court of Appeal in *Tolhurst's Case* (1), as in the House of Lords, the practical inquiry was made: "Could an assignee perform the assignor's part of the agreement without detriment to the rights of the contracting party of the other part?" In the present case it was conceded for the plaintiffs that the obligation of the hirer under cll. 1 to 4 of the agreement could be performed as adequately by some other person, but the undertaking for leave to re-enter under cl. 5 was said to be personal and not capable of performance by deputy. Nothing was advanced in argument, however, to show that the latter part of cl. 5 adds anything in substance to the right of the plaintiffs to resume possession of the piano by forcible means in case of default of the hirer.

On the whole, I am of opinion that there is not in the words of the agreement which create the option of purchase anything to support the contention that the hirer's obligations could be performed only by Nina Nolan, and, therefore, I hold that the benefit of the option granted by the plaintiffs to Nina Nolan was capable of assignment and was assigned by her to the defendant. I see no ground for the contention that Nina Nolan defeated the effect of any assignment which she could lawfully make by purporting to assign the piano without any reservation of or in disregard of the proprietary rights of the plaintiffs. There are no findings of fact by the learned county court judge to support the conclusion stated in the Divisional Court that Nina Nolan by a fraudulent repudiation of her agreement with the plaintiffs had forfeited all her interest. *Halliday* v. *Holgate* (6) shows that a sale by a pledgee of chattels, although technically wrongful, does not necessarily re-vest the chattels in the pledgor. And there seems to me to be no good reason here for saying that a hirer of a chattel must lose an option of purchase of the chattel by entering into an agreement for an absolute sale. The question whether there has been an offer of recission of an executory contract and acceptance of such offer must, I think, be a question of fact. And I see no evidence to warrant a finding that the hirer in the present case so behaved as to manifest an intention to repudiate the contract. She certainly communicated no such intention to the plaintiffs. As to the form of the judgment, counsel for the plaintiffs insisted that the default of the hirer in making the later payment under the agreement entitled the plaintiffs as of right to a judgment for delivery of the piano with some damages for its detention. His argument was based upon the form of the rules as to judgment in detinue. I agree with what has been said by WARRINGTON, L.J., concerning the effect of the plaintiffs' particulars of demand. They claimed the piano and damages in detinue, and, alternatively, claimed damages as for a conversion, and thereby gave the defendant her choice of paying the damages claimed for conversion in satisfaction of their whole claim. On the general question I am satisfied that the rules do not give a plaintiff in detinue the alleged absolute right. A plaintiff had not that right at common law or in equity before the Judicature Act, 1873: see DAY'S COMMON LAW PROCEDURE ACTS (4th Edn.), p. 324, in notes to *Dowling* v. *Betjemann* (3). The Rules of the Supreme Court and the County Court Rules leave it in the discretion of the court to determine whether judgment for the delivery of the specific chattel out to issue. In the present case it would

be idle and oppressive to issue such a judgment and thereupon to declare and give effect to the rights which this court holds to be vested in the defendant. I am of opinion that the judgment of the county court should be restored.

Appeal allowed.

Solicitors: *Peachey & Co.*; *H. E. Tudor.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN OLYMPIA OIL AND CAKE CO., LTD. AND MACANDREW, MORELAND & CO., LTD.

[COURT OF APPEAL (Pickford, Bankes and Scrutton, L.JJ.), July 15, 1918]

[Reported [1918] 2 K.B. 771; 34 T.L.R. 581; 16 L.G.R. 745; 82 J.P.Jo. 351; 88 L.J.K.B. 227; 119 L.T. 553; 83 J.P. 9]

Arbitration—Award—Form—Alternative award—Award in form of Special Case and alternatively final award—Conditions imposed as to time within which party must elect to proceed on Special Case.

Arbitrators made an award, first, in the form of a Special Case under s. 7 (b) of the Arbitration Act, 1889, on which either of the parties to the arbitration could take the opinion of the court provided that he gave to the other party fourteen days' written notice of his desire to take the opinion of the court and within fourteen days from the service of such notice set the award down for argument before the court as a Special Case, and, secondly, if such notice was not given and the Case was not set down within the time specified in the form of a final award. On a motion to set the award aside,

Held, by BANKES and SCRUTTON, L.JJ., PICKFORD, L.J., dissenting: in imposing conditions as to the time within which either party must elect to proceed on the Special Case the arbitrators were not giving any direction which was contrary to any statute or rule of court; they were entitled to make an award in the alternative form which they had adopted, and in doing so they acted reasonably; and, therefore, the motion failed.

Notes. The Arbitration Act, 1889, was repealed by the Arbitration Act, 1934, itself repealed by the Arbitration Act, 1950, of which see now s. 21: 29 HALSBURY'S STATUTES (2nd Edn.) 89.

Referred to: *Re Fischel and Mann and Cook*, ante, p. 584.

As to the form of an award, see 2 HALSBURY'S LAWS (3rd Edn.) 42, 43; and for cases see 2 DIGEST (Repl.) 594–597, 621.

Appeal from an order of the Divisional Court (SHEARMAN and SANKEY, JJ.), dismissing a motion to set aside an award which stated as follows:

"By contracts in writing, dated respectively Aug. 17 and 18, 1917, the sellers, the Olympia Oil and Cake Co., Ltd., sold to the buyers, MacAndrew, Moreland & Co., Ltd., two lots of 100 tons each palm kernel (Twitchell) fatty acids of the usual good quality of £73 10s. per ton ex mill, Selby, Oct., 1917, delivery. The contracts were on the terms of the sale conditions of the Liverpool General Brokers' Association, which were endorsed thereon. The sellers did not deliver or tender the subject-matter of the contracts, and the buyers claimed arbitration under the rules of the association, and the arbitrators duly made an award in favour of the buyers. The sellers, under the

rules of the association, appealed against the award to the appeal committee of the association. Upon the hearing of the appeal the sellers requested the appeal committee to state in the form of a Special Case for the opinion of the court certain questions of law arising in the course of the reference. We, the appeal committee, decided to make their award in alternative form, namely, first in the form of a Special Case under s. 7 (b) of the Arbitration Act, 1889, and, secondly, in the form of a final and conclusive award, our intention being that the sellers shall have the option of taking the opinion of the court upon the points on which we were requested to state a Special Case if they so desire and of such desire shall give notice to the buyers within the time and subject to the conditions hereinafter appointed by us, but that, if they shall not so desire and shall not give such notice and comply with the said conditions, our award shall be and shall be treated as a final and conclusive award, immediately enforceable by action or otherwise, without previous recourse to the court. . . . If either party shall desire to take the opinion of the court upon the questions of law on which we were requested to state a Special Case and of such desire shall before the expiration of fourteen days from the date hereof give to the other party notice in writing and shall before the expiration of two weeks from the service of such notice set the award down for argument before the court as a Special Case, then, subject to the opinion of the court, we hereby make our award in the form of a Special Case for the opinion of the court. . . . If, on the other hand, the notice appointed [above] shall not be given by either party, or if either party, having given such notice, shall fail to duly set down the award for argument before the court as a Special Case within the time or times appointed . . ., then and in such case we award and direct as follows:

Final Award.

A. That the sellers do pay to the buyers the sum of £1,050 with interest thereon from Nov. 20, 1917, at 5 per cent. per annum. B. That the sellers do pay the fees for arbitration before the appeal committee and of this award (which we award to be the sum of £71 14s. 8d.). C. We award and direct that this our final award shall be read and construed as if it consisted only of paras. 1 and 2 and A and B . . ."

The sellers moved to set aside the award on the ground (inter alia) that the award was in excess of jurisdiction in that the arbitrators had purported to limit the time within which the opinion of the court could be taken upon the award, and that the award was conditional and void, and bad in law on the face of it. The Divisional Court refused to set aside the award, holding that it was not in excess of jurisdiction, and that the arbitrators had adopted a reasonable and convenient course. The sellers appealed.

Various grounds were put forward on which the sellers contended that the award was bad, but only the ground dealt with in this report calls for report.

Greer, K.C., and *Greaves Lord* for the sellers.
Leck, K.C., and *C. R. Dunlop* for the sellers.

PICKFORD, L.J.—This is a motion to set aside an award on various grounds. One is important and difficult. It is said that the arbitrators have made an award which is in excess of their jurisdiction. They have stated an award in the form of a Special Case first, and have said this:

"We, the appeal committee of the said association, decided to make our award in alternative form—namely, first, in the form of a Special Case under s. 7 (b) of the Arbitration Act, 1889, and, secondly, in the form of a final and conclusive award, our intention being that the sellers shall have the option of taking the opinion of the court upon the points on which we are requested to state a Special Case if they so desire and of such desire shall give notice

to the buyers within the time and subject to the conditions hereinafter appointed by us, but that, if they shall not so desire and shall not give such notice and comply with the said conditions, our award shall be and shall be treated as a final and conclusive award immediately enforceable by action or otherwise without previous recourse to the court. . . . If either party shall desire to take the opinion of the court upon the questions of law on which we were requested to state a Special Case and of such desire shall before the expiration of fourteen days from the date hereof give to the other party notice in writing and shall before the expiration of two weeks from the service of such notice set the award down for argument before the court as a Special Case, then, subject to the opinion of the court, we hereby make our award in the form of a Special Case for the opinion of the court."

Then they make their award and raise the question which the parties wanted decided. They go on:

"If, on the other hand, the notice [mentioned above] shall not be given by either party, or if either party, having given such notice, shall fail to duly set down the award for argument before the court as a Special Case within the time or times appointed . . ., then and in such case we award and direct as follows. . . ."

There follows the final award, an award of payment of £1,050 by the sellers to the buyers.

That is said to be in excess of the jurisdiction of the arbitrators, because, if arbitrators, under s. 7 (b), state an award as to the whole or part thereof in the form of a Special Case for the opinion of the court, there are no rules as to the time within which that Special Case must be set down and argued, and these arbitrators have no power to say: "You shall take your Special Case, but on the terms which we impose, and if you do not comply with those terms we make a final award." I think that argument is well founded. I think what the arbitrators did was quite reasonable, and there I agree with the Divisional Court, but I think it was an excess of jurisdiction, and there I differ from the Divisional Court, and, I am sorry to say, also from my colleagues in this court. I think an arbitrator has no right in his Special Case to impose conditions upon either party taking advantage of it. There are certain legal incidents attached to the Special Case when stated. An argument was used to us of this kind: "Suppose the arbitrators had said, 'We won't give you a Special Case except on the condition that you give notice within fourteen days and set it down within fourteen days more, and supposing an application had then been made to the court, would the court have granted a Special Case without imposing that condition?" As to that I can only say I do not know. I think very likely the court would not, but it seems to me that that argument is beside the point altogether. It does not follow because the court might have imposed that condition itself, or refused to make an order unless that condition was accepted, that, therefore, arbitrators can impose the condition without being asked for it. It is giving to the arbitrators the power of the court. Therefore, I do not think they had power to do that. I think it is saying this: "We make an award in the form of a Special Case; we won't leave it there as by law we are bound to do, but we will say that if you choose to comply with the condition which we choose to put into it that is our award. If you do not, then you cannot have your Special Case and we make another award." That, in my mind, was beyond their jurisdiction, and I think this award ought to be set aside. The other members of the court, however, do not agree with me, and, therefore, the appeal will be dismissed with costs. I only mention this further matter to show that I have not forgotten it. An argument was addressed to us on cl. 28 that:

"If the court should be of opinion that the measure of damages is other than that decided by us, the award will be for such amount as the court may think fit."

It was argued that that made the award bad because it is uncertain, and it was said that the arbitrators ought to have assessed the amount on various bases and then ask the court to say which was the right basis. It is not necessary, in the view I take, to express any opinion about that. It is not altogether an easy question, and I think I had better not express any opinion upon it. In my opinion this appeal ought to be allowed, but the other members of the court think otherwise, and it will be dismissed with costs.

BANKES, L.J.—I have the misfortune to differ from PICKFORD, L.J., the opinion of the Divisional Court, in my view, being right.

I arrive at my conclusion by these steps. The arbitrators have done something quite out of the common. It is not disputed that from some points of view they took a reasonable course, but that is not the question, which is whether they had a right to do what they did. I think the right view of what they did is that they have not made two awards at all in the sense of one award for x pounds and another award for y pounds, nor have they awarded alternatives in the sense that was referred to by SHEARMAN, J., when he spoke of an award directing that the defendant should either marry the plaintiff or pay £50. What they have really done, I think, is to give one award and one award only, but putting it in alternative forms, the one a form which is adopted for the purpose of giving the parties a right to take the opinion of the court, and the other the form which is to be operative if the parties elect not to take the opinion of the court. In my view that is a course which an arbitrator is entitled to take.

The next question is whether, in taking that course in this particular case, the arbitrators have exceeded their jurisdiction, and I will deal with the two alternative forms of award separately. First, there is what the arbitrators call the final award, and of course their jurisdiction to make the final award depends upon the agreement of the parties. If the final award stood alone, it is not suggested, as I understand the argument, that in making it in the form in which they have made it they have exceeded the jurisdiction which had been conferred upon them by the parties. I turn now to consider the other form of award, that in the form of a Special Case, and the objection is taken that the arbitrators had no right to impose a condition as to the time within which either party must elect to adopt that particular form of award. The point is, no doubt, of very considerable difficulty. But the jurisdiction of the arbitrators to state their award in this particular form is a statutory jurisdiction, and the statute confers upon arbitrators a right to state their award either in whole or in part in the form of a Special Case for the opinion of the court. The statute is silent as to the form that the Case is to take, and it is also silent as to the time within which either party must state a Special Case for argument. Not only is it silent upon that point, but there is no rule of court directing any time within which the Case is to be set down. In taking the course they did, therefore, the arbitrators were not giving a direction which was contrary either to the statute or a rule of court in saying that in their opinion the Case to be effective must be set down within a certain time. The only question, which is that on which I differ from the judgment just given by my brother, is whether this court should interfere to the extent of setting this award aside, because the arbitrators have adopted this course of saying: "If you want our award in a form which will enable you to take the opinion of the court upon it, you must act promptly and set the case down within a certain number of days."

It seems to me that there is nothing in the statute or the rules which direct an arbitrator as to what he is to put into his Special Case. He can take his own course as to the form which the Special Case follows, and the only remedy of the party who complains of the form or the substance of the Case is to apply to the court, and the court may then either remit it to the arbitrator or set it aside. But they will not set it aside, as it seems to me, unless they come to the conclusion that the arbitrator has either been guilty of misconduct, or something in the nature of misconduct, or that he has so obviously exceeded his jurisdiction as to the matter

about which he was asked to arbitrate that he must be treated as a person to whom it would not be proper to remit the case for his further consideration. I think it is a material test to consider what the court would have done had the arbitrators said to the parties: "You asked for a Special Case. We will grant you a Special Case, provided you undertake to set it down within a certain number of days, we will say fourteen," and one of the parties had said: "You have no right to impose that condition upon me, and I shall apply to the court to compel you to state a Special Case on the ground that you have refused to do so." In the view I take the court would have refused to compel an arbitrator to state a Case in those circumstances on the ground that he had refused. It seems to me the view they would take would be that he did not refuse, but that he had offered a Case under reasonable conditions, and it was the party who refused to accept what were really reasonable conditions. If that is the true view, I cannot bring myself to see that the arbitrators have done anything in the nature of misconduct in inserting into the Special Case itself the condition instead of taking the course which I have just indicated. I fail to find any grounds upon which it can be said that the arbitrators have exceeded their jurisdiction in inserting this, which seems to me a reasonable term, into their award, instead of taking the course of saying that they refused to grant a Special Case except upon those terms, and allowing the parties to apply to the court to decide whether the course they have taken was reasonable. On these grounds I think that the view taken by the Divisional Court was right.

SCRUTTON, L.J.—It is unnecessary to say that in differing from my Lord on a commercial matter I do so with the greatest hesitation, but, after the best consideration I can give to the argument addressed to us and the judgment of the Divisional Court, I have come to the conclusion that this appeal must be dismissed.

The motion is one to set aside an award, and I have for long been strongly impressed with a view as to the position the court should take with regard to arbitration. In old times there were comparatively few arbitrations and those were of a very subordinate nature. A great part of the commercial business of the country is now dealt with by commercial arbitrators, who deal with matters rather according to substance than to form, and, in my view, it would be very undesirable if many of the old rules of a somewhat technical character were used to interfere with decisions of commercial arbitrators when no injury in the matter of substance is done by the form which those commercial arbitrators have adopted in expressing their decisions. The system which appears favoured by some litigants and their advisers is to have two hearings before the arbitrators and the appeal tribunal, and then as many hearings as they can get in the law courts, in one recent case making eight hearings in all. It is very disastrous if such a system is in any way allowed to flourish, and I approach the decision of this case with a desire not to interfere with the award of commercial arbitrators unless I am satisfied that substantial injustice has been done apart from a question of form.

It is said that this award is bad because it is not final, or because it is conditional, or because it is double. It is put in several ways. The arbitrators have made an award of this description: "We award one thing, and if a certain condition is not fulfilled we award another." It is said that such an award is not final and is bad. I myself, having had some experience of awards at the Bar and on the Bench, have not seen an award in this exact form before. The arbitrators are acting under the Liverpool General Brokers' Association's conditions of sale, which obviously attach great importance to prompt decisions in commercial matters, an importance with which I feel sure every member of this court thoroughly agrees, and the conditions provide that when the arbitrators are making an award the appeal is to be made on the second business day after the award is received, and the committee must meet on the third business day after receipt of the notice, so that the conditions contemplate that you may get a decision from the appeal committee of the association within a week after the original award has

been made. The arbitrators have desired to carry out that requirement of prompt business decision, and they have said in effect, "You ask us for a Special Case. We are quite willing to give you one, but you must deal with it promptly. Our view is that the sellers should pay the buyers £1,050 and the fees for arbitration. That is our award, but we state the facts on which we have come to that conclusion in a Special Case for the opinion of the court provided that you set the Case down for hearing in the court within fourteen days. If you do, the court will decide whether our award is right. If you do not, our award stands." That seems to me to be one award. The amount awarded is the same, and the costs awarded are the same. The only thing that is said with regard to the Special Case is that you must deal with it promptly, and I consider it a good way of testing it—agreeing with my brother Bankes—to see what would have happened if the arbitrators had said when they were applied to for a Special Case: "Yes, we will grant one if you proceed with it within fourteen days, but if you are going to delay we will not"; and the sellers had said, "We decline to be fettered with such a condition. We will apply to the court to set aside the award for legal misconduct in that you are refusing us our proper rights of a Special Case." In my view, the court would have declined to revoke the submission to the arbitrators for making a requirement which the Divisional Court has thought to be a reasonable requirement. If the court would not revoke the submission when the arbitrators made such a requirement, I can see no reason in substance why the court should interfere with an award which, in my view, expresses in substance that requirement only. The view of the arbitrators as to the amount to be awarded is the same: "We award £1,050. You ask us to so state our award that the court can test whether we are right. We do so. Our view is still that £1,050 is the right amount, and we state the reasons and the facts upon which we come to that conclusion, but you must do it promptly. Just as you must come to the appeal committee within three business days, you must set down this award in the form of a Special Case within fourteen days, otherwise our award stands."

I can see no objection in substance to what the arbitrators have done, and, that being so, I am anxious not to interfere with the award because it may conflict, if it does, with any old decisions on the matter of form at a time when commercial arbitrations were much fewer and much less understood than they are at the present day. For those reasons, feeling fairly confident that I am doing justice between the parties, I decline to be any party to sending this award back or setting it aside. If the sellers desire the full privilege of proceeding in the law courts, with all the delays of the law courts, they should not enter into agreements of sale with arbitration clauses in them. If they do enter into agreements of sale with arbitration clauses in them, they should be content with commercial arbitrators and not embark in these expensive and dilatory excursions in the law courts. For these reasons I agree with the decision of the Divisional Court, and think the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co.*, for *Simpson, North, Harley & Co.*, Liverpool; *Rawle, Johnstone & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

HEPWORTH MANUFACTURING CO., LTD. *v.* RYOTT

[Court of Appeal (Warrington and Atkin, L.JJ., and Eve, J.), October 14, 15, 16, 1919]

[Reported [1920] 1 Ch. 1; 89 L.J.Ch. 69; 122 L.T. 135; 36 T.L.R. 10; 64 Sol. Jo. 19]

Contract—Illegality—Public policy—Restraint of trade—Restraint on exercise of profession or calling—Film actor.

The principle that a contract in restraint of trade is void as being against public policy save in so far as it is reasonably necessary to protect the interests of the covenantee is not confined to a restraint of trade in the ordinary commercial meaning of the word "trade." It extends to a restraint on the exercise by a person of his profession or calling.

By a contract in writing dated Oct. 29, 1915, the plaintiffs, cinematograph film producers, engaged the defendant to act in films produced by them under a pseudonym which, it was stipulated, should be the sole property of the company. By cl. 4 of the contract it was provided that on the determination of the agreement the defendant was not to use the pseudonym for any purpose whatever, and should not permit himself to be advertised under it, without the consent of the plaintiffs. During the continuance of the contract the defendant acted in a number of films produced by the plaintiffs and became a well-known and popular actor.

Held: the defendant had made the pseudonym an important item in his professional equipment by his own skill and application, and the agreement would constitute an interference with his liberty of action and his right to use the qualifications he had acquired to the best advantage for himself and for the public; the real object of the agreement was not to protect any property of the plaintiffs in the films they produced, but to bind the plaintiff to them if, under the use of the pseudonym, he had acquired such a popularity as made it worth their while to keep him in their service; and, therefore, the contract was void and unenforceable.

Decision of Astbury, J., (1919), 121 L.T. 226, affirmed.

Notes. As to contracts in restraint of trade, see 25 Halsbury's Laws (3rd Edn.) 460, 461, and ibid., 2nd Edn., vol. 32, pp. 397 et seq.; and for cases see 43 Digest 19 et seq.

Cases referred to:

(1) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, *139*.

(2) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, *143*.

(3) *Haynes* v. *Doman*, [1899] 2 Ch. 13; 68 L.J.Ch. 419; 80 L.T. 569; 15 T.L.R. 354; 43 Sol. Jo. 553, C.A.; 43 Digest 24, *158*.

(4) *A.-G. of Commonwealth of Australia* v. *Adelaide Steamship Co., Ltd.*, [1913] A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 12 Asp.M.L.C. 361; sub nom. *R. and A.-G. of Commonwealth of Australia* v. *Adelaide Steamship Co.*, 29 T.L.R. 743, P.C.; 43 Digest 12, *68*.

(5) *Herbert Morris, Ltd.* v. *Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 Sol. Jo. 305, H.L.; 43 Digest 24, *154*.

(6) *Sir W. C. Leng & Co., Ltd.* v. *Andrews*, [1909] 1 Ch. 763; 78 L.J.Ch. 80; 100 L.T. 7; 25 T.L.R. 93, C.A.; 43 Digest 25, *164*.

(7) *Mitchel* v. *Reynolds* (1711), 1 P.Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, *59*.

Appeal by the plaintiffs from an order of ASTBURY, J.

The facts appear in the judgment of WARRINGTON, L.J.

Frank Russell, K.C., and *Dighton Pollock* for the plaintiffs.

Hastings, K.C., and *H. E. Wright*, for the defendant, were not called on to argue.

WARRINGTON, L.J.—This is an appeal from an order of ASTBURY, J., dismissing the plaintiffs' action. The plaintiffs are a company whose business it is to produce cinema films. The defendant is a cinema actor. The object of the action is to enforce an agreement between the parties by which the defendant is subject to certain restraints—which I will refer to more particularly when I come to read the covenant—upon the use by him and the advertisement to the public of a pseudonym or acting name under which he has passed in his profession as a cinema actor. The real defence to the action, which has been adopted by ASTBURY, J., is that the contract in question comes within the principle under which contracts in restraint of trade are held to be primâ facie void as being contrary to public policy, and is not within the well-known exception from the generality of that rule in regard to contracts which contain provisions reasonably necessary for the protection of the person with whom they are entered into. The question is whether ASTBURY, J., was right in the view he thus took in supporting the defence which I have stated.

The facts of the case are really not in dispute. The plaintiffs, as I have already mentioned, are a company whose business it is to produce cinema films. Having produced a film, they proceed to sell that film to middlemen, who are called renters, and those renters deal with the film and the right of showing it by conferring such rights upon the proprietors of cinema theatres. That, speaking generally, is the course of the business in this particular trade. For the purpose of producing these films it is the practice of the film-producing firm—there are only nine or ten in this country—to have what is called a stock company, and apparently, judging from the agreement which we have before us, and also from what was stated in evidence, they, as far as possible, impose upon the actors forming part of that stock company a pseudonym for the purpose of advertisement, and they advertise, no doubt, in the trade papers, the films which they have produced and which they have for disposal, with the names of the actors, and where, as is in some instances the case, the actors are performing under a pseudonym, they, of course, advertise that pseudonym. The defendant was an actor by profession. He started that profession in the year 1905, and from that time until the year 1913, with some interruption which it is immaterial to mention, he acted here and in Australia in his own name. In 1913 he entered into a contract with the plaintiffs to act as a cinema actor as part of their stock company. We have not before us the agreement he made in 1913, but, so far as I know, it was substantially the same, except that the salary was much smaller, as that which he entered into in 1915, and which is the contract sued upon. He and the company adopted as his pseudonym—I am using as far as possible a neutral term—the name of "Stewart Rome." He proved a very skilful cinema actor; he had natural capabilities and qualifications which fitted him for that profession, and, under the name of "Stewart Rome," he proved very successful, and films which represented him in a leading part in the picture plays represented became extremely popular with the renters, the cinema theatre proprietors, and the public. The result was that the name of "Stewart Rome" added largely to the value of the films which were produced, and became also a very important item in the equipment of the defendant himself and an element in enabling him to earn a salary in the profession which he had adopted.

In those circumstances the agreement in question was made on Oct. 29, 1915, at a time when Mr. Ryott was still in the employment of the plaintiff company under his previous contract. The contract of Oct. 29, 1915, was made between the plaintiff company, of the one part, and Mr. Ryott, of the other part. It provides, first:

> "The company engages the artiste to dance, act, and perform for the purpose of being photographed to the best of his or her ability as required such parts

as the company or its representative may allot for this purpose, and to perform such parts wherever and whenever required by the company for a period of twelve months at a salary of seven pounds per week, this engagement to commence on June 1, 1915, and to terminate on May 31, 1916, unless determined by the company as hereinafter provided and subject to the terms and conditions hereinafter set forth."

Pausing there for one moment, it is an absolute contract on the part of the defendant to act for the company for a whole year ending May 31, 1916, though the company, under the provisions of the agreement, could determine it in certain events. The second clause provides that he shall not act for any other employer during that time. The third clause is important. It provides:

"If the company advertise the artiste they will do so under the name of 'Stewart Rome,' and the right to use such pseudonym or any other pseudonym hereinafter agreed upon in connection with photoplays or otherwise shall be the sole property of the company."

I fail to see how the name under which the defendant acts can possibly be the subject of property in the company. One understands property in a trade mark. One understands property in the copyright of some literary or artistic production. But how there can possibly be property in the use by an actor of a nom de théatre passes my comprehension. It only can mean that Mr. Ryott, the artiste, shall not as between himself and the company have the right to use the name of "Stewart Rome" without their consent. If it means that, then for the purposes of this agreement it means nothing, because the same provision, as will be seen, is contained in another clause of the agreement. The clause in the agreement that is sued upon is cl. 4:

"Upon the determination of this agreement, it is hereby declared and agreed as to any such pseudonym as follows: The artiste shall not use such pseudonym for any purpose whatever, and shall not dance, act, perform, or otherwise pose for the purpose of being photographed by any person, firm, or corporation, or agree so to do, unless and until the said person, firm, or corporation have agreed in writing with him . . . not to expose or advertise photographs of him . . . under such pseudonym; and, further, shall not dance, act, perform, or otherwise appear in any theatrical, dramatic, or spectacular entertainment under such pseudonym; and shall not agree with any person, firm, or corporation to dance, act, perform, or otherwise appear in any theatrical, dramatic, or spectacular entertainment unless and until such person, firm, or corporation have agreed in writing with him not to announce or advertise his dance, act, performance, or other appearance under such pseudonym."

I shall have to come back presently to analyse that contract when I have stated the rest of it. The subsequent clauses are, most of them, not material. But there are two which are material. The first of those is the eighth:

"If the company shall cease to make photoplays for more than six consecutive days, whether by reason of fire, epidemic, strikes, lock-outs, or any other cause which the company in its absolute discretion may consider adequate, or if the company shall sell, or otherwise dispose of its business and/or its studio, then the company may by notice in writing to the artiste forthwith determine this agreement."

The point of that is that power is given to the employers in certain events to terminate the agreement; no corresponding power is given to the employee. Clause 14 provides that:

"It is agreed that the company shall have the option of re-engaging the artiste for a further period of one year at a salary of not more than eight pounds per week or such smaller sum as may be agreed upon, and in other respects on the same terms and conditions as herein contained, and that they may exercise this option at any time before the termination of the agreement."

Therefore, one day before May 31, 1916, they might exercise this option. I will assume that that option can only be exercised once, though it has been contended that it may be introduced into the new agreement constituted by its exercise, and be exercised from time to time over and over again. I will assume that it is not so oppressive as that. But for another year, at the very moment before the termination of the agreement, the company may impose upon the defendant the obligation of serving them for another year at an advance of no more than one pound on the salary which he had been earning at the time this agreement was made.

I have now mentioned all the material clauses in the agreement. I propose to go through the fourth clause thereof and see exactly what it purports to do, and the restrictions which it purports to impose upon the actor. First, he is not to use the pseudonym for any purpose whatever. That is to say, supposing he desires to revert to his practice of an ordinary stage actor, he would be prohibited by this agreement from acting under this name of "Stewart Rome." How that can possibly be required for the protection of these film producers seems to me to be quite unintelligible. Then I come to the second branch of the clause—I have divided it into four subdivisions for convenience—he

> "shall not dance, act, perform, or otherwise pose for the purpose of being photographed by any person, firm, or corporation, or agree so to do, unless and until the said person, firm, or corporation have agreed in writing with him or her not to expose or advertise photographs of him or her under such pseudonym."

That is intended to prevent the exhibition outside the cinema theatre, for the information of the public as to what is taking place inside, of a photograph of the defendant, either in character or in the ordinary dress of an English gentleman, under the name of "Stewart Rome." The third sub-clause is:

> "and, further, shall not dance, act, perform, or otherwise appear in any theatrical, dramatic, or spectacular entertainment under such pseudonym."

That sub-clause only contains as a particular provision that which would be covered by the more general provision to which I have already referred, namely, that he shall not use the pseudonym for any purpose whatever. But it is quite clear upon the words of it that it would prevent the defendant from performing on the stage, not for the cinema only, but for performing on the stage under the name of "Stewart Rome." The fourth sub-clause, which is the provision that it is mainly sought to enforce in this action, is that he "shall not agree with any person, firm, or corporation to dance, act, perform, or otherwise appear in any theatrical, dramatic, or spectacular entertainment unless and until such person, firm, or corporation have agreed in writing with him . . . not to announce or advertise his . . . dance, act, performance, or other appearance under such pseudonym."

This agreement expired by the effluxion of time on May 31, 1917. It had been renewed for one year. But meanwhile—in January, 1917—the defendant had been called up for military service, and was engaged in military service until some time towards, I think, the end of the year 1918. While he was still on military service, and after the period of the contract had expired, certain correspondence took place between him and a representative of the plaintiff company as to his re-entering their service at a salary of £10 per week. However, no agreement had actually been come to, and on Jan. 25 he made a contract with another film-producing company to act for them at a salary of £20 per week, and did not require them to enter into an agreement not to announce or advertise his performance under the name of "Stewart Rome." That is to say, he unquestionably committed a breach of the fourth sub-clause of the fourth clause of his agreement with the company. I think that is all I need state of the facts.

The first question that arises is whether this provision is within the principle rendering void and unenforceable contracts which are in restraint of trade. The

material fact with reference to that appears to me to be this. The defendant, while acting for the plaintiff company under the name of "Stewart Rome," acquired a particular item of equipment—namely, the popularity which his name of "Stewart Rome," coupled with his skill in acting, had acquired for him. It is in evidence that the popularity of the films in which the name of "Stewart Rome" appeared as one of the principal characters was exceedingly high; in fact, it is stated in evidence that in a competition, held under circumstances which we do not know, but it does not very much matter, the famous name of "Charlie Chaplin" appeared at the head of the list, and that of "Stewart Rome" appeared second. I only mention that as showing that the name of "Stewart Rome" as that of a cinema actor had obtained a very high degree of popularity. The result is that the film producer who is able to announce a film in which the name of "Stewart Rome" appears can obtain a higher price for that film than the film producer who cannot advertise the name of "Stewart Rome." Not only that, but Mr. Ryott himself, owing to that fact, is enabled to command a higher price for the services he performs for that film producing company. Accordingly, the pseudonym of "Stewart Rome" and the right to use that pseudonym for the purposes of his profession has become—by nothing, as far as I can see, that the plaintiff company have really done—an important item in the defendant's professional equipment. I say "as far as I can see, nothing the plaintiff company have done." I am not forgetting that the plaintiff company, knowing that they have a valuable asset in Mr. Stewart Rome, have spent considerable sums in advertising the films in which he appears. They do that, however, for their own purposes, and in order to obtain that higher price which the fact I have referred to enables them to command. Incidentally, no doubt, it increases the value of Mr. Stewart Rome's qualifications to himself, but the real object of the advertisement is for the plaintiff company to obtain a price for their films. That name of "Stewart Rome" is an important item in the professional equipment of the gentleman in question, and one which he has made of importance by his own skill, by his own personal qualifications, and no doubt by his attention to that which is necessary in order to make a good cinema actor. If this agreement were carried into effect, he would lose that item of equipment for the period, impossible, of course, of definition, during which, either by using his own name or by using another pseudonym, he would be acquiring over again that item of equipment as attached either to his own name or another pseudonym, as the case might be. He is, therefore, prevented from going into the market with the full equipment which he has acquired in the practice of his profession.

Is his being so prevented in effect in restraint of trade, to use the technical expression applicable to such cases? It may be said that there is now no dispute about the law, but I propose to read one or two passages in which learned judges, all of them addressing the House of Lords, have expressed their views as to what is meant by a contract in restraint of trade. LORD MACNAGHTEN, in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1), in a passage quoted by LORD HALDANE in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (2) ([1913] A.C. at p. 733) said ([1894] A.C. at p. 565):

> "The true view at the present time I think is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule."

The material expression for the present case is "all interference with individual liberty of action in trading." LORD MACNAGHTEN went on to say (ibid.):

> "But there are exceptions. Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference

to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

It is also pointed out in the same case—that is to say, in *Mason's Case* (2), that there is a clear distinction between contracts entered into upon the sale of a goodwill, for example, and contracts entered into between an employer and an employee, for the simple reason that contracts for the protection of goodwill are to protect an item of property which is being sold by the covenantor for a consideration which he receives from the covenantee.

There is one other passage in *Mason's Case* (2) to which I think I ought to refer. It is a passage in the speech of LORD SHAW. He is dealing with the case of a servant seeking fresh employment, and using information which he has obtained in the course of his employment by his previous master, and he goes on to say this ([1913] A.C. at pp. 740, 741):

"Upon this last point, my Lords, there was much argument at your Lordships' Bar as to whether this case did not fall within the principle of *Haynes* v. *Doman* (3). But *Haynes* v. *Doman* (3) was a case, and was expressly so treated, of the divulging of trade secrets, and of a servant entering into new employment carrying with him these trade secrets, with the constant risk of divulging them to rival manufacturers. Such cases, my Lords, are, in my opinion, widely distinguished from the other cases of an employee who, by faithful and industrious exercise of his powers, becomes mentally, or even manually, well equipped as a servant. The distinction between that case and the former is as wide as the psychological distinction between subjective and objective knowledge. But it is also as real. For, in the former case, the equipment of the workman becomes part of himself, and its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden. But in the other case the knowledge of trade secrets may be as real and objective as the possession of material goods, and the law would much more readily support a restraint of liberty which would, or might, be likely to induce the transfer of this to others, with the danger of consequent loss. In all cases of restraint sought to be put upon an employee under a contract between master and servant this distinction should be borne in mind."

I refer to that passage because the learned Lord is there dealing with the case of an item of equipment which the servant has obtained by his own efforts while in the employment of his master, and saying that, as regards that item of equipment, he cannot properly be deprived of the advantage of it unless there are exceptional circumstances which would justify his being so deprived. In the present case, as I have already said, the defendant is possessed of an item of equipment which it is undisputed is of value to him. This agreement, if carried into effect, would deprive him of that item of equipment, and would make it necessary for him to reacquire it in an undefined period of time. For that reason it seems to me that this agreement is within the principle which renders void contracts in restraint of trade. It is an interference with the right of the defendant to use those qualifications of which he is possessed to the best advantage for himself and for the public, and, as such, it is contrary to public policy. It was said by counsel for the plaintiffs, and this was really the foundation of his argument, that there is nothing here to prevent the defendant acting for whomsoever he pleases as a cinema actor after the termination of this agreement. In my opinion, that is not enough. No doubt, he can, without breaking this agreement, act as a cinema actor. But he would be so maimed and crippled by the loss of that which is at the present moment the source of his popularity, and the qualification which enables him to earn a high, remunerative salary. He would have to go back to the beginning and earn a reduced salary. I think it was stated in the evidence that probably his salary would not be more

than £6 per week, whereas he is now able to obtain £20. In my judgment, therefore, the agreement is in restraint of trade.

The only other question is: Does it come within the exception? Is there anything in this agreement which is necessary for the reasonable protection of the previous employer? As far as I can understand, it can hardly be suggested that there is anything to be protected. If there is anything to be protected, it is the thirty or thirty-one films produced by the plaintiffs in which Mr. Ryott is represented. A suggestion was made that the value of those films might be destroyed or impaired if the defendant, under the name of "Stewart Rome," were to act for other employers in some objectionable or vulgar performance. It seems to me that is fantastic. But it does not end there. On the evidence, considering that Mr. Ryott ceased when he was called up in January, 1917, nearly three years ago, to act for the plaintiffs, every film in which he appears must be at least two years and three-quarters old, and the evidence is that the life of a film is certainly not more than three years, except in very exceptional circumstances where they may be re-issued. It is hardly suggested that, if the contract is in restraint of trade, there was anything in this agreement that was reasonably necessary for the protection of the employer. I think it is pretty obvious that the object of this agreement is not to protect any property of the employers which they may have in any films which they produce. The real object of it is to bind the particular actor to those particular employers, if under the use of the selected pseudonym he has acquired a popularity so as to make it worth the while of the employers to retain him in their service. That, I think, is obviously the true object of this agreement, and I am glad to think that by our decision the object will probably be defeated. In my judgment, the decision of ASTBURY, J., was right, and this appeal ought to be dismissed with costs.

ATKIN, L.J.—The defence to the action brought in the present case is that the agreement sued upon is in restraint of trade. The argument that was addressed to us was almost entirely based upon the contention that this agreement was not in fact in restraint of trade as that doctrine has been authoritatively laid down by the courts. Quite shortly, I will state what has been decided in reference to the doctrine of restraint of trade.

The authoritative decisions that have been pronounced lately, I think, are contained in the speeches of LORD PARKER in the House of Lords and in the Privy Council. I do not refer to his judgment in the Privy Council in *A.-G. of Commonwealth of Australia* v. *Adelaide Steamship Co., Ltd.* (4), in which, delivering the judgment of the Privy Council, he stated in some detail the principles of this particular doctrine; but I refer to *Herbert Morris, Ltd.* v. *Saxelby* (5) ([1916] 1 A.C. at p. 706), where LORD PARKER says this, affirming and adopting the decision of LORD MACNAGHTEN in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co., Ltd.* (1):

> "As I read LORD MACNAGHTEN'S judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them."

So far, that lays down that a restraint of trade is, primâ facie, contrary to public policy. It is a misapprehension to suggest, if it were suggested, that this doctrine is confined to restraint of trade in any ordinary meaning of the word "trade." It extends further than trade. It extends to the exercise, undoubtedly, of a man's profession or calling. If authority is needed for that, I think it would be found in the passage in FARWELL, L.J.'s judgment in *Sir W. C. Leng & Co., Ltd.* v. *Andrews* (6), which was quoted with approval by LORD SHAW in *Mason* v. *Provident Clothing*

and Supply Co., Ltd. (2). The passage to which I refer is this. FARWELL, J., said, referring to the passage cited by LORD PARKER ([1909] 1 Ch. at p. 773):

> "That doctrine does not mean that an employer can prevent an employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and the additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction."

I think that makes it quite plain, if authority were needed, that the doctrine was not merely confined to restraining commercial transactions as such. What is meant by a "restraint for trade?" There are one or two passages that I should like to read with a view to indicating the broad way in which that question has been considered by the learned judges who have had to deal with the matter. I think that the first passage I should like to refer to is going back almost to the source of the doctrine—namely, *Mitchel* v. *Reynolds* (7) (Smith L. Cas., 11th Edn., p. 413), where LORD MACCLESFIELD said (1 P.Wms. at p. 190):

> "The two reasons of the distinction upon which the judgment in these cases of voluntary restraint are founded are, first, the mischief which may arise from them, first to the party by the loss of his livelihood and subsistence of his family, and, secondly, to the public by depriving it of a useful member."

Following out the doctrine, and explaining the kind of restraint which is considered objectionable by the courts, there are one or two passages which I think help one to understand what is meant. LORD SHAW in *Mason's Case* (2) said this ([1913] A.C. at p. 737):

> "My Lords, conflicting considerations are in such cases immediately presented to the mind. Here is a bargain, it is said, between two parties having full contracting power, and with their eyes open. It is not void or voidable under any of the familiar categories which justify rescission. Why then should the law decline to hold parties to it? On the other hand, it is said, here is a citizen who has come for a period of years under a restraint which is inconsistent with elementary freedom, namely, the freedom to earn his living as best he can. This is a freedom which it is not alone in his interest, but in the public interest, that the law should protect."

LORD SHAW also said (ibid. at p. 738):

> "In my opinion there is much greater room for allowing, as between buyer and seller, a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade, than there is for allowing a restraint of the opportunity for labour in a contract as between master and servant or an employer and an applicant for work."

Dealing with the contract in that case, which was a restriction upon an employee, he said (ibid. at p. 741):

> "No workman could have the freedom to dispose of his own labour, or risk a movement towards his own advancement, under what might turn out to be the cruel operation of such a clause."

Finally, and it is the only other passage that I wish to cite, there is the passage which my Lord has read from the speech of LORD SHAW in *Mason's Case* (2). I should not wish to read it again, except that I think there is a passage at the end of it, which my Lord did not read, to which I will call attention. LORD SHAW said ([1916] 1 A.C. at p. 714):

> "There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and expand his powers is advantageous to every citizen, and may be highly so for the country at large."

Lastly, in *Mason's Case* (2) LORD MOULTON said this ([1913] A.C. at p. 746):

> "It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business, and having so acted they must take the consequences."

I ask myself what is the effect of the present contract in reference to the restraint which has been put upon the defendant's activities as judged by the passage that I have just read. It appears to me that it is quite plain that the result of this contract was to deprive the defendant of the reputation which he has earned under what was his professional name—that is to say, the only name in which he was known as a film actor. It is quite impossible, it seems to me, to dispute, at any rate it is plainly proved by the evidence, that the effect of depriving the defendant of the right to use the professional name which he has used, the only name which he has used in his profession for five years, is to diminish his earning capabilities to begin with. It is obvious that that which is of value to him is the fact that he has achieved a certain reputation in his calling, and that if those who employ him are not to be allowed to advertise the fact and make known to the public that they have the advantage of the services of a skilled artiste, they will not pay him as much for his services as they would if they were free to make the full announcement to the public of the person whom they have secured for their service. It is evident that, if that is measured in money, it represents one-half of the defendant's earning capabilities, certainly for some time, and for a substantial time. For how long it is not easy to know. Quite apart from gauging it in money, it appears to me that there are other considerations which are just as important—specially important to an artiste in a profession such as this—who depends entirely, it appears to me, or very largely, for his success in life upon his reputation with the public. The defendant has built up a reputation, has acquired a public reputation. Ordinarily speaking, I suppose, it is one of the most legitimate, and certainly one of the strongest, incentives to good work in this world, that a man tries to improve his reputation; he honestly seeks to increase his reputation and tries to make his work worthy of his reputation, and to move on, so to speak, from height to height. In this particular case the effect of this contract is that, having worked for five arduous years in this particular calling, he certainly, like Sisyphus, rolled up his burden to a certain height, but he is thrust back again and has to start to win another reputation, not even under the same identity, but under a name which is unknown to the public. It appears to me that that, in itself, is a deprivation of a man's liberty of action, and it has diminished his aptitude, apart from paralysing his capacity. Perhaps in a slightly different application, it appears to me that the defendant might say that "he who steals my purse, steals trash; . . . but he that filches from me my good name, robs me of that which naught enriches him, and makes me poor indeed." I am satisfied that, at any rate, this contract is plainly in restraint of trade within the meaning of the doctrine.

The only other question that arises is whether or not the restraint of trade is justified by being a protection that is reasonably necessary, and no more than is reasonably necessary, for the protection of the employer's interests. What was the object of this clause, as stated in evidence by the employers who entered into it? I desire to read a short passage from the shorthand notes. This is in the examination-in-chief.

> "(Q.) If the name were used by anyone else than your firm how do you suggest it would injure you?—(A.) It would give a wrong impression, would not it? (Q.) First of all you say it would give a wrong impression?—(A.) The name has been so long associated with our firm. (Q.) You mean in connection with the Hepworth Picture Films?—(A.) Yes. (Q.) What do you mean when you say it would give a wrong impression?—(A.) I think it would convey the impression that the picture which was being advertised had been made by us."

If that means anything at all, it is a suggestion of "passing off," and we have not heard a single suggestion of any sort or kind that that was the real reason. It is quite plain there is nothing in it, because the films produced by the rival firm of producers are produced by that firm who advertise themselves as the producers, and there is no suggestion that they seek to pass them off as the films of the plaintiff company.

There is another suggestion, which I think rather emanates from counsel, because it is put in the form of a leading question: "Assume that the name were used in connection with plays of inferior standard to yours, would that prejudice you?—(A.) Yes, I think it would." We have heard some sort of suggestion as to that, which, to my mind, is mere pretence and make-believe. There is no real foundation for it at all. Nor can I imagine how a clause such as this could be justified upon such a ground as that. It would apply to every case where a man was employed in his own name, for however short a time, if, in fact, the name of the servant was associated with the product or the output of the master. In every case the master might say: "You must change your name, because your name, if employed afterwards in connection with other goods, may be used in connection with goods which are of inferior quality to ours." The passage goes on thus:

> "And you have had up till now a monopoly in that name.—(A.) Yes." Well, that is true. All that means is that a monopoly in a name is that the man who was called by that name had only acted for that particular company. "(Q.) How would it affect you if other plays were subsequently staged and filmed with Mr. Stewart Rome's name advertised with it?—(A.) It is very difficult to say, but I assume it would reduce the value. (Q.) They would be competing films?—(A.) They would be competing films."

It is made quite plain by the authorities which have been referred to by my lord, that it is not sufficient justification for a restraint of trade that the servant might help his new employer to compete with the old employer; that in itself is not sufficient.

Those are the only reasons that are put forward by him, so far as I have been able to go through the evidence of Mr. Hepworth, to justify this particular clause. They seem to me to be entirely insufficient. But he was cross-examined, and I think, in cross-examination a further reason appeared which approaches very much more clearly to the real reason in this particular case.

> "(Q.) Do you really think it was for the reasonable requirements of your business that that should be done?—(A.) Yes. (Q.) You concede, do you not, that supposing the name is of value to the artiste, about which we may have our own opinion, you have a tremendous hold over these people if you can make them sign an agreement like that?—(A.) Yes, it gives some hold certainly. (Q.) Supposing it is right that an artiste has to begin life more or less over again, we will take only half of his marketable value, you can go on paying these people half their marketable value as long as they stay with you, because they dare not go anywhere else. That is right, is it not?—(A.) It seems a logical deduction from your premises. (Q.) But do not you think it is a fair deduction from your agreement?—(A.) No, I do not think that."

It appears to me that that is the real essence of this agreement. To my mind it gave the plaintiffs a hold upon the artistes who signed these agreements, and etymologically and manifestly I can draw no distinction between a restraint upon the employee, and a hold upon the employee. I think it was intended to have a hold upon the employee, and, to my mind, it was entirely unreasonable and unfair. I consider this a most unconscionable clause, and I am very glad, therefore, to think that such an agreement as this has been brought before the court, and that the court will refuse to enforce it. I cannot conceive anything more intolerable than that young people of either sex who, as far as one can see, should enter into these agreements wholesale, certainly in the first instance. There is a printed agreement with this clause prepared for all of them, and a pseudonym prepared

for all of them, so that the employer should be able to filch the identity of an artiste who was of any value. I am glad to say that upon the evidence this is not a usual clause in agreements, and that as a result of this decision that this clause will disappear.

There is the further question whether or not this clause, if it were held to be necessary for the protection of the plaintiffs, is excessive. Upon that I entirely agree with what fell from my brother EVE during the argument, when he pointed out that this was a restraint that operated during the whole of the defendant's life, whereas the life of a film was only some six or nine months, with a possibility of its appearance for three years. I entirely agree with that view. Upon all these grounds it seems to me that the decision of the learned judge in the court below was quite right, and that this appeal should be dismissed with costs.

EVE, J.—The real and substantial question in this case is whether the contract in cl. 4 of the agreement of Oct. 29, 1915, on which the action is founded, is one which can properly be described as a "contract in restraint of trade." If that question is answered in the affirmative, the further one arises, whether its operation is more extensive than is necessary for the reasonable protection of the covenantees.

What is meant by the expression "contract in restraint of trade"? It means a contract whereby a restraint is imposed upon the liberty of an individual to earn his living or exercise his calling, or, in other words, a contract whereby the individual liberty of action in trading is interfered with and controlled. What we have to consider is, first, whether the restrictions imposed upon the covenantor in cl. 4 of this agreement have that operation. In this connection it is very material to bear in mind that counsel for the plaintiffs was constrained to admit that, if cl. 3 of this agreement had been omitted, and if the defendant had acted and performed and been advertised in his own name, he would still, in order to make his argument logical, have been bound to contend that the contract was not one in restraint of trade. In construing cl. 4, therefore, we are entitled to read it as though the reference to the pseudonym were omitted and as though it dealt only with the defendant's own name. Just see, by taking cll. 1 and 4, what the effect of the sub-paragraphs would be. The first one would be this:

> "The artiste shall not use his own name for any purpose whatever [after leaving the employment of the plaintiffs, when he had to obtain from any persons into whose employment he was about to enter a written contract that they would not allow him to] dance, act, perform, or otherwise appear in such theatrical, dramatic or spectacular entertainment or announce or advertise his or her dance, act, or performance, or other appearance under his own name."

Can it be said that these are not stipulations designed and calculated to deter the covenantor from transferring his services and qualifications to a competitor in trade?

Counsel for the plaintiffs took exception to one passage in the judgment in the court below, where the learned judge said:

> "By an ingenious device made use of by the company when it first engaged the defendant he was induced to agree to adopt the pseudonym of Stewart Rome, and during his service as a cinematograph actor in the plaintiffs' employ in this name alone he acted, was advertised, and became known."

I do not think that there was evidence to show that there was any inducement on the part of the plaintiff company which led the defendant to adopt the name. But I do say that, in my opinion, the insertion of the clause in this agreement requiring the artistes to adopt the pseudonym was a device—I am not using the word in any opprobious sense—for controlling the employees after leaving the service of the employers by creating in the employers some proprietary right in the name by which the employee had been designated and become identified in his profession. It is a device which, in my opinion, has failed—failed because when the argument is pressed to its logical conclusion it comes to this, that the plaintiffs are obliged

to contend that, if the adoption of the pseudonym was dropped altogether, this contract would not be a contract in restraint of trade, although a man, by its very terms, agrees not to use his own name for any purposes whatever, and that he will not be advertised as an actor in this particular business or anything connected with it in his own name. I think it is quite impossible, upon the true and fair construction of this agreement, to come to any other conclusion than that the contract is in fact a contract in restraint of trade, and, having arrived at that, there really is very little left in the case. The suggestion of there being any right or property of the employer which this contract was necessary to protect was shadowy in the extreme, and even had there existed such a right of property I am of opinion that it was of so transitory a nature, of so ephemeral a character, that the imposition upon the employee of a restraint extending during the whole of his life is altogether unreasonably wide, and far more than was necessary for the due protection of his right, if it existed. For these reasons I agree in thinking that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *W. P. Guillet*; *Romer & Skan.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

ELTON COP DYEING CO., LTD. *v.* ROBERT BROADBENT & SON, LTD.

[Court of Appeal (Warrington and Atkin, L.JJ., and Eve, J.), October 24, 1919]

[Reported 89 L.J.K.B. 186; 122 L.T. 142]

Accord and Satisfaction—Satisfaction—Substituted agreement—New promise, and not its performance, accepted as satisfaction—Evidence—Terms of substituted agreement.

Liability under a contract cannot be discharged by accord without satisfaction, but satisfaction may consist of the accord between the parties. A substituted agreement, therefore, may be accepted in accord and satisfaction of an existing cause of action, the new promise only and not the performance of it, being taken in satisfaction and discharge. In determining whether a substituted agreement has been accepted in satisfaction the agreement itself may be looked at as well as circumstances which afford independent proof of acceptance.

Observations of Erle, J., in *Flockton* v. *Hall* (1) (1849), 14 Q.B. 380 at p. 386, applied.

Notes. Considered: *British Russian Gazette and Trade Outlook, Ltd.* v. *Associated Newspapers, Ltd.*, *Talbot* v. *Same*, [1933] All E.R.Rep. 320.

As to accord and satisfaction, see 8 Halsbury's Laws (3rd Edn.) 206–209; and for cases see 12 Digest (Repl.) 496 et seq.

Cases referred to:

(1) *Flockton* v. *Hall* (1849), 14 Q.B. 380; 19 L.J.Q.B. 1; 14 L.T.O.S. 176; 14 Jur. 571; 117 E.R. 150; affirmed sub nom. *Hall* v. *Flockton* (1851), 16 Q.B. 1039; 20 L.J.Q.B. 208; 17 L.T.O.S. 54; 15 Jur. 600, Ex. Ch.; 12 Digest (Repl.) 499, *3743*.

(2) *Morris* v. *Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34, H.L.; 12 Digest (Repl.) 499, *3744.*

(3) *Peytoe's Case* (1611), 9 Co. Rep. 77 b; 77 E.R. 847; 12 Digest (Repl.) 502, *3761.*

Also referred to in argument:

Sibree v. *Tripp* (1846), 15 M. & W. 23; 15 L.J.Ex. 318; 153 E.R. 745; 12 Digest (Repl.) 500, *3752.*

Evans v. *Powis* (1847), 1 Exch. 601; 11 Jur. 1043; 154 E.R. 255; 12 Digest (Repl.) 500, *3753.*

Allies v. *Probyn* (1835), 2 Cr.M. & R. 408; 4 Dowl. 153; 1 Gale, 255; 5 Tyr. 1079; 4 L.J.Ex. 227; 150 E.R. 176; 12 Digest (Repl.) 499, *3745.*

Appeal from an order of SHEARMAN, J., in an action tried by him without a jury at Manchester Assizes.

The plaintiffs were a limited company and carried on the business of spinners and doublers of yarn. The defendants were makers of winding and doubling machinery. By several contracts, made on various dates between the months of March and October, 1915, the plaintiffs agreed to buy from the defendants, and the defendants agreed to sell and deliver to the plaintiffs, sixteen doubling frames of the defendant's manufacture for the use of the plaintiffs in their mills for their said business. In performance of the contracts, the defendants delivered to the plaintiffs sixteen doubling frames, and were paid for ten of them, but the plaintiffs alleged that these frames were not, nor was any of them, in accordance with the terms and conditions of the contracts, but, on the contrary, were defective and incapable of doing the plaintiffs' work satisfactorily and were not reasonably fit for the purpose aforesaid. The plaintiffs on numerous occasions in their correspondence and interviews with the defendants complained, as they alleged, of the defects, and gave to the defendants notice of the losses that were being and were likely to be incurred by the plaintiffs by reason of the defects, and ultimately it was agreed by and between the plaintiffs and the defendants that the defendants should alter the frames and remedy the defects upon the terms and conditions set out in the correspondence confirming such agreement. The principal term of the agreement was contained in a letter which was written to the plaintiffs by the defendants on May 8, 1917, and was as follows:

> "In consideration of our agreeing to bear half the expense of adding nip-rollers and cap-bars to the remaining fourteen frames to your instructions, you will pay for the machines and withdraw all claims against us for any damages in respect of the frames delivered or on any other account."

The plaintiffs alleged that the defendants after having altered or remedied seven of the doubling frames, had wrongfully and in breach thereof failed, neglected, and refused to alter or remedy the remaining seven of the doubling frames which remained useless and worthless to the plaintiffs. They claimed £16,280 18s. 1d. damages for breaches of their contracts with the defendants, including both those of 1915 and that of May 8, 1917, which, they alleged, was a conditional contract, the conditions of which had not been fulfilled. The defendants pleaded that the agreement of May 8, 1917, was an accord and satisfaction of their liability under the earlier contracts and had been accepted by the plaintiffs in discharge of any cause of action they had under those earlier contracts. SHEARMAN, J., gave judgment for the defendants, and the plaintiffs appealed.

Sylvain Mayer, K.C. (with him *T. B. Leigh*), for the plaintiffs.

Cyril Atkinson, K.C., and *T. Eastham*, for the defendants, were not called on to argue.

WARRINGTON, L.J.—This is an action brought by the plaintiffs to recover damages for breach of a warranty as to the quality of goods, the subject of a contract for the sale of those goods by the defendants to the plaintiffs. The parties had disputed whether there had or had not been a breach of this warranty, and

that dispute had taken place during the month of February, 1917. To the action it is pleaded—which is the only plea that I need refer to—as follows:

"The defendants agreed on the terms and conditions set out in certain letters which are referred to in para. 6 of the statement of claim to bear half the actual cost of nip-rollers and cap-bars for fourteen frames on the plaintiffs' instructions, and in consideration of the defendants so agreeing the plaintiffs agreed to pay for the doubling frames and withdraw all claims against the defendants for any damages in respect of the frames delivered or on any other account. The said agreement was accepted by the plaintiffs in discharge of the alleged cause of action."

Putting it shortly, without reference to the particular facts, it comes to this: There is a cause of action for damages for breach of the original contract. That cause of action is satisfied by an accord and satisfaction, that accord and satisfaction being the entering by the defendants and the plaintiffs into the subsequent agreement as it is pleaded.

I think that the law with reference to the question is put as neatly as it can be by LORD ATKINSON in *Morris* v. *Baron & Co.* (2) ([1918] A.C. at p. 35):

"The law as to the accord and satisfaction of a breach of an agreement was much discussed in argument. There is no doubt that the general principle is that an accord without satisfaction has no legal effect, and that the original cause of action is not discharged as long as the satisfaction agreed upon remains executory. That was decided so long ago as 1611 in *Peytoe's Case* (3) (9 Co. Rep. at p. 79 b). If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made."

The question here is whether the plaintiffs did or did not accept the promise of the defendants contained in the agreement, which is alleged as accord and satisfaction, in satisfaction of their cause of action. If they did, then that cause of action is gone, and if they have any further complaint to make it must be for breach of the second of the two agreements.

As I have said, the dispute arose in February, 1917. In May, 1917, the parties came together and they made the agreement which is relied upon as being accepted in satisfaction of the plaintiffs' then alleged cause of action. The terms of that agreement are expressed in a letter dated May 9, 1917, written and sent by the defendants to the plaintiffs, and the whole question, in my opinion, turns upon the true construction to be placed upon that agreement. If on its true construction it amounts to an agreement to accept the agreement itself in satisfaction, then the plaintiffs cannot maintain their present action founded upon their original cause of action. The letter is in these terms:

"Dear Sirs,—Doubling Frames. Confirming the arrangement come to yesterday afternoon between our Mr. Thomson and your directors . . . in consideration of our agreeing to bear half the expense of adding nip-rollers and cap-bars to the remaining fourteen frames to your instructions, you will pay for the machines and withdraw all claims against us for any damages in respect of the frames delivered or on any other account. The expense of the above rollers to be invoiced to you by us at the bare cost price plus 10 per cent. towards our overhead charges, we to satisfy you that such costs are correct and to credit you on one-half."

That, of course, is to carry out the first stipulation, that the defendants were to bear one-half of the expense. It was further provided:

"That the three comb frames last delivered be paid for forthwith and that the balance owing for doubling frames be paid as and when the rollers are added. That time being of the utmost importance in view of the pressing government requirements we undertake to hurry immediate completion of the

A first two frames if the material is available, and that we complete the agreed additions to remaining fourteen frames in seven weeks conditionally on our being able to secure the necessary steel within . . . and no further strikes occur during the next seven weeks. On receipt of your acknowledgment in writing that the above is a true and correct statement of our agreement we will at once instruct our solicitors to abandon proceedings and will exercise B every diligence in fulfilling our part of the bargain."

That letter was answered by a letter of May 10:

"We are in receipt of your letter of the 9th inst. setting out the various heads of agreement come to on the 8th inst. between your Mr. Thomson and four of our directors. Your confirmation on the whole appears to be correct C with one exception. . . ."

Ultimately a variation was accepted, but we need not trouble about it, because it is immaterial for the present purpose, and the letter of May 9 constitutes the agreement between the parties.

[HIS LORDSHIP considered the terms of the letter and continued:] It seems to me that on the true construction of this agreement nothing was left, first in respect D of the defendants' claim for the price of the goods, and, secondly, with regard to the plaintiffs' claim for damages for breach of warranty, and that the agreement was intended by the parties to put an end to the last-mentioned claim. Having regard to the learned judge's decision, the only cause of action remaining to the plaintiffs was for damages for breach of this substituted contract, and to have filed a statement of claim on the original pleading and then turn it into an action for E breach of the second contract would have been a most inconvenient course. Having arrived at the conclusion he did, he must have made the plaintiffs in any case pay the costs up to the time of his decision if he had allowed any amendment. There had been substantially a new action from that time, and I think that he exercised his discretion wisely and I think kindly also in favour of the plaintiffs by refusing to allow them to amend and leaving them to take such steps as they might think F fit with reference to the alleged breach of the second contract. On the whole the judgment of the learned judge, in my opinion, was correct. I think, therefore, this appeal ought to be dismissed.

ATKIN, L.J.—I agree. In my judgment, there is no doubt that there can be no discharge of a contract after breach except by alleging an accord and satisfaction. G But, at the same time, I think that there can be no doubt but that the satisfaction may consist in the accord between the parties. It may be treated by both parties as satisfaction.

For that proposition though there is judicial authority to which I will refer, I should like to rely upon the passage in the third edition of BULLEN AND LEAKE, PRECEDENTS OF PLEADING, Notes, at p. 478:

H "A substituted agreement in my opinion may be accepted in accord and satisfaction of an existing cause of action, the new promise only, and not the performance of it, being taken in satisfaction and discharge."

I imagine that proposition is not really disputed by the plaintiffs. There is one case that I should like to refer to, and that is *Flockton* v. *Hall* (1). It was on a I demurrer. I do not think it necessary to state the facts of that case. I mention it because of the little difference of opinion between the two very learned judges, who decided the case on one minor point. COLERIDGE, J., says (14 Q.B. at pp. 386, 387):

"It is allowed, indeed it could not be disputed, that a plea of accord without satisfaction is bad. Now there may be two kinds of accord: the making of the agreement itself may be what is stipulated for, or the doing the things mentioned in the agreement. In the latter case the plea, as is admitted, ought to aver that the things have been done, and the agreement, without

that, affords no answer. Where the making of the agreement is itself the thing looked to, the plea must aver that it has been accepted in satisfaction. In this case, therefore, the only question is whether the acceptance of the agreement in satisfaction is involved in the agreement itself. Now, as to that, I think we cannot look into the agreement itself for the purpose of collecting from it the additional fact that it has been accepted in satisfaction; the acceptance must be shown independently."

He added that the plea in addition to being bad is ambiguous. ERLE, J., says this (ibid. at p. 387):

"I think this is a bad plea. I take the law to be that an agreement may be accepted in satisfaction of an existing cause of action. If the agreement itself expressed that it, the agreement, was to be accepted as satisfaction, the averment that it was so accepted might be unnecessary."

I take that as being an expression of opinion different from that pronounced by COLERIDGE, J., that you cannot look into an agreement itself for the purpose of collecting from it the fact that it has been accepted in satisfaction. Of those two opinions I myself prefer the opinion expressed by ERLE, J., and I myself think that that is what is consistent with the later authorities, because the only question is whether or not the plaintiff agrees to accept the agreement of the other side in satisfaction of his cause of action. If it is a question of his agreement he merely may agree in writing, and if he does agree in writing then his agreement is to be ascertained from the writing and from nothing else.

It is quite plain, therefore, that he might express his agreement to accept a promise to do something in the very written agreement in which the promise to do something is made. I do not think that those points can be controverted. The only question, therefore, is whether or not the agreement which is arrived at between the parties in settlement does or does not contain an agreement by the party who has a cause of action to accept the promise of the other side in satisfaction of the cause of action. That brings you again to the construction of the written contract, and I agree that in the present case the true construction of this contract is that the plaintiffs did intend to accept the defendants' promise to fit up the rollers and to bear half the expense as a discharge of the cause of action. It seems to be inevitable that it should be so in the terms of the contract. When you contemplate that the promise, that which was to be done, was something which it was contemplated would take at least seven weeks, and only then if the material was to be obtained, and when one recognises the difficulty that there was in 1917 in obtaining material of any sort, it seems to me quite plain that the consideration for the withdrawal of the claim was the promise to do the act and not the performance of the promise. Therefore, I think that the defendants' plea is correct and is established, and I think that the original cause of action was discharged.

It is quite plain that the determination of the present action does not prevent the plaintiff from pursuing a claim for damages for breach of a subsequent contract if they are advised so to do. But that action is a different action, and it is a question of convenience and expense whether or not an amendment to the existing action should be allowed. I am quite satisfied that the parties would have been landed in endless confusion if an amendment had been granted. It would merely have had the result of superimposing upon a claim, with very elaborate particulars, for damages for breach of the original contract, a claim for damages for breach of a second contract, based upon different considerations. I think, therefore, that the learned judge in the court below, in the exercise of his discretion in refusing an amendment, was exercising his discretion rightly and wisely and sympathetically. This appeal should be dismissed with costs.

EVE, J.—I am of the same opinion. The question whether the making of the agreement or the doing of the things provided for by the agreement is to be

accepted in satisfaction is a question of the construction of the agreement into which the parties have entered. When that agreement has been embodied in a written document I fail myself to appreciate what further materials could have been placed before the learned judge in the court below than were placed before him when the correspondence and the documents read therein had been brought to his attention. In my opinion, the course taken by the learned judge in the court below both in determining the case as he did and in refusing to allow any amendment was a right one, and, in my judgment, therefore, this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Haslam & Sanders*, for *Denham & Jackson*, Manchester; *J. B. & F. Purchase*, for *Leonard Broadbent*, Blackburn.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

WILSON AND ANOTHER *v.* UNITED COUNTIES BANK, LTD., AND ANOTHER

[HOUSE OF LORDS (Lord Birkenhead, L.C., Viscount Finlay, Lord Atkinson, Lord Parmoor and Lord Wrenbury), April 29, May 1, 2, 5, 6, June 2, 1919]

[Reported [1920] A.C. 102; 88 L.J.K.B. 1033; 122 L.T. 76]

Bankruptcy—Bankrupt—Right of action—Injury to reputation—Trustee joined as plaintiff—Injury to reputation arising from same transaction as damage to estate—Property available for distribution—Damages received by bankrupt for injury to reputation.

While all causes of action for damage to the property of a bankrupt vest in the trustee in the bankruptcy, any cause of action for damage to the person or reputation of the bankrupt remains vested in the bankrupt despite the bankruptcy. This is so where damage to both the bankrupt's estate and his personal reputation arises from the same breach of contract or duty, as where, during a customer's enforced absence, a bank undertakes to supervise the carrying-on of his business and to take all reasonable steps to maintain his credit and financial reputation and fail to do so, with the result that the business suffers severe loss and the customer is made bankrupt. No difficulty arises if the bankrupt and the trustee sue as joint plaintiffs in the same action if the damages to which they are respectively entitled are separately found. The matter is analogous to those cases in which a banker dishonours his customer's cheque although the customer's account is in fund, and the customer can recover in respect of the injury caused to his reputation by the bankruptcy without proof of special damage.

Notes. Considered: *Re Kavanagh, Ex parte Bankrupt* v. *Jackson*, [1949] 2 All E.R. 264.

As to actions vesting in a trustee in bankruptcy and property available for distribution among creditors in a bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 397–404; and for cases see 5 DIGEST (Repl.) 679 et seq., 1042 et seq.

Cases referred to:

(1) *Beckham* v. *Drake* (1849), 2 H.L.Cas. 579; 13 Jur. 921; 9 E.R. 1213, H.L.; 5 Digest (Repl.) 1042, 8421.

(2) *Rolin* v. *Steward* (1854), 14 C.B. 595; 23 L.J.C.P. 148; 18 Jur. 536; 2 C.L.R. 959; 139 E.R. 245; sub nom. *Rollin* v. *Steward*, 23 L.T.O.S. 114; 2 W.R. 467; 17 Digest (Repl.) 105, *190*.

(3) *Rogers* v. *Spence* (1844), 13 M. & W. 571, Ex. Ch.; affirmed (1846), 12 Cl. & Fin. 700; 8 E.R. 1586, H.L.; 5 Digest (Repl.) 1043, *8430*.

(4) *Brewer* v. *Dew* (1843), 11 M. & W. 625; 1 Dow. & L. 383; 12 L.J.Ex. 448; 1 L.T.O.S. 290; 7 Jur. 953; 152 E.R. 955; 5 Digest (Repl.) 1043, *8429*.

(5) *Re Wilson, Ex parte Vine* (1878), 8 Ch.D. 364; 47 L.J.Bcy. 116; 38 L.T. 730; 26 W.R. 582, C.A.; 5 Digest (Repl.) 727, *6296*.

(6) *Rose* v. *Buckett*, [1901] 2 K.B. 449; 70 L.J.K.B. 736; 84 L.T. 670; 50 W.R. 8; 17 T.L.R. 544; 8 Mans. 259, C.A.; 5 Digest (Repl.) 1043, *8431*.

(7) *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 32 W.R. 944, C.A.; 17 Digest 85, *61*.

(8) *Addis* v. *Gramophone Co., Ltd.*, [1909] A.C. 488; 78 L.J.K.B. 1122; 101 L.T. 466, H.L.; 17 Digest (Repl.) 74, *1*.

(9) *The Argentino* (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 37 W.R. 210; 6 Asp.M.L.C. 348, C.A.; 17 Digest (Repl.) 80, *27*.

(10) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415; 1 Jur. 77, n.; 9 L.J.O.S.K.B. 42; 109 E.R. 842; 17 Digest (Repl.) 79, *23*.

(11) *Prehn* v. *Royal Bank of Liverpool* (1870), L.R. 5 Exch. 92; 39 L.J.Ex. 41; 21 L.T. 830; 18 W.R. 463.

Also referred to in argument:

Banbury v. *Bank of Montreal*, [1918] A.C. 626; 87 L.J.K.B. 1158; 119 L.T. 446; 34 T.L.R. 518, H.L.; 17 Digest (Repl.) 187, *828*.

Floyd v. *Gibson* (1909), 100 L.T. 761, C.A.; 17 Digest (Repl.) 186, *814*.

MacDougall v. *Knight* (1889), 14 App. Cas. 194; 58 L.J.Q.B. 537; 60 L.T. 762; 53 J.P. 691; 38 W.R. 44; 5 T.L.R. 390, H.L.; 32 Digest 138, *1698*.

Martin v. *Great Northern Rail. Co.* (1855), 16 C.B. 179; 3 C.L.R. 817; 24 L.J.C.P. 209; 1 Jur.N.S. 613; 3 W.R. 477; 139 E.R. 724; sub nom. *Stone* v. *Great Northern Rail. Co.*, 25 L.T.O.S. 144; 36 Digest (Repl.) 137, *722*.

Nevill v. *Fine Art and General Insurance Co.*, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 32 Digest 72, *1010*.

Seaton v. *Burnand*, *Burnand* v. *Seaton*, [1900] A.C. 135; 69 L.J.Q.B. 409; 82 L.T. 205; 16 T.L.R. 232; 44 Sol. Jo. 276; 5 Com. Cas. 198, H.L.; 26 Digest (Repl.) 221, *1707*.

Turnbull & Co. v. *Duval*, [1902] A.C. 429; 71 L.J.P.C. 84; 87 L.T. 154; 18 T.L.R. 521, P.C.; 26 Digest (Repl.) 227, *1761*.

Appeal by the plaintiffs in the action from an order of the Court of Appeal, directing a new trial of an action tried before Bray, J., and a special jury.

The appellant, R. S. Wilson, was an officer in the yeomanry, and in 1914 was called up to serve in France. He had a business and farms at Ackleton, near Bridgnorth, which produced him a substantial income, although for the purpose of financing his business, which was that of a maltster, he had for many years arranged for an overdraft with the respondent bank, for which he deposited deeds and securities of about £29,000. On being called up to serve abroad he saw the general manager of the bank and it was agreed that the local branch manager at Bridgnorth (Mr. Cremonini) would generally supervise the carrying on of the appellant's business while he was away on active service, and, in particular, would see to the financial side of it, and that the bank would take all reasonable steps to maintain his credit and financial reputation. The appellant alleged that owing to the negligence of the bank his business and estate had suffered damage with the result that he had been made bankrupt and his personal credit and financial reputation had also been damaged, and in the action, in which the trustee in the bankruptcy was joined, the appellants claimed from the bank damages for negligence and breach of contract. There was a further claim by Wilson for injury to his personal credit and reputation caused by the bankruptcy proceedings. At the

trial the jury found that the loss to the appellant Wilson's estate was due to the bank's negligence, and they awarded the appellants £45,182 5s. 8d. on this ground. They also awarded Wilson £7,500 for injury to his personal credit and reputation caused by the bankruptcy proceedings, making in all £52,682 5s. 8d. The Court of Appeal (Pickford and Bankes, L.JJ., and Sargant, J.) ordered a new trial mainly on the ground that the damages were assessed on a wholly wrong basis. The appellants appealed and asked that the order for a new trial should be set aside, and the verdict and judgment as entered at the trial should be restored.

McCall, *K.C.*, *Rigby Swift*, *K.C.*, and *H. St. John Field* for the appellants.
Douglas Hogg, *K.C.*, and *H. H. Joy* for the respondents.

The House took time for consideration.

June 2, 1919. Their Lordships read opinions which dealt largely with the facts of the case, but also with a question of bankruptcy law which calls for report. This report is confined to that matter.

LORD BIRKENHEAD, L.C., (read by Lord Atkinson) considered the case relating to damages to the appellant's estate, said that he was unable to see any reason for encouraging the re-hearing of any part of that case, and continued: There remains only to be considered the finding of the jury that the plaintiff had personally and additionally sustained damage to the extent of £7,500 as the result of the same negligence. Judgment, in fact, was entered for the aggregate amount of the two sums, namely, £45,182 5s. 8d. [damage to the appellant's business and estate] and £7,500 less the amount of the unsecured balance of the debt due to the defendants. It was entered in favour of the two plaintiffs, Major Wilson and his trustee in bankruptcy. I have on the whole reached the conclusion, though not without hesitation, that under the peculiar language of the agreement found by the jury the £7,500 is recoverable by Major Wilson himself. The express obligation of the defendants was to maintain the credit of Major Wilson as a trader. They broke that contract. In my opinion, this breach was actionable, and the right of action remained with Major Wilson for the reasons given by Erle, J., in *Beckham* v. *Drake* (1) (2 H.L.Cas. at p. 604):

> "The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without reference to his rights of property. Thus it has been laid down that assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, defamation, battery, injury by personal negligence, as for not carrying safely, not curing, not saving from imprisonment by process of law."

My noble and learned friend, Lord Atkinson, has very carefully collected all the authorities upon this point, and I do not think it necessary to repeat them, as I am in agreement with his conclusion. The objection was taken by the defendants that this finding of the jury cannot be supported without proof of special damage. In deciding this point, I do not lay down a rule of general law, but I deal with the exceptional language of an exceptional contract. The defendants undertook for consideration to sustain the credit of the trading customer. On principle the case seems to belong to that very exceptional class of cases in which a banker who, though his customer's account is in funds, nevertheless dishonours his cheques. The ratio decidendi in such cases is that the refusal to meet the cheque, although the account is in credit, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit. The leading case upon the point is that of *Rolin* v. *Steward* (2). The direction of Lord Campbell to the jury has been generally accepted and treated as an accurate statement of the law. If it be held that there is an irrebuttable presumption that the dishonour of a trader customer's cheque in the events supposed is injurious to him and may be compensated by other than nominal damages, the conclusion would appear to follow almost a fortiori that such

damages may be given where the defendant has expressly contracted to sustain the financial credit of a trading customer and has committed a breach of his agreement. I am, therefore, of opinion that this appeal must be allowed with costs here and below, and I move your Lordships accordingly.

VISCOUNT FINLAY said that, in his opinion, on the question of damage to the appellant's estate there had been a miscarriage with regard to the largest item in the damages, and on that point he agreed with the Court of Appeal that there ought to be a new trial. His Lordship continued: There still remains for consideration the finding of the jury for £7,500 for damage sustained by the plaintiff personally by reason of loss to his credit and reputation caused by the bankruptcy which resulted from the defendant's negligence. It seems clear upon the terms of the findings of the jury that this sum is given purely in respect of damage to the plaintiff personally apart from and in addition to all damage to the estate. The two leading cases on the subject of damages personally to a bankrupt are *Rogers* v. *Spence* (3) and *Beckham* v. *Drake* (1). On principle and from these two cases it appears clear that while all causes of action for damage to the property vest in the trustee, any cause of action for damage to the person or reputation of the bankrupt would remain vested in him in spite of his bankruptcy. As both Mr. Wilson and his trustee in bankruptcy are joined as plaintiffs, it may not for the present purpose be very material whether Mr. Wilson or his trustee is the person in whom the right of action is vested; but, in my opinion, it is vested in Mr. Wilson as being purely personal to him and altogether separate from damage to the estate. It is clear that the fact of bankruptcy must injure the credit of the person made bankrupt apart from damage to the estate. In an action for negligence against a solicitor leading to the bankruptcy of his client, even if owing to fortuitous circumstances the estate had not been damaged, it seems on principle that the jury might give substantial damages for injury to the credit of the person made bankrupt. For a libel falsely imputing bankruptcy to the plaintiff, damages might be recovered in respect of injury to his credit. It is difficult to see on what principle such damages might not be given if there has been an actual bankruptcy as the result of breach of contract on the part of the defendant to take steps to prevent it. If the imputation of bankruptcy would give a right to such damages in an action for libel, why should not the fact of the bankruptcy owing to the defendant's breach of duty confer a similar right upon the plaintiff? It was urged that proof must be given of special damage in order to sustain the verdict on this head for more than nominal damages. I cannot see on what principle this contention rests. The mere fact of bankruptcy imports damage to the credit of the bankrupt. It is a natural consequence, and it is for the jury to assess the damages for such a slur. There was nothing excessive in the sum given on this head, £7,500, and I do not think that any case has been made for disturbing the verdict on the point. In the result, I think that there ought to be a new trial on the one question of damages in respect of the business and estate, but that the findings of the jury in all other respects should remain undisturbed.

LORD ATKINSON said that on the part of the case relating to damage to the appellant's estate the parties were bound by the course of the trial, unsatisfactory as he thought that trial was, and he continued: The sum awarded in respect of the injury to Major Wilson's estate vests in his trustee, but a question arises as to the person in whom vests the sum of £7,500 damages awarded in respect of the injury done to Major Wilson's credit and reputation. Is Major Wilson entitled to retain that sum for his own use, or does it pass to his trustee in bankruptcy? The difficulty involved in this question arises from the fact that the same breach of contract, the neglect of the defendants to take reasonable steps to maintain Major Wilson's credit and reputation, caused loss to his estate, and at the same time inflicted upon him as a trader (for it was in reference to his trade and business the contract was entered into) pain and humiliation and loss of credit and repute. That credit and repute, though of great value to him, was not part of his assets.

Injury to it, though it might do him much harm, did not lessen or depreciate this property; and it would appear to me that the right of action in respect of this injury would no more pass to his trustee than would his right of action for slander reflecting on him as a trader published in the course of the bankruptcy proceedings.

In *Beckham* v. *Drake* (1), the plaintiff A. entered into an agreement with the defendants to serve them for seven years at the fixed rate of wages of three guineas weekly, the party making default to pay to the other the sum of £500 by way of special damage. A. was dismissed, subsequently became bankrupt, and, after bankruptcy, brought an action of assumpsit to recover this sum of £500, to which the defendants pleaded his bankruptcy. It was held a good plea as the right of action passed to his assignees. The issue in fact raised on the pleadings was tried first, and a sum of £100 awarded to the plaintiff. In the course of the argument *Brewer* v. *Dew* (4) and *Rogers* v. *Spence* (3) were cited. In the latter of these two cases the action was brought for breaking and entering the plaintiff's premises, damaging them, and exposing the plaintiff's goods for sale therein, by means of which the plaintiff was not only disturbed in the possession of his house, but also prevented from carrying on his business and was deprived of the enjoyment of his goods. The defendant pleaded that before the action was brought the plaintiff had become bankrupt. It was held on general demurrer to this plea that as there were some causes of action included in the declaration which would not pass to the assignee, the plea which went to the whole of the declaration and not to any particular portion of it was insufficient and bad, but Lord Campbell said (12 Cl. & F. at p. 720):

> "It is quite unnecessary to enter into the other points that have been discussed. There is no doubt that a cause of action which is exclusively confined to injury to property will pass to the assignees. In that case there is no difficulty. The difficulty is where there is (as in the case which has been put during the argument) a mixed case of injury to the person and injury to the property. There has been no case as yet which has decided what, under such circumstances, is to happen. It may possibly be that the law will give an action to the bankrupt for the personal injury which has been sustained by him, and will give an action to the assignees for the injury that has been done to the property."

In the former of these two cases *Brewer* v. *Dew* (4) an action was brought for trespass for seizing and taking the plaintiff's goods under a false and unfounded claim of debt, "per quod the plaintiff was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain of his lodgers left his house." It was held that this right of action did not pass to the assignees. Lord Abinger, in giving judgment, laid down a test. It was this. Could the jury give vindictive damages beyond the mere value of the goods seized and taken? If so, the action did not pass to the assignees.

In *Beckham* v. *Drake* (1) Erle, J., said (2 H.L.Cas. at p. 604):

> "The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect to his body, mind or character, and without (immediate) reference to his rights of property. Thus it has been laid down that assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law."

Maule, J., said (ibid. at p. 621):

> "There is no doubt that the right to bring an action for an injury to the person, character or feelings of a bankrupt does not pass to the assignees, and that the right to bring an action for the payment of money agreed to be paid to the bankrupt does pass. And it appears to me that the present action is, in effect, an action on a contract to pay money."

The case was decided on this latter view, but PARK, B., in addition deals with the case where only part of the damage was recoverable for the personal injury to the bankrupt. He says (ibid. at pp. 628, 629):

> "That part could not be transferred to the assignees, and ought not to be lost. . . . Who then are to sue for the breach of contract where part belongs to the assignee and part to the bankrupt? . . . Either the right of action on the contract must be divided, and each sue, or the right of action altogether must remain in the bankrupt or altogether be transferred to the assignees, or both must join, the contract being entire, to sue for damages. In the first two cases the plea would be good, in the last two bad, for in the first it would be no answer to the entire cause of action, and in the second it would be no answer to any part of it. I should find considerable difficulty in deciding the question, but this case does not depend upon it, for I have to consider what the effect of the penalty is."

Ultimately he held that the rights to the penalty could not remain in the bankrupt, and that, therefore, the plea was good.

In *Re Wilson, Ex parte Vine* (5) it was decided that the Bankruptcy Act, 1869, did not affect the rule that a cause of action for injury to personal reputation (slander) did not pass to the trustee in bankruptcy. In *Rose* v. *Buckett* (6) it was held that where an action was brought for wrongful entry to the plaintiff's premises and wrongful conversion of the plaintiff's goods, whereby the plaintiff suffered great personal inconvenience, and annoyance to himself and his family by being wrongfully deprived of his property and of the quiet enjoyment of his house and premises from time to time by the defendant, it being admitted that no substantial damage was done to the premises or goods, the plaintiff's right of action did not, upon his bankruptcy, pass to his assignees.

In *Brunsden* v. *Humphrey* (7) the plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered then the amount claimed, brought a second action in the High Court against the defendant, claiming damages for personal injury sustained by the plaintiff himself through the same negligence. It was held by BRETT, M.R., and BOWEN, L.J., (LORD COLERIDGE, C.J., dissenting) that, although the injury to the plaintiff's goods and the injury to his person were occasioned by the same wrongful act they constituted infringement of distinct and different rights, creating distinct and different causes of action, and that consequently the successful prosecution of the first suit raised no bar to the institution of the second. In the present case by parity of reasoning it would seem to follow that the negligence of the defendants gave rise to two distinct causes of action, the one consisting of injury to the bankrupt's estate, the other personal and consisting of injury to his character, credit and repute; the first passing to his trustee, the second remaining vested in himself. If that be so, independent actions could have been instituted against the defendants, the one by the trustee, the other by the bankrupt, each claiming damages in respect of the right of action vested in him. I do not think any insurmountable difficulty is created in the present case by the fact that both sue as plaintiffs, since the damages to which they are respectively entitled have been separately found.

Addis v. *Gramophone Co., Ltd.* (8) conflicts in no way with this conclusion. There the contract broken was a contract of service, and it was admitted that the plaintiff was entitled to the net benefit of having the contract performed, and was, therefore, entitled to be put in the same position, as far as money could do it, as if it had been performed. What was contended for, however, was that he was also entitled to recover damages in respect of the hurt to his feelings and the injury to his reputation caused by the offensive and depreciatory manner in which he was, in breach of this contract, dismissed. The present case is wholly different. Major Wilson is not seeking to recover damages to any extent due to the breach, in such a manner as that of a contract not directly connected with his credit and reputation.

He is seeking to recover damages for the injury caused to his credit and reputation by the defendant's neglect to perform the service they had by their contract bound themselves to perform—namely, to take all reasonable steps to maintain that credit and reputation. By withholding that service, the defendants directly caused Major Wilson to be ultimately made a bankrupt.

It would appear to me that injury to the credit and reputation of a trader is not only a natural and reasonable result of his being made a bankrupt., i.e., such a consequence as would, in the ordinary course of things, flow from it, but must, in the present case, have been in the contemplation of the parties when they entered into the contract as the result which would probably follow from the breach of it, and that the damages therefore are not too remote: *The Argentino* (9). The present case differs also from the case (always treated as exceptional) of a banker who, having adequate funds in his hands to pay his customer's cheque, dishonours it. In the latter case the banker does not contract to take any steps to maintain his customer's credit or reputation. His contract with his customer is to honour the latter's cheque while he has in his hands, to the customer's credit, funds available for that purpose. Yet the refusal to honour the customer's cheque while such funds are so available is held to be in itself so injurious to the customer's credit, if he be a trader, as to entitle him—though no special damage be alleged or proved —to recover not merely nominal damages but to recover in the shape of damages temperate and reasonable compensation for the injury thus done to his credit.

In *Rolin* v. *Steward* (2), which was a case of this character, no special damages being alleged or claimed, LORD CAMPBELL directed the jury that they ought not to limit their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be reasonable compensation for the injury they must have sustained by the dishonour of their cheques. The jury found a verdict for the plaintiffs for £500. A rule nisi was obtained on behalf of the defendants for a new trial on the ground of misdirection, and also on the ground that the damages were excessive. On the case coming on for argument on showing cause against this rule, JERVIS, C.J., was absent, but the direction of LORD CAMPBELL was upheld by three distinguished judges—namely, CRESSWELL, WILLIAMS, and CROWDER, JJ. The reasons given for their decision are instructive. The statement of the law by LORD TENTERDEN in *Marzetti* v. *Williams* (10) was much relied upon. His Lordship there said (1 B. & Ad. at p. 424):

> "I cannot forbear to observe that it is a discredit to a person, and therefore injurious in fact to have a draft refused for a small sum, for it shows the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade."

CRESSWELL, J., in giving judgment, after quoting this passage, said (14 C.B. at p. 606):

> "His Lordship therefore assumes as a thing not to be disputed that a breach of contract of this sort is necessarily injurious to a person in trade, and, if so, the jurors might properly take that into consideration and give damages accordingly.

He then proceeds to quote a passage from the judgment of TAUNTON, J., in *Marzetti* v. *Williams* (10). The passage runs thus (1 B. & Ad. at p. 427):

> "Here, independently of other considerations, the credit of the plaintiff was likely to be injured by the refusal of the defendants to pay the cheque, as it was the duty of the defendants to pay the cheque when it was presented, and that duty was not performed. I think the plaintiff, who had a right to its being performed, is entitled to recover nominal damages."

CRESSWELL, J., proceeds (14 C.B. at p. 607):

> "Why? Because the jury had a right to assume that it would be to some extent injurious, and, if so, it was for them to say to what extent. For these

reasons I am of opinion that the direction of LORD CAMPBELL to the jury was right."

WILLIAMS, J., in giving judgment, said (ibid.):

"I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonouring a cheque at a time when he had funds of the customer in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover substantial damages, and when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract, just as in the case of an action for a slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage."

It may be that the existence of this apparently indisputable presumption that the dishonour of a trader's cheque under the circumstances mentioned is necessarily injurious to him as a trader, is the special feature which distinguishes this class of cases from others and makes them exceptional. On the whole, I think that the appeal should be allowed, with costs here and below.

LORD PARMOOR said that it was unnecessary for him to dwell on the absence in the notice of appeal to the Court of Appeal of the points relied on before that court and this House, but he desired to express his entire agreement with the view that where the rules as to the giving of the notice of appeal were not observed, it was only in exceptional cases and on special grounds that relaxation should be allowed. Having said that he did not think that there was need for the re-trial of any part of the case, he concluded: I have had some difficulty in the item of £7,500. The jury have found that the respondent bank agreed to take all reasonable steps to maintain the appellant Wilson's credit and reputation, and that the appellant Wilson could rely on the respondent bank to look after his financial affairs, but that the respondent bank was guilty of negligence in the performance of this duty, and that thereby the appellant Wilson's credit was lost. No evidence, however, was given of any actual damage, and the question arises whether in such a case general damages can be considered. On the whole, this case appears to me to come within the same category as when a banker having funds to meet a customer's cheque dishonours his draft, and that the amount ascertained of actual damages could not be, as estimated in money, a fair satisfaction for the wrong which the appellant Wilson has suffered consequent on the breach of duty by the respondent bank. In *Prehn* v. *Royal Bank of Liverpool* (11) MARTIN, B., defined general damages to be such damages as the jury may give when the judge cannot point out any measure of damages by which they are to be assessed except the opinion and judgment of a reasonable man. I think that on those lines the verdict for £7,500 should not be disturbed. In my opinion, the appeal succeeds, and the judgment of BRAY, J., should be restored, with costs in this House and in the Court of Appeal.

LORD WRENBURY.—It is certainly a salutary principle that a court of justice should confine itself to adjudicating upon the questions raised by the parties litigant to the exclusion of other questions which they do not advance. But, like many other principles, care must be taken in its application. Upon the question of the £7,500 I do not wish to add anything.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.*, for *Ansell & Sherwin*, Birmingham; *Rawle, Johnstone & Co.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

Re ATKINSON. PYBUS *v.* BOYD

[Chancery Division (Younger, J.), February 15, 19, May 14, 1918]

[Reported [1918] 2 Ch. 138; 87 L.J.Ch. 505; 119 L.T. 235]

Will—Construction—"Children"—Gift to children of deceased person—Only grandchildren living at date of will—Exclusion of grandchildren.

Where a testator makes a bequest to the children of a deceased person and to his knowledge there are no such children in existence, there is no rule of construction that the word "children" must be held to include grandchildren. The particular words of each will must be construed with reference to their context.

Crooke v. *Brookeing* (1) (1689), 2 Vern. 106, explained.

Fenn v. *Death* (2) (1856), 23 Beav. 73, and *Re Smith, Lord* v. *Hayward* (3) (1887), 35 Ch.D. 558, disapproved.

Re Kirk, Nicholson v. *Kirk* (4) (1885), 52 L.T. 346, followed.

Notes. As to the construction of "children" in a will, see 34 Halsbury's Laws (2nd Edn.) 303, 304; and for cases see 44 Digest 840 et seq.

Cases referred to:

(1) *Crooke* v. *Brookeing* (1689), 2 Vern. 106; 23 E.R. 679; 44 Digest 843, *6959*.

(2) *Fenn* v. *Death* (1856), 23 Beav. 73; 2 Jur.N.S. 700; 4 W.R. 828; 53 E.R. 29; 44 Digest 844, *6973*.

(3) *Re Smith, Lord* v. *Hayward* (1887), 35 Ch.D. 558; 56 L.J.Ch. 771; 56 L.T. 878; 35 W.R. 663; 44 Digest 844, *6980*.

(4) *Re Kirk, Nicholson* v. *Kirk* (1885), 52 L.T. 346; 44 Digest 840, *6942*.

(5) *Crook* v. *Whitley* (1857), 7 De G.M. & G. 490; 26 L.J.Ch. 350; 3 Jur.N.S. 703; 5 W.R. 383; 44 E.R. 191, L.C.; 44 Digest 579, *3984*.

(6) *Pride* v. *Fooks* (1858), 3 De G. & J. 252; 28 L.J.Ch. 81; 32 L.T.O.S. 358; 5 Jur.N.S. 158; 7 W.R. 109; 44 E.R. 1265, L.JJ.; 44 Digest 844, *6974*.

(7) *Berry* v. *Berry* (1861), 3 Giff. 134; 4 L.T. 635; 7 Jur.N.S. 752; 9 W.R. 889; 66 E.R. 354; 44 Digest 844, *6975*.

Also referred to in argument:

Radcliffe v. *Buckley* (1804), 10 Ves. 195; 32 E.R. 819; 44 Digest 843, *6964*.

Loring v. *Thomas* (1861), 1 Drew & Sm. 497; 30 L.J.Ch. 789; 5 L.T. 269; 7 Jur.N.S. 1116; 9 W.R. 919; 62 E.R. 469; 44 Digest 796, *6528*.

Moor v. *Raisbeck* (1841), 12 Sim. 123; 59 E.R. 1078; 44 Digest 844, *6967*.

Adjourned Summons as to the construction of a will.

By her will, dated Aug. 19, 1914, Jane Atkinson, after appointing executors and trustees, and giving certain specific bequests and legacies, devised and bequeathed her residuary real and personal estate to her trustees upon trust for sale and conversion, and after payment of certain expenses, she directed her trustees to hold the residue upon the trusts thereinafter declared. By cl. 6 of the will the testatrix directed that:

"My trustees shall hold one equal fifth part of my residuary estate upon trust for such of the children of my late cousin Isabella Watt as shall be living at my death absolutely in equal shares between them and if none of such children shall survive me then upon trust for such remoter issue of the said Isabella Watt as shall be living at my death absolutely in equal shares between them per stirpes and not per capita."

By cll. 7 and 8 respectively the testatrix directed her trustees to hold two other equal fifth parts upon similar trusts for the children of her late cousins Jane Heslop and Elizabeth Richardson respectively, with a similar gift over to their remoter

issue respectively. By cl. 9 she directed that, subject to the trusts aforesaid, her trustees should hold her residuary estate upon trust

> "to divide the same in equal shares per capita and not per stirpes absolutely among such of the children of my late uncles Thomas Liddell and William Liddell and my late aunts Jane Carr and Ann Arkley (brothers and sisters of my mother) as shall be living at my death."

The testatrix died on Nov. 30, 1914. An originating summons was issued by the executors and trustees asking, inter alia, whether, in the event of there being no children of Thomas Liddell, William Liddell, Jane Carr, and Ann Arkley living at the death of the testatrix, their grandchildren were entitled to the two-fifths shares bequeathed by cl. 9 of the will.

W. J. Whittaker for the trustees.

Cecil Turner (for *Roope Reeve*, serving with His Majesty's forces) and *Bovill* for the next-of-kin.

J. G. Wood and *A. Beddall* for the grandchildren.

Cur. adv. vult.

May 14, 1918. **YOUNGER, J.,** after stating the facts and reading cl. 9 of the will, read the following judgment.—The question to be discussed is whether, in the circumstances which I have stated, the word "children," as used in cl. 9 of this will, is a word of sufficiently comprehensive import to extend to grandchildren, but to the exclusion of more remote descendants, of the deceased uncles and aunts of the testatrix named in the clause, or whether it must be limited to their children strictly so called.

That offspring in the first degree is the natural and ordinary signification of the word "children" was not disputed at the Bar, nor is there anything in this will to indicate that it is there used in any other sense. On the contrary, in the three clauses of the will immediately preceding that in question, in each of which the testatrix disposes of one-fifth of her residuary estate, it is clear that it is in that ordinary sense, and in no other, that the testatrix there employs the term "children," the word being in each clause contrasted with the "remoter issue" of the same person. I will read cl. 6 as representative of all three. [His Lordship read cl. 6, and continued:] In that clause, as in cll. 7 and 8, the testatrix is benefiting the children living at her death of one cousin dead at the date of her will, and she carefully provides for a stirpital division amongst the remoter issue of the cousin in case all the children have predeceased herself. In cl. 9, however, the testatrix is dealing as one class with the children of four deceased uncles and aunts. These children if living at her death are to take equally per capita and not per stirpes, and there is no provision for their remoter issue at all in the event of all being then dead. The similarity between this clause and each of the three which precede is therefore striking. The dissimilarity is, however, no less striking; and yet I am in effect asked by those representing the grandchildren to read the clause as if that dissimilarity did not exist, and as if there were to be read into this clause a provision not there, which, in the case of each of the three immediately preceding clauses, the testatrix, in precisely analogous circumstances, thought it necessary plainly to insert.

It appears to me that, if the question be one of the construction of this particular will, such a course would be inadmissible; but I am further asked to attribute to the word "children" in cl. 9 not only an unusual signification, but one at variance with the natural and ordinary meaning, which, again in precisely analogous circumstances, is demonstrably attributed to it in each of these three preceding clauses. This again, it appears to me, if the question be one of the construction of this particular will, is a thing that I cannot do. It was, however, urged that the question to be solved does not really depend upon the terms of a particular instrument, but that we are here in the presence of a rule of construction; the rule being that if, in such a case as the present, there are at the date of the will no "children"

A strictly so called in existence, and this fact is known to the testator, and if from the nature of the case, as here, no such children can thereafter come into existence, that then grandchildren will take under a gift to "children," so that an intestacy may not supervene.

It may be doubted whether any authority short of a deliberate deliverance of the House of Lords to that effect would be sufficiently august to establish a rule at B once so comprehensive and so strangely restricted in its scope, for remoter issue are not within it. It may be said at once that no such deliverance exists; such foundation, indeed, as there is for the so-called rule is of the slenderest description. It is to be found, if at all, in a dictum in *Crooke* v. *Brookeing* (1), which has, it must be admitted, received an amount of consideration in subsequent cases hardly justified, either by the imperfect report in VERNON or by the circumstances of the C case. There the testator by his will made on Feb. 15, 1651, gave £1,500 to his brothers Simon and Joseph Snow for such uses as he had declared to them, and by them not to be disclosed. On Nov. 17, 1652, after the testator's death, Simon in a letter to Joseph stated that the trusts were to provide maintenance for Anne Crewe during her husband's life, and if, as happened, the husband survived her the money was to go among the children of her sister Grace as she, Anne, should D advise. Anne died in 1684, leaving her husband surviving, having made no appointment. At her death Grace had one child living, the plaintiff; five others had died intestate since the testator's death, some leaving children. The Lords Commissioners, overruling JEFFERIES, L.C., held that the plaintiff, as the only child living at the death of Anne, was entitled to the whole. The judgment as reported (2 Vern. 106) is short:

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> "Where devise is to children, grandchildren cannot come in to take with children: and, turn it into Latin, children and grandchildren are exprest by distinct and different words: but all admitted that if there had been no child the grandchildren might have taken by the devise to *his* [the italics are mine] children."

F It is upon these last words that the so-called rule now being considered is said to be founded. That they are a mere dictum is of course clear; that they are inaccurately reported at least in one obvious respect is equally plain. It is noticeable also that the result which in a particular event they purport to describe is not the result of a phrase found in a carefully framed instrument, but is that of a passage contained in a mere informal communication made by one trustee to another, G explaining the parol trust on which a fund was held by the two. It may be doubted whether a dictum of such doubtful authenticity, and prompted by a phrase in a document so homely, has ever before been invoked as the foundation of an artificial rule of construction of universal application. But that is not all. The dictum goes far beyond the rule it is supposed to justify, comprehensive as that rule is. Consider the facts in *Crooke* v. *Brookeing* (1) as disclosed in the report. There is H nothing there to show that Grace was dead at the date of the will; there is, indeed, nothing to show that she was not still living at the death of Anne. It is, moreover, quite clear that, both at the date of the will and at the testator's death, there were living children of Grace properly so called. Presumably, therefore, the dictum, if it means anything, means that in *Crooke* v. *Brookeing* (1), even in these circumstances, the grandchildren of Grace living at Anne's death would have taken, I if only the plaintiff had been dead. But it has never in any subsequent case even been suggested that grandchildren or remoter descendants of A. can, as a mere matter of construction, take under a gift to the children of A., if either A. is living at the date of the will or if there are then children living of A., who is then dead. Indeed, I can find no case in which the so-called rule has been applied where A. has not in the will been described as dead, and certainly no case in which its applicability has been suggested when there were children of A. living at the date of the will. In truth the dictum has apparently never been applied in any circumstances remotely analogous to those in reference to which it was propounded. But, notwithstanding,

it has in a vague way survived even to this day, although it will not, I think, be found that there is judicial authority for the compendious phrase in which it is sometimes stated, that a gift to children extends to grandchildren where there is no child. Indeed, any judicial authority for the supposed rule is extraordinarily scanty.

Fenn v. *Death* (2) is perhaps the most express. There the gift was "in trust for the children of my late mother's deceased half-brother, Thomas Death." All the children were dead at the date of the will. There were then living both grandchildren and great-grandchildren of Thomas. There was apparently no evidence that the testator knew that the children were all dead. SIR J. ROMILLY, M.R., however, applying the supposed rule, held that the grandchildren were entitled and the great-grandchildren excluded. That case, however, can, I think, no longer be regarded as an authority.

First of all, it is clear that the rule cannot apply unless it is affirmatively established that the testator knew when he made his will that all the children properly so called were then dead, and such knowledge will not be presumed: see *Crook* v. *Whitley* (5). Secondly, to exclude great-grandchildren in such a case is contrary both to principle and to authority. In *Pride* v. *Fooks* (6), TURNER, L.J., said (3 De G. & J. at p. 275):

> "The principle which extends the limitation to the grandchildren must, as I conceive, extend it also to the more remote issue. I can see no ground on which the limitation, if it extends beyond the children, can be confined to the grandchildren, or on which the great-grandchildren mentioned in the course of the argument can be excluded."

In the present case, if I may here make this digression—I can see no ground upon which, if the grandchildren were included, the great-grandchildren of the uncles and aunts could be excluded. *Berry* v. *Berry* (7), before STUART, V.-C., is perhaps the next strongest authority. There the gift was to the children "of my late brother John." John had two sons, both dead at the date of the will, a fact known to the testator. There were four grandchildren then living. Elsewhere in his will the testator referred to the "issue" of his late brother. There, on that will, the Vice-Chancellor held the grandchildren entitled. But his language is very cautious (3 Giff. at p. 134):

> "Children may mean grandchildren where there can be no other construction, but not otherwise."

I believe that these so far are the best authorities that can be adduced in support of the so-called rule. They do not carry it any further, and its true limits were, as I think, authoritatively laid down by PEARSON, J., in his considered judgment in *Re Kirk, Nicholson* v. *Kirk* (4). In that case one share of residue was given to the children of the late A.; another to the children of the late B., and so on; there were living at the date of the will children of A. and grandchildren, but no children, as the testator knew, of B. PEARSON, J., held that the grandchildren of B. did not take. After discussing the authorities in detail, he says (52 L.T. at p. 348):

> "I come to the conclusion, therefore, on the authorities, that it is clear that I cannot substitute 'issue' or 'grandchildren' for 'children,' merely on the ground that at the date of the will or testator's death the named person has no child living, but only grandchildren; and that I can only alter the word 'children' from its proper meaning if on a proper construction of the will itself it is found to have been intended to bear a larger signification. Here I am unable to find any such intention, for, as I have said, the first fourth share is plainly given to the children of the one brother; and I do not see how I can alter the principle of construction when I come to consider the gift to the 'children' of the second brother. I may add that I agree in this case with TURNER, L.J.'s opinion in *Pride* v. *Fooks* (6) as to the difficulty there of excluding great-grandchildren. If I say that 'children' does not mean children, how

can I say that it means grandchildren or great-grandchildren or both? The true rule is that a gift in a will to 'children' must be construed as a gift to children literally, and nothing else, unless from the will itself and the context it appears that the word is intended to have a larger meaning."

This case shows, one might have hoped finally, that we are here in the presence of no hard-and-fast rule; that the question is never more than one of construction of the particular instrument; that the word "children" must have its natural signification attributed to it in all cases, unless from the will itself and the context it appears that the word is intended to have a larger meaning, or unless, as may be added, by the application of a principle not limited to the word "children," the word is in a proper case carried beyond its ordinary signification from the want of any persons more accurately answering to the description, a course necessary to prevent its being imputed to a testator that he made a gift without having in his mind any actual or possible object or subject of it.

Somewhat unfortunately, however, if I may very respectfully say so, the matter again arose in *Re Smith, Lord* v. *Hayward* (3), where KAY, J., in a case exactly similar to that of *Re Kirk* (4), which, however, was not cited to him, decided in favour of the grandchildren, and in the course of his judgment made some observations which were utilised by counsel for the grandchildren as the real foundation of his argument here. In *Re Smith* (3), KAY, J., said (35 Ch.D. at p. 559):

"The law seems to stand thus. If the testator on the face of his will gives a legacy to the children of a deceased person, mentioning that person as being dead, and at the date of the will there are no children of that person, but there are grandchildren, then the court, on the principle ut rest magis valeat, holds that the gift takes effect in favour of the grandchildren."

It will be noted that in that case KAY, J., purported to proceed upon authority. I have, I hope, showed that for the proposition so widely stated by him there was then no sound authority; I feel sure he would not have said there was had PEARSON, J.'s judgment in *Re Kirk* (4) been brought to his notice, and I cannot help saying that, in my judgment, *Re Smith* (3), where it differs from the principles of *Re Kirk* (4), ought not to be followed.

In the result, we are here, as I think, confronted by no special rule governing the determination of this particular question. The principles of construction applicable to it are of universal application where they are relevant, and decisions subsequent in date make it clear that nothing in *Crooke* v. *Brookeing* (1) now remains to justify the further citation of that case as an authority for anything. I may add that in the present case an attempt was made to show that at the date of her will the testatrix knew that all the children of the uncles and aunts were dead. That attempt, in my opinion, failed. It was for all these reasons I was constrained to hold that the testatrix died intestate as to the two-fifths of her residue now in question.

Solicitors: *Stibbard, Gibson & Co.*, for *Gibson, Pybus & Pybus*, Newcastle-upon-Tyne; *Beamish, Hanson, Airy & Co.*; *Gibson & Weldon*, for *T. W. D. Spence*, South Shields; *Doyle, Devonshire & Co.*, for *Hannay & Hannay*, South Shields.

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

In the Estate of RANKINE

[Court of Appeal (Swinfen Eady and Bankes, L.JJ., and Eve, J.), March 4, 1918]

[Reported [1918] P. 134; 87 L.J.P. 114; 118 L.T. 670; 34 T.L.R. 294; 62 Sol. Jo. 382]

Probate—Grant—Confirmation—Scottish confirmation—Rescaling—Jurisdiction of English court—Discretion—Executor incompetent by English law—Confirmation of Executors (Scotland) Act, 1858 (21 *&* 22 *Vict., c.* 56), *s.* 12.

Section 12 of the Confirmation of Executors (Scotland) Act, 1858, is imperative; and the sealing of a confirmation of executors granted in Scotland is a ministerial act which the Probate Court in England is required to perform, and is not one for the court's discretion.

Where, therefore, under a trust disposition and settlement a corporation aggregate had been appointed executor and the nomination had been confirmed by the Scottish court, the Probate Court was **held** to be bound to seal the confirmation, notwithstanding that according to English law a corporation aggregate was not itself a competent person to take a grant of probate without the intervention of a syndic.

Notes. Section 12 of the Confirmation of Executors (Scotland) Act, 1958, has been replaced by s. 168 of the Supreme Court of Judicature (Consolidation) Act, 1925 (see 9 Halsbury's Statutes (2nd Edn.) 782).

Considered: *Burns* v. *Campbell*, [1951] 2 All E.R. 965. Referred to: *Re McLaughlin*, [1922] P. 235.

As to resealing of Scottish grants, see 16 Halsbury's Laws (3rd Edn.) 259; and for cases see 23 Digest (Repl.) 262.

Cases referred to:

(1) *In the Goods of Duchess d'Orléans* (1859), 1 Sw. & Tr. 253; 28 L.J.P. & M. 129; 32 L.T.O.S. 261; 5 Jur.N.S. 104; 7 W.R. 269; 164 E.R. 716; 11 Digest (Repl.) 409, *630*.

(2) *In the Goods of Darke* (1859), 1 Sw. & Tr. 516; 29 L.J.P.M. & A. 71; 2 L.T. 24; 8 W.R. 273; 23 Digest (Repl.) 268, *938*.

(3) *In the Goods of Hunt*, [1896] P. 288; 66 L.J.P. 8; 45 W.R. 236; 23 Digest (Repl.) 231, *2782*.

Appeal from Coleridge, J., sitting as a judge of the Probate Division.

James Rankine died on June 5, 1917, domiciled and resident in Scotland. By his trust disposition and settlement (or will), dated Mar. 31, 1906, and recorded in the court books of the commissariot of Edinburgh on Oct. 4, 1917, he appointed, in the events which happened, the Royal Exchange Assurance Corporation, incorporated by Royal Charter, to be his executor. On Oct. 5, 1917, confirmation of the nomination of executor contained in that trust disposition and settlement was granted by the Sheriff of the Lothians and Peebles to the Royal Exchange Assurance Corporation, and it was given full power to administer the estate and generally to do every other thing concerning the same that to the office of an executor nominate is known to belong. On Oct. 18, 1917, the confirmation of the grant by the Scottish court in favour of the Royal Exchange Assurance Corporation, was presented to the Principal Registry of the Probate Division of the High Court under the Confirmation of Executors (Scotland) Act, 1858. The papers were accepted, but were subsequently returned to the solicitor who had lodged them, with an intimation that the court refused to reseal them on the ground that it was not the practice to reseal to a corporation, but that the court was prepared to reseal to a syndic duly appointed by the corporation. On Jan. 14, 1918, a motion was made ex parte under s. 12 of the Act of 1858, before Coleridge, J., sitting in the Probate Division, for an order directing that the confirmation be resealed to the

Royal Exchange Assurance Corporation, the executor whose nomination had been confirmed by the Scottish court, without the intervention of any syndic, or for such other order as to the court might seem meet. On Jan. 21, 1918, COLERIDGE, J., refused to make any order on the application. His Lordship was of opinion that a corporation, unless a corporation sole, was by English law not competent to take a personal grant.

The Royal Exchange Assurance Corporation appealed.

Sir Ernest Pollock, K.C., and *Le Bas* for the appellants.

There was no opposition, the matter being non-contentious.

SWINFEN EADY, L.J.—This is an appeal from an order of COLERIDGE, J., sitting in the Probate Division, refusing an application made under the Confirmation of Executors (Scotland) Act, 1858, that there might be sealed in England a confirmation of a Scottish trust deed and disposition.

James Rankine was a domiciled Scotsman, and at the time of his death had property both in Scotland and in England. On Oct. 5, 1917, confirmation of his trust disposition and settlement was granted in Scotland to the Royal Exchange Assurance Corporation. That corporation was incorporated by Royal Charter on June 22, 1720, and since that date it has been, and is now, regulated by certain Acts of Parliament. It is within the powers of the corporation to act as executor, and, having been appointed by the will of James Rankine, the Scottish court confirmed the trust disposition and settlement. Upon that confirmation having been obtained in Scotland, it was presented to the Probate Division here to be sealed in England. COLERIDGE, J., declined to give directions for the seal to be affixed in England, upon the ground that a corporation in England would not be a competent person to take a grant of probate or administration, and that the Act must be interpreted as meaning that the duty of the court in England was to affix the seal to a grant when the person making the application was a person competent according to English law to take a grant of probate.

In my opinion, that view cannot be maintained. The object of the Act was to enable a Scottish confirmation to be made to extend over all parts of the United Kingdom, and the act of the Probate Division in England in affixing their seal is a ministerial act which the court is by statute required to perform, and not an act which is left to the discretion of the court as to whether it will or will not perform it. The Act is intituled

> "An Act to amend the law relating to the confirmation of executors in Scotland, and to extend over all parts of the United Kingdom the effect of such confirmation and the grants of probate and administration."

Then the preamble to the Act recites:

> "Whereas it is expedient to amend the law relating to the confirmation of executors in Scotland and to extend over the United Kingdom the effect of such confirmation and of grants of probate and administration."

Then there are various provisions. The first I need refer to is s. 9, which provides that the inventory may include personal estate in any part of the United Kingdom —that is to say, it is not restricted to Scotland. Certain portions of that section were repealed by the Statute Law Revision Act, 1892, and it now runs as follows:

> "It shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland or both. . . . Provided that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom."

The provisions of s. 9 are complied with in this case because the commissariot finds that the deceased was domiciled in Scotland, and he certifies that there is given upon oath an inventory of the personal estate and effects of the said deceased at the time of his death situated in Scotland and England amounting to so much money. Then s. 12 is the next material section, and it is upon that section that the question in the present case turns.

> "When any confirmation of the executor of a person who shall be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England [that is the case here] shall be produced in the Principal Court of Probate in England and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissariot finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said court of probate."

The confirmation is to be sealed with the seal of the court in England. There is no discretion vested in the court; the language is imperative. Section 15 provides for securing the payment of the stamp duties. I need not read it.

It is to be observed that although the language of that statute renders it compulsory on the court, it differs from the language of the Colonial Probate Act, 1892, dealing with probates in British possessions to which the Act applied where a discretion is vested. By s. 2 (1) of that Act it is provided:

> "Where a Court of Probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to and a copy thereof deposited with a Court of Probate in the United Kingdom, be sealed with the seal of that court, and, thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom as if granted by that court."

It is to be observed that there is a difference in the language of that section and the language now under consideration.

We are not dealing on this occasion with any question of making an original grant of probate or letters of administration. In *In the Goods of Duchess d'Orléans* (1) the court was asked to make a grant of letters of administration to a minor in respect of the estate of the late duchess, who was domiciled in France. It was there held that the court would not follow the grant of the country of domicil where it would by so doing be acting in contravention of the law of this country. The application there was to make a grant to a minor, and such a grant is not made by English law. Nor in England is a grant of probate or letters of administration made directly to a corporation aggregate. The practice was pointed out in the case of *In the Goods of Darke* (2). In that case, by reason of the fact that the corporation could not take the oath for the due execution of the office of executor—the corporation could not, as such, take it—upon the corporation appointing their syndic for the purpose of taking the grant, the grant of letters of administration was made to the syndic. A similar practice was followed in *In the Goods of Hunt* (3), where an English limited company had been appointed to be executor and trustee of a will and the grant of letters of administration with the will annexed was made to the general manager of that company, the company being permitted to be the sole surety for the administration. For these reasons I am of opinion that the view taken in the court below was erroneous, and that the applicants are entitled as of right to have the seal of the court affixed to their confirmation. In my opinion the appeal ought to be allowed and the confirmation sealed.

BANKES, L.J.—I agree. The language of s. 12 of the Confirmation of Executors (Scotland) Act, 1858, appears to me to be quite plain, and as I read it it directs the doing of certain things of a mere ministerial kind, and under these circumstances I think that the view taken by COLERIDGE, J., was not correct.

EVE, J.—I agree.

Appeal allowed.

Solicitor: *Shirley W. Wolmer.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re STONEHAM. STONEHAM *v.* STONEHAM

[CHANCERY DIVISION (P. O. Lawrence, J.), November 22, December 4, 1918]

[Reported [1918] 1 Ch. 149; 88 L.J.Ch. 77; 120 L.T. 341; 63 Sol. Jo. 192]

Gift—Gift inter vivos—Gift of chattels capable of delivery—Donee in possession of chattels before gift made—Need of further act of delivery to perfect gift—Incomplete gift—Completion by confirmation in will and appointment of donee as executor—Effect of statements by testator to third party inconsistent with confirmation in will.

Where chattels capable of delivery are the subject-matter of a verbal gift and at the time of the gift are already in the possession of the donee to the knowledge of the donor, no further act of delivery by the donor is necessary to make the gift effective, for delivery antecedently to the gift perfects it in the same way as delivery concurrently with or subsequently to the gift.

Cochrane v. *Moore* (1) (1890), 25 Q.B.D. 57, applied.

From 1910 the donee, with the donor's consent, was in possession of the donor's house and the furniture therein. In 1913 the donor by verbal gift gave the donee part of the furniture, that gift being confirmed by the donor in a will which he made in 1914 and in which he appointed the donee as executor. It was alleged by a third party that at a later date the donor made statements relating to his furniture which were inconsistent with the gift to the donee.

Held: (i) the fact that the donee was in possession of the furniture when the gift was made was sufficient delivery to complete the gift; (ii) even if the gift had been incomplete when made, it was completed by the appointment of the donee as executor coupled with the confirmation of the gift in the will, and any change of intention regarding the gift communicated by the testator to a third party after the will was made could not revoke or modify the confirmation in the will.

Notes. As to delivery, see 18 HALSBURY'S LAWS (3rd Edn.) 382, paras. 728, 729, and as to the completion of incomplete gift, see ibid., 399, 400, para. 758. For cases on gifts of chattels see 25 DIGEST 506 et seq.

Cases referred to:

(1) *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57; 59 L.J.Q.B. 377; 63 L.T. 153; 54 J.P. 804; 38 W.R. 588; 6 T.L.R. 296, C.A.; 25 Digest 508, *47.*

(2) *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551; 106 E.R. 467; 25 Digest 501, *3.*

(3) *Re Harcourt, Danby* v. *Tucker* (1883), 31 W.R. 578; 25 Digest 507, *45.*

(4) *Re Ridgway, Ex parte Ridgway* (1885), 15 Q.B.D. 447; 54 L.J.Q.B. 570; 34 W.R. 80; 2 Morr. 248; 25 Digest 507, *46.*

(5) *Shower* v. *Pilck* (1849), 4 Exch. 478; 154 E.R. 1301; sub nom. *Sharr* v. *Pilch*, 19 L.J.Ex. 113; 14 L.T.O.S. 135; 25 Digest 508, *55.*

(6) *Flower's Case* (1597), Noy, 67; 74 E.R. 1035; 25 Digest 508, *54.*

(7) *Winter* v. *Winter* (1861), 4 L.T. 639; 9 W.R. 747; 25 Digest 508; *56.*

(8) *Kilpin* v. *Ratley*, [1892] 1 Q.B. 582; 66 L.T. 797; 56 J.P. 565; 40 W.R. 479; 8 T.L.R. 290; 25 Digest 509, *58.*

(9) *Cain* v. *Moon*, [1896] 2 Q.B. 283; 65 L.J.Q.B. 587; 74 L.T. 728; 40 Sol. Jo. 500, D.C.; 25 Digest 541, *286.*

(10) *Re Wasserberg, Union of London and Smiths Bank, Ltd.* v. *Wasserberg*, [1915] 1 Ch. 195; 84 L.J.Ch. 214; 112 L.T. 242; 59 Sol. Jo. 176; 25 Digest 553, *378.*

(11) *Strong* v. *Bird* (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 22 W.R. 788; 25 Digest 538, *268.*

(12) *Re Pink, Pink* v. *Pink*, [1912] 2 Ch. 528; 81 L.J.Ch. 753; 107 L.T. 241; 28 T.L.R. 528; 56 Sol. Jo. 668, C.A.; 25 Digest 539, *270.*

Summons taken out in an administration action by the applicant, Frederick William Stoneham, the testator's son, for an order to vary the master's certificate that certain old oak furniture, arms and armour were given by the testator in his lifetime to his grandson, Robert Thompson Douglas Stoneham, and thus did not belong to the testator at his death and did not pass under a general bequest in his will of furniture and effects.

The testator owned two residences, one at Brighton and the other, which was known as Beredens, in Essex. In 1910 the grandson (hereafter referred to as "the claimant"), and his family went to reside at Beredens at the testator's request since the testator spent most of the year at his Brighton residence and visited Beredens only in the summer. In 1911 the testator divided some of the modern furniture and pictures at Beredens between the applicant, another son and the claimant; the furniture and pictures appropriated to the claimant remained at Beredens. In the spring of 1913, when the claimant was still residing at Beredens, the claimant alleged that the testator while at Beredens told him that he intended leaving Beredens in trust for the claimant and his son and thereupon verbally gave the claimant the old oak furniture, arms and armour at Beredens. On July 3, 1914, the testator executed his last will which contained a confirmation of the gift to the claimant "of the furniture and effects in his possession at Beredens", and also a gift of "all my furniture and effects . . . (or such of them or such parts of thereof as I may not have given away, sold or disposed of in my lifetime or by this my will)" on certain trusts declared in the will. The will appointed the claimant one of the executors of the will, the other executors being the applicant and two other persons. It was alleged by the applicant that in November, 1914, when he was staying with the testator at his Brighton residence, the testator asked him to assist in dividing up the testator's furniture and effects, including the oak furniture and arms and armour at Beredens and made statements which were inconsistent with the gift alleged by the claimant.

At the hearing of the summons the applicant contended that the purported gift to the claimant was ineffective since it was not accompanied by delivery or by any change in possession of the goods. The claimant contended that if the gift was defective, which he denied, the defect was cured by his appointment as executor coupled with the express confirmation in the will of the gift to him.

Sir John Butcher, K.C., and *MacSwinney* for the applicant.

Frank Russell, K.C., and *Horace Freeman* for the claimant.

C. E. Jenkins, K.C., and *Horace Freeman* for the independent executors.

Ward Coldridge, K.C., and *K. Preedy* for parties attending.

Owen Thompson for other parties interested.

Cur. adv. vult.

Dec. 4, 1918. **P. O. LAWRENCE, J.**—The first question which I have been asked to decide is whether the claimant has proved that the testator did in fact purport to make a parol gift of the old oak furniture, arms, and armour to him in the spring of 1913. [HIS LORDSHIP, after reviewing the evidence, came to the conclusion that the gift was proved, and continued:] The next point taken on behalf of the applicant is a point of law. It is contended that even if the testator purported to make the gift as stated by the claimant, yet the gift was not effectual to pass the property in the articles in question because it was not accompanied by delivery or by any change in the possession of the articles. This contention raises the question whether a gift per verba de præsenti of chattels in the possession of the intended donee is effectual to pass the property in such chattels without more, or whether it is an essential constituent of such a gift that the donor should first regain possession of the chattels and then hand them back to the donee, or should do some other act equivalent to a further delivery of such chattels. Having regard to the fact that the testator by his last will appointed the claimant as one of his executors and confirmed the gift to him of the furniture and effects in his possession at Beredens, I am by no means convinced that this question really arises, but, as it has been fully argued before me, I think it desirable that I should express my opinion upon it. The applicant relies upon the decision of the Court of Appeal in *Cochrane* v. *Moore* (1), and submits that it is conclusive in his favour. This submission renders it necessary for me to consider that case carefully, because, if it covers the contention of the applicant, I am bound to give effect to such contention whatever my own opinion may be. That case, in my judgment, clearly affirms the proposition that where chattels capable of delivery are not in the possession of the donee, a parol gift of such chattels is not effectual to pass the property in the chattels to the donee unless accompanied or followed by delivery. The subject-matter of the gift in *Cochrane* v. *Moore* (1) was an undivided fourth part of a horse, and, although the facts in that case rendered it unnecessary for the Court of Appeal to decide the general question whether delivery is necessary in the case of a parol gift of an ordinary chattel, yet the court thought the question of such importance that it felt bound to express an opinion upon it. In the result, after an exhaustive examination of the authorities, the court came to the conclusion that *Irons* v. *Smallpiece* (2) was rightly decided and had not been overruled by *Re Harcourt*, *Danby* v. *Tucker* (3) or by *Re Ridgway* (4), and that delivery was necessary to pass the property in the case of a parol gift of an ordinary chattel. On behalf of the claimant, however, it is contended that the rule thus affirmed by the Court of Appeal does not involve the proposition that where the chattel the subject-matter of the parol gift is already in the possession of the donee at the time when the gift is made, a further delivery or a change of possession is necessary in order to render the gift effectual. In my judgment this contention of the claimant is sound, and I will now proceed to state my reasons for coming to this conclusion.

In *Cochrane* v. *Moore* (1) the subject-matter of the gift was never in the possession of the donee, and I cannot find anything in the report of that case to suggest that the court in affirming the proposition that delivery was necessary in the case of a parol gift of ordinary chattels intended to hold that where the chattels had already been delivered to the donee, any further delivery was necessary; no argument, so far as I can see, was addressed to the court as to any distinction between a gift of chattels previously delivered to the donee and in his possession and a gift of chattels not in the possession of the donee at the time of the gift; nor in my judgment was the court considering any such question. From a common-sense point of view it seems to me strange that articles already in the possession of an intended donee could not be effectually given by word of mouth without first removing them from the possession of the intended donee and then handing them back to him. In my judgment the foundation of the rule affirmed by the Court of Appeal in *Cochrane* v. *Moore* (1) is that, in order to constitute a perfect gift by word of mouth of chattels capable of delivery, the donee must have had the chattels delivered into his

possession by the donor or by someone on his behalf. In principle I can see no distinction between a delivery antecedently to the gift and a delivery concurrently with or subsequently to the gift. Nor can I see any reason in principle why the rule should not apply to a case where the chattels have been delivered to the donee before the gift as bailee or in any other capacity, so long as they are in his possession at the time of the gift to the knowledge of the donor. The donor, if he wanted to recover the chattels, would have to bring an action against the donee whether he had delivered the chattels prior to the gift or whether the delivery had accompanied or followed the gift, and the donee could in such an action plead the gift as a defence, whenever the chattels had been delivered to him, and, in the case of a prior delivery, in whatever capacity he had originally received them. As showing that all that the law requires in the case of a verbal gift of chattels is that the property in and the possession of the chattels should unite in the recipient, I refer to the passage in Mr. Nicholl's translation of BRITTON (Lib. 2, c. 3, p. 220), quoted in *Cochrane* v. *Moore* (1) (25 Q.B.D. at pp. 66, 67). That LORD ESHER, M.R., rests his judgment in *Cochrane* v. *Moore* (1) mainly on the principle which I have endeavoured to communicate appears from the tests and illustrations of complete and incomplete gifts which he lays down and gives (ibid. at p. 76), and which I need not here repeat. That FRY and BOWEN, L.JJ., in their joint judgment in *Cochrane* v. *Moore* (1) were not intending to decide that any further delivery is necessary where the thing given is already in the possession of the donee, is, I think, shown by their comment on the statement of the law by BRIAN, J., in Michaelmas Term, 21 Edw. 4, pl. 27, fol. 55 (vide 25 Q.B.D. at pp. 69, 70). The learned lords justices state:

> "the case appears only to go to this, that if A. after bailing a chattel to B., then gives it to B., B. might defend himself by his suit in an action of detinue. If good law, it seems to establish that delivery first and gift afterwards is as effectual as a gift first and delivery afterwards."

It is true that a doubt as to the correctness of the statement of the law by BRIAN, J., is suggested by the words "if good law," but if the learned lords justices had intended to lay down that a future delivery is necessary where the chattels are already in the possession of the donee as bailee, they could hardly have done otherwise than express their direct dissent from the statement of the law by BRIAN, J. No doubt when commenting upon the decision of *Shower* v. *Pilck* (5) (a case in which a gift of chattels then in the possession of the intended donee was made per verba de futuro) the learned lords justices (vide 25 Q.B.D. at p. 61) emphasise the fact that it was there held that the gift was open to the objection not only that it was made per verba de futuro, but also that it was not accompanied by delivery. In my judgment, however, that case was quoted by the lords justices, not for the purpose of showing that a future delivery was essential where the chattels were already in the possession of the donee as bailee, but solely for the purpose of showing that in 1849 the Court of Exchequer (notwithstanding several decisions which appeared to cast a doubt on the correctness of the law as laid down in *Irons* v. *Smallpiece* (2)) held the view that delivery was still an essential constituent of a complete parol gift of an ordinary chattel.

Flower's Case (6), in my view, in no way conflicts with the proposition that a further delivery is unnecessary where a chattel is already in the possession of the donee. The bag of gold which in that case the donee brought did not belong to the donor until it was cast upon the table; all that the donor had until then was a chose in action in respect of the loan which he had made to the donee. In order to establish a valid release of the debt, it was essential to prove that the bag of gold had passed into the possession of the donor before he gave it back to the donee. Moreover, there are several cases (in addition to the case before BRIAN, J., already referred to) which, in my judgment, tend to support the contention of the claimant.

In *Winter* v. *Winter* (7) it was held that a barge in the possession of the defendant as servant of the plaintiff was effectually given by word of mouth without

further delivery. In that case it was proved that after the gift the donee treated the barge as his own by paying the wages of the crew and by working it as his own, and it is sought to distinguish that case from the present on that ground. But, in my judgment, the conduct of the donee after the gift, although no doubt it afforded strong corroborative evidence of the gift, could not operate as evidence of any further delivery where there admittedly was none. The barge was in the possession of the donee at the time of the gift and remained in his possession after the gift; the character of the possession no doubt changed by reason of the gift, but that change must always take place where a gift of a chattel then in the possession of the donee as bailee or in some other capacity is proved to have been made, and, in my judgment, the nature or extent of the use of the chattel by the donee after the gift (although it may afford evidence of the gift having been made) cannot afford a test as to whether the gift was or was not complete when it was made. The case, however, is not very satisfactory owing first to the diversity of the reasons given by the learned judges who decided it, and, secondly, to doubt which seems to have been cast by one of those learned judges on the soundness of the decision in *Irons* v. *Smallpiece* (2). In *Kilpin* v. *Ratley* (8) the furniture at the date of the gift was in the house occupied by the donee and her husband, and remained in that house after the gift. The county court judge held that, as the donor had gone to the house expressly in order to make the gift, had pointed to the furniture in the room where he was when making the gift, and had then departed, leaving the furniture and the donee in the house, there had been such delivery and change of possession of the whole of the furniture of the house as was reasonably practicable in the circumstances and that therefore the gift of such furniture was valid and effectual. This decision was affirmed by HAWKINS and WILLS, JJ. In *Cain* v. *Moon* (9) it was held that antecedent delivery to the donee to hold in a different capacity was a sufficient delivery to satisfy the rule requiring delivery in parol gifts of chattels. This case would have been a direct authority in favour of the claimant's contention but for the fact that it was a case of donatio mortis causa and not a case of a gift inter vivos. It will be observed that the court decided the case on the footing that as regards delivery a donatio mortis causa stood on precisely the same footing as a gift inter vivos, a view which if taken in its literal sense would seem to be inaccurate: see *Re Wasserberg* (10). Both the learned judges who decided *Cain* v. *Moon* (9), however, were of the opinion that in a parol gift of chattels inter vivos any further delivery was unnecessary where the chattels were already in the possession of the intended donee, and WILLS, J., gives the following illustration ([1896] 2 Q.B. at p. 289):

> "Suppose a man lent a book to a friend, who expressed himself pleased with the book, whereupon the lender, finding he had a second copy, told his friend he need not return the copy he had lent him, it would be very strange if in such a case there were no complete gift, the book being in the possession of the intended donee."

In the result, after having examined all the authorities to which my attention has been called, I have come to the conclusion that there is no decision which prevents my giving effect to the claimant's contention. I therefore hold that the old oak furniture, arms and armour in question in this case were effectually given by the testator to the claimant in the spring of 1913, and did not belong to the testator at the date of his death. The claimant, however, further contends that, even if the gift was not effectual in law by reason of there having been no further delivery, yet that this defect was cured by his appointment as executor, coupled with the express confirmation of the gift in the testator's will. In my judgment this contention also is sound. Counsel for the applicant, in answer to this contention, urged that the gift confirmed by the testator's will was not the gift made by the testator in the spring of 1913, but was the gift which he made in the year 1911. They then contended that, in order to make the appointment of executor operate so as to enable the claimant to retain the articles in question, it was

essential for him to prove that the testator had a continuing intention to abide by his gift of 1913 down to the date of his death, citing *Strong* v. *Bird* (11) and *Re Pink* (12) in support of this contention. They further urged that the incident of November, 1914, conclusively proved that the testator had changed his mind before his death, and that therefore the claimant, as executor, could not rely upon any countervailing equity to enable him to retain the articles for his own use. In my judgment, none of these contentions ought to prevail. The surrounding facts proved in this case, in my judgment, clearly show that the gift which the testator confirmed by his will of July 3, 1914, was the gift which he made to Robert in the spring of 1913 and not the gift which he made in 1911. This confirmation is, in my judgment, fatal to the applicant's contention, based upon the incident of November, 1914. The will of July 3, 1914, was left unrevoked by the testator and became his last will. Any change of mind which the testator may have communicated to the applicant in November, 1914, could not, in my judgment, operate so as to revoke or modify this confirmation. The appointment of the claimant as executor passed the property in the articles, assuming that they still belonged to the testator at the time of his death, to the claimant, and the gift being confirmed by the will became complete. No person claiming as a volunteer under the same will can, in my judgment, be heard to dispute the gift. I, therefore, hold that the applicant fails on all the points he has urged, and that his application to discharge or vary the master's certificate should be dismissed with costs.

Solicitors: *H. G. Campion & Co.*; *Stoneham & Sons.*

[*Reported by* R. R. Formoy, Esq., *Barrister-at-Law.*]

JANVIER *v.* SWEENEY AND ANOTHER

[Court of Appeal (Bankes and Duke, L.JJ., and A. T. Lawrence, J.), March 21, 24, 1919]

[Reported [1919] 2 K.B. 316; 88 L.J.K.B. 1231; 121 L.T. 179; 35 T.L.R. 360; 63 Sol. Jo. 430]

Deceit—False statements and threats causing shock—Competency of action for damages.

Master and Servant—Liability of master for act of servant—Wrongful act by servant—Servant put by employer in position to do that class of act.

The defendant S. was a private detective, and the defendant B. was in his employment. S. instructed B. to endeavour to induce the plaintiff to obtain for him certain letters which were in the possession of a person living in the house of the plaintiff's employer, where the plaintiff also resided, these letters being required for inspection by a client of S. for the purpose of establishing their genuineness, it having been alleged that the client had written them. S. told B. that the plaintiff would receive a reward if she produced the letters, but B. attempted to obtain their production by telling her that he was a police officer and that the plaintiff was "wanted" as she had been corresponding with a German spy. The plaintiff alleged that as a result of these false statements and threats she suffered a severe shock, with resultant neurasthenia, and was unable to follow her employment.

Held: (i) the threats, resulting in physical injury to the plaintiff, were actionable; (ii) S. having put B. in a position to do that class of act, B., in making the threat was acting within the scope of his employment, and, therefore S. as well as B. was liable to the plaintiff in damages.

Wilkinson v. *Downton* (1), [1897] 2 Q.B. 57, and *Dulieu* v. *White & Sons* (2), [1901] 2 K.B. 669, approved and applied.

Notes. Considered: *Hambrook* v. *Stokes Bros.*, [1924] All E.R.Rep. 110. Referred to: *Hay (or Bourhill)* v. *Young*, [1942] 2 All E.R. 396.

As to actions for deceit, see 26 HALSBURY'S LAWS (3rd Edn.) 862 et seq., and cases there mentioned.

Cases referred to:

(1) *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57; 66 L.J.Q.B. 493; 76 L.T. 493; 45 W.R. 525; 13 T.L.R. 388; 41 Sol. Jo. 493; 1 Digest 25, *205.*

(2) *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669; 70 L.J.K.B. 837; 85 L.T. 126; 50 W.R. 76; 17 T.L.R. 555; 45 Sol. Jo. 578; 36 Digest (Repl.) 197, *1038.*

(3) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 2 Smith, L.C., 12th Edn., 71; 100 E.R. 450; 1 Digest 24, *194.*

(4) *Langridge* v. *Levy* (1837), 2 M. & W. 519; 6 L.J.Ex. 137; affirmed sub nom. *Levy* v. *Langridge* (1838), 4 M. & W. 337; 150 E.R. 1458; sub nom. *Levi* v. *Langridge*, 1 Horn & H. 325; 7 L.J.Ex. 387, Ex. Ch.; 35 Digest 51, *464.*

(5) *Bell* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L.R.Ir. 428; 36 Digest (Repl.) 197, **1852.*

(6) *Jones* v. *Boyce* (1816), 1 Stark. 493, N.P.; 36 Digest (Repl.) 23, *101.*

(7) *Adams* v. *Lancashire and Yorkshire Rail. Co.* (1869), L.R. 4 C.P. 739; 38 L.J.C.P. 277; 20 L.T. 850; 17 W.R. 884; 36 Digest (Repl.) 191, *1010.*

(8) *Allsop* v. *Allsop* (1860), 5 H. & N. 534; 29 L.J.Ex. 315; 2 L.T. 290; 6 Jur.N.S. 433; 157 E.R. 1292; sub nom. *Alsopp* v. *Alsopp*, 8 W.R. 449; 32 Digest 173, *2110.*

(9) *Victorian Railways Comrs.* v. *Coultas* (1888), 13 App. Cas. 222; 57 L.J.P.C. 69; 58 L.T. 390; 52 J.P. 500; 37 W.R. 129; 4 T.L.R. 286, P.C.; 36 Digest (Repl.) 196, *1034.*

(10) *Ford* v. *Monroe* (1838), 20 Wend. 210.

(11) *Coyle (or Brown)* v. *John Watson, Ltd.*, [1915] A.C. 1; 83 L.J.P.C. 307; 111 L.T. 347; 30 T.L.R. 501; 58 Sol. Jo. 533; 7 B.W.C.C. 259, H.L.; 34 Digest 268, *2284.*

(12) *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; 56 L.J.Q.B. 229; 55 L.T. 709; 51 J.P. 404; 35 W.R. 141; 3 T.L.R. 233, H.L.; 36 Digest (Repl.) 130, *667.*

(13) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 1 Digest 587, *2245.*

Also referred to in argument:

Riding v. *Smith* (1876), 1 Ex.D. 91; 45 L.J.Q.B. 281; 34 L.T. 500; 24 W.R. 487; 32 Digest 171, *2094.*

Terwilliger v. *Wands* (1858), 17 N.Y. 54.

Wilson v. *Goit* (1858), 17 N.Y. 442.

Appeal by the defendants against an order made by AVORY, J., in an action tried before him with a jury.

The plaintiff brought an action against the two defendants, one Sweeney and one Barker, for damages for false and wilful and malicious statements and threats, which, she alleged, had caused her physical injury, she having suffered from nervous shock, neurasthenia, and shingles as a consequence thereof, and rendered unable to follow her employment. She claimed £57 15s. as special damage. The defendants denied that they had made the statements alleged and that the plaintiff's illness was the result of the alleged statements; and they contended that the statement of claim disclosed no cause of action. The plaintiff, a Frenchwoman, was companion to a Mrs. Rowton. The plaintiff had been engaged for some years to be married to a German named Neuman, who, from July, 1915, onwards, was interned in the Isle of Man. The plaintiff had visited him there on two occasions, and was in the habit of corresponding with him by letter. In or about July, 1917, a certain Miss Marsh came to reside with Mrs. Rowton, where a Major X used to visit. Miss Marsh had in her possession certain letters purporting to have been written by Major X, who desired to inspect the letters to ascertain whether they

were genuine. The defendant Sweeney was a private detective, and he had an assistant, the defendant Barker. Major X. engaged the professional services of Sweeney, who instructed Barker to go to the house in John Street to obtain an interview with the plaintiff, and to endeavour to induce her to allow him (Barker) to see the letters and to compare them with the handwriting of Major X. Sweeney was aware that some inducement would be offered by Barker to the plaintiff, and he told Barker that she would be rewarded for her services in connection with the production of the letters. On July 16, 1917, Barker called at the house in John Street at about 8 p.m. and interviewed the plaintiff. There was a conflict of evidence at the trial as to the words used on that occasion by Barker, but the jury found that (i) Barker used the words: "I am a detective inspector from Scotland Yard, and represent the military authorities. You are the woman we want, as you have been corresponding with a German spy"; (ii) Barker was acting within the scope of his authority as agent for Sweeney in making those statements; (iii) the statements or some of them were calculated to cause physical injury to the plaintiff; (iv) the statements or some of them were made maliciously, that is, with the knowledge that they were likely to cause such injury; and (v) the illness from which the plaintiff suffered was caused by the utterance of the statements or some of them. The jury awarded the plaintiff £250 damages, and on those findings AVORY, J., entered judgment for the plaintiff. The defendants appealed.

Cecil Hayes for the defendant, Sweeney.

Turrell for the defendant, Barker.

Lewis Thomas, K.C., and *W. A. Jowitt*, for the plaintiff, were not called on to argue.

BANKES, L.J.—The object of this appeal is to get the verdict and judgment for the plaintiff set aside, and to have judgment entered for the defendants, or a new trial ordered. Some of the points taken were urged on behalf of both the defendants, while one point was urged on behalf of the defendant Sweeney alone. The main contention of the defendants is that the action is not maintainable at all, but they also challenge some of the answers of the jury.

The case for the plaintiff was that she was employed by a lady in whose house she resided, and that, on July 16, 1917, a man called at the house and told her that he was a detective inspector from Scotland Yard representing the military authorities and that she was the woman they wanted as she had been corresponding with a German spy. The plaintiff said that she was extremely frightened, with the result that she suffered from a severe nervous shock, and she attributed a long period of nervous illness to the shock she received from the language used to her on that occasion. If she could establish the truth of that story and satisfy the jury that her illness was the direct result of the shock, she was entitled to maintain this action. At the trial the defendants disputed the plaintiff's story altogether. They said that Barker had never spoken the words alleged, and that, so far from suffering any shock, the plaintiff was a very self-possessed woman with her wits about her all the time during which the defendants were in communication with her, and that she was mainly occupied in attempting to trick these two men whom she suspected of being private inquiry agents. These matters were entirely for the jury. The court cannot interfere with their findings merely because it might think the opposite inference preferable. It is clear that the learned judge would not have arrived at the same conclusion as the jury. The defendants cannot complain of the summing-up. But in spite of that summing-up in favour of the defendants, the jury accepted the plaintiff's story, and their findings as to the words used by Barker is not challenged in this court. We must take it then that Barker went to this house and deliberately threatened the plaintiff in order to induce or compel her to commit a gross breach of the duty she owed to her employer.

It is no longer contended that this was not a wrongful act which would amount to an actionable wrong if damage which the law recognises can be shown to have flowed directly from that act. But counsel for the defendant, Barker, contended

that no action would lie for words followed by such damage as the plaintiff alleges here. In order to sustain that contention it would be necessary to overrule *Wilkinson* v. *Downton* (1). In my opinion, that judgment was right. It has been approved in subsequent cases. It did not create any new rule of law, though it may be said to have extended existing principles over an area wider than that which they had been recognised as covering, because the court there accepted the view that the damage there relied on was not in the circumstances too remote in the eye of the law. The substance of that decision is to be found in the following passage from the judgment of WRIGHT, J. After referring to the doctrine of *Pasley* v. *Freeman* (3) and *Langridge* v. *Levy* (4), the learned judge said ([1897] 2 Q.B. at pp. 58, 59):

> "I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

WRIGHT, J., went on to consider the cases cited to him, and pointed out that those cases do not conflict with the law which he was laying down. That case was subsequently considered in *Dulieu* v. *White & Sons* (2). I wish to refer to two passages from the judgment of PHILLIMORE, J. He said ([1901] 2 K.B. at p. 682):

> "I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case, if A. does inflict such a shock upon B.—as by terrifying B.—and physical damage thereby ensues, B. may have an action for the physical damage, though the medium through which it has been inflicted is the mind."

He then referred to *Bell* v. *Great Northern Rail. Co. of Ireland* (5) and *Wilkinson* v. *Downton* (1), which he accepted as law, *Jones* v. *Boyce* (6) and *Adams* v. *Lancashire and Yorkshire Rail. Co.* (7), and proceeded thus (ibid. at pp. 683, 685):

> "These principles and cases seem to establish that terror wrongfully induced and inducing physical mischief gives a cause of action. . . . Once get the duty and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being mental only makes no difference."

I adopt those passages which seem to me to state the law accurately. If the law so stated applies to this case it follows that the plaintiff is entitled to succeed.

With reference to the contention of counsel for the defendant, Barker, based on some observations in *Allsop* v. *Allsop* (8), which was an action for slander, the distinction between actions of slander and actions of this kind is clear. In slander it is necessary to prove publication, and so the words must have been uttered to some person other than the person complaining of the physical injury. The language of the judgments in *Allsop* v. *Allsop* (8) must be read with reference to the fact that the action was for slander. I agree there are some expressions which would seem to indicate that the judges took a view similar to that taken by the Privy Council in *Victorian Railways Comrs.* v. *Coultas* (9). In *Allsop* v. *Allsop* (8) POLLOCK, C.B., said (5 H. & N. at p. 538):

> "In actions for making false charges before magistrates, for giving false characters, and for torts of all kinds illness might be said to have arisen from the wrong sustained by the plaintiff. The case of *Ford* v. *Monroe* (10) is the

only authority that has any tendency to throw light on the argument; but we ought not to act upon the authority of that case, opposed as it is to the universal practice of the law in this country. The courts here have always taken care that parties shall not be responsible for fanciful or remote damages, or in fact any that do not fairly and naturally result from the wrongful act itself."

The opinion of BRAMWELL, B., was to the same effect (ibid. at p. 539):

". . . a wrong is done to the female plaintiff who becomes ill, and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action."

It may be true to say that these remarks, though not necessary for the decision of the case, do point to the conclusion arrived at in *Victorian Railways Comrs.* v. *Coultas* (9); but of late years a different view has been taken on the subject of physical injuries or illness in certain circumstances forming sufficient grounds for special damage. I need only refer to the opinion of LORD SHAW in *Coyle* v. *John Watson, Ltd.* (11), where he deals with *Victorian Railways Comrs.* v. *Coultas* (9) and to all the decisions in which that judgment is criticised, and says: "I am humbly of opinion that the case can no longer be treated as a decision of guiding authority." WRIGHT, J., in his judgment in *Wilkinson* v. *Downton* (1) and KENNEDY and PHILLIMORE, JJ., in *Dulieu* v. *White & Sons* (2) were only following the universal view recently adopted of the decision in *Allsop* v. *Allsop* (8). In my view of the present state of the authorities, it is impossible to suggest that *Wilkinson* v. *Downton* (1) is not good law or that it ought to be reversed. So much for the main point.

The second point was that the plaintiff did not discharge the onus of proof because this was a case in which, as was said in *Wakelin* v. *London and South Western Rail. Co.* (12), the evidence was equally consistent with the existence and the non-existence of a cause of action, and, therefore, it was not competent to the judge to leave the matter to the jury. It was said that the illness which the plaintiff attributed to the shock caused by the language used by Barker might just as easily, and more probably, have been produced by anxiety of mind in a woman engaged with the strong disapproval of her relatives to one who was interned as an alien enemy, and that the medical evidence is equally consistent with the existence or absence of a cause of action. This argument ignores the plaintiff's own evidence. She said that the words of Barker caused her a terrible shock, and that she was in a state of collapse. Something happened on the following day which the doctors say might have been caused by a shock and which the plaintiff says was directly caused by and was the direct consequence of the shock. She says: "My illness was caused by what happened. It was the greatest shock I ever had in my life." She also described how, after the defendant Barker called, she sat on the stairs from midnight till 5 a.m. with a police whistle in her hand and did not sleep; and George Mercer, the detective inspector from Vine Street, says that when the plaintiff came to his office on the same day at nine o'clock in the evening she was crying, and that it was five minutes before he could get her story. The defendants make light of that evidence; but the jury accepted it. It was clear evidence connecting her illness with Barker's threats and the shock which followed them. The medical witnesses were of opinion that, assuming the facts, the illness might well be the result of the shock. In cross-examination they admitted that it might also have followed from mental anxiety. Of course it might, but that leaves the case a long way from the principle of *Wakelin* v. *London and South Western Rail. Co.* (12), and the learned judge was right in holding that he was bound to leave the matter to the jury.

Was the verdict against the weight of the evidence? Was it one which reasonable men could not have arrived at? I cannot say it was. If the jury believed the plaintiff their verdict was one which reasonable persons could have given.

I pass on now to consider the argument for the defendant Sweeney, that Barker, assuming that he threatened the plaintiff as she asserts, was not acting within the scope of his employment. The real contention was that this act of Barker in threatening the plaintiff could not in law be held to be within the scope of his employment, because, first, he had no actual authority, and, secondly, it is not to be supposed that a private inquiry agent would give his agent instructions to do such an act. The judge put this point rather more favourably to the defendants than he need have done. He asked them whether Barker was acting in the scope of his employment. The jury answered: Yes, and they were quite justified in so answering. If the matter requires further consideration, there is ample authority for holding Sweeney responsible for the act of his agent Barker. No imputation was cast on the way in which Sweeney carries on his business. If a private detective employs agents in his business he exposes himself to very grave risks. As was said by WILLES, J., in *Barwick* v. *English Joint Stock Bank* (13) (L.R. 2 Ex. at p. 266):

> "It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

Barker was sent by Sweeney, his employer, to procure from the plaintiff by some form of inducement certain letters which Sweeney's principal had instructed him to get, not to keep, but for the purpose of comparing the handwriting of the letters with genuine handwriting of Sweeney's principal. Sweeney's object was to get temporary possession of these letters. He knew that to attain his object it would be necessary to offer the plaintiff some inducement to commit a gross breach of duty. He plainly put Barker in his place to do that class of act, telling him that a remuneration would be offered in return for the letters. If, then, Barker carried out his instructions by means of a threat, as being a more effective and less expensive inducement than a bribe, Sweeney must be answerable for the manner in which Barker conducted the business entrusted to him. It is impossible to disturb either the verdict or the judgment, and this appeal must be dismissed.

DUKE, L.J.—I am anxious not to overlay or weaken the force of the judgment which has just been delivered, with every word of which I agree. My observations will, therefore, be brief. This is a much stronger case than *Wilkinson* v. *Downton* (1). In that case there was no intention to commit a wrongful act; the defendant merely intended to play a joke upon the plaintiff. In the present case there was an intention to terrify the plaintiff for the purpose of attaining an unlawful object in which both the defendants were jointly concerned.

Counsel for the defendant, Barker, contended on the authority of *Allsop* v. *Allsop* (8), and other cases that the damage alleged was too remote in law, and, therefore, the third and fifth answers of the jury were irrelevant. In my view, *Allsop* v. *Allsop* (8) does not warrant the conclusion which counsel would draw from it. In that case the words complained of were not alleged to have been uttered in the presence of the female plaintiff, and the judgments show that in cases of the class of *Pasley* v. *Freeman* (3), where special damage is the gist of the action, care must be taken that the special damage alleged is the fair and natural consequence of the act complained of. It was also urged that damage for loss of reputation would afford ground for an action of slander, but that shock and illness arising from the excitement which the slanderous language might produce was not the sort of damage which formed a ground for that action. Counsel for Barker in the present case went further and argued that it had been held as matter of law that injury to health resulting from a nervous shock cannot be regarded as special damage, and he cited *Victorian Railways Comrs.* v. *Coultas* (9). To say that as

matter of law certain damage cannot follow as matter of fact is a confusion of thought or expression, but, be that as it may, in *Wilkinson* v. *Downton* (1) WRIGHT, J., differing from *Victorian Railways Comrs.* v. *Coultas* (9), held that illness resulting from nervous shock might be the immediate consequence of a wrongful act and might give a cause of action. This decision was approved in *Dulieu* v. *White & Sons* (2), and the views of KENNEDY and PHILLIMORE, JJ., in that case were confirmed in the House of Lords in *Coyle* v. *John Watson, Ltd.* (11). It seems to me that, so far as concerns remoteness in law and existence in fact, there is nothing to distinguish the damage in the present case from the damage in *Wilkinson* v. *Downton* (1) and *Dulieu* v. *White & Sons* (2). Those two cases appear to me to state elementary principles of law, and, where a case comes immediately within them, the alarming consequences foretold by counsel for the defendants afford no ground for withholding from the plaintiff that relief to which in the opinion of the jury she is entitled.

As to the other point, I have a difficulty in appreciating the relevancy of questions as to the scope of Barker's authority. The law as to the extent of an agent's authority cannot apply so as to exonerate one or two participants in an unlawful undertaking. But if the scope of Barker's agency is to be considered, it was recognised by both defendants that he might accomplish their object by bribery. He was to obtain the letters, and was not restricted to lawful means. He might bribe, and I think there was authority to use the cheaper means of threats, which do not usually give a cause of action. In this case the threats produced physical injury and were actionable, but that does not take them out of the agent's authority. There was, therefore, a wrong done by the agent in the course of his employer's business and for his employer's purposes. In the result, whether the defendants were principals, or principal and agent, in either case they are liable.

A. T. LAWRENCE, J.—I agree. I do not wish to add anything upon the question of Barker's authority beyond saying that, in my view, the summing-up was unduly favourable to the defendant Sweeney. As to the other point, it seems clear, on the authority of *Wilkinson* v. *Downton* (1) and on general principle, that the verdict of the jury ought not to be disturbed. The defendants attempted to get possession of the letters by instigating the plaintiff to commit a trespass and a breach of confidence. The means which they used were false statements made to the plaintiff calculated to cause terror. It was found by the jury that the statements caused physical injury to the plaintiff. The plaintiff's evidence had to be considered. The jury accepted it. They saw the plaintiff and came to the conclusion on the evidence before them that these wrongful acts directly caused physical injury to the plaintiff, and there is no ground for rejecting their verdict. Counsel for the defendant, Barker, sought to apply the principles applicable to an action of slander per quod. But those principles are inapplicable to a case like the present. The gist of that action is injury to the reputation of the plaintiff caused by statements made, not to the plaintiff, but to third persons. There is no direct injury from the defendant to the plaintiff in that case. The injury is suffered at the hands of third persons to whom the slander is published. As pointed out by DUKE, L.J., in *Allsop* v. *Allsop* (8), which was tried on a demurrer to the declaration, there was no allegation that the words were spoken in the presence of the plaintiff, and there was no direct connection between the act of the defendant and the injury to the plaintiff's health. The words spoken by the defendant never reached the plaintiff. In those circumstances it was held that the illness of the plaintiff in that case caused by the acts of third persons was not the natural result of the words originally spoken by the defendant. The case is quite different where the illness is caused by words spoken directly by the defendant to the plaintiff. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *L. O. Glenister*; *R. J. Preston*.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law*.]

WHITMORE AND OTHERS *v.* KING

[Court of Appeal (Swinfen Eady, M.R., Warrington and Duke, L.JJ.), July 9, 10, 11, 1918]

[Reported 87 L.J.Ch. 647; 119 L.T. 533]

Contract—Illegality—Restraint of trade—Unreasonable scope—Covenant by servant not to engage "in any business whatsoever in any way connected with" the employer's business.

In 1906 the defendant entered into an agreement in writing with a partnership firm, consisting of two members who were carrying on the business of importing and selling wood, which provided that he should be employed by them as clerk, traveller, and representative for the sale of their commodities. By cl. 8 of the agreement it was provided that the defendant should not at any time during the period of five years after he should cease to be in the service of the firm be "engaged or concerned either alone, or with, or on behalf of any other person or persons in any business whatsoever in any way connected with the wood business" in four specified counties without the consent in writing of the firm. After the death of both the partners the defendant entered the employment of another firm of timber merchants, who established a branch of their business at a town which was in one of the counties referred to in the agreement, and appointed the defendant as manager of it. In an action by the executors of the deceased partners and a company to whom the partnership business had been sold,

Held: the covenant in cl. 8 of the agreement was not limited to the wood business carried on by the partnership; it prohibited the employment of the defendant "in any business whatsoever in any way connected with the wood business", and the words "connected with" connoted a business different from the wood business; accordingly, the covenant would prevent the defendant being engaged in some business connected with, but different from, the wood business, his being concerned in which could not or might not cause the partnership any damage; and, therefore, the covenant was wider than was necessary for the reasonable protection of the partnership business and the court would not enforce it.

Notes. As to contracts in restraint of trade, see 25 Halsbury's Laws (3rd Edn.) 460, 461, and 32 Halsbury's Laws (2nd Edn.) 397 et seq.; and for cases see 43 Digest 19 et seq.

Cases referred to:

(1) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 23, *143*.

(2) *Horner* v. *Graves* (1831), 7 Bing. 735; 5 Moo. & P. 768; 9 L.J.O.S.C.P. 192; 131 E.R. 284; 43 Digest 26, *181*.

(3) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, *139*.

(4) *Mills* v. *Dunham*, [1891] 1 Ch. 576; 60 L.J.Ch. 362; 64 L.T. 712; 39 W.R. 289; 7 T.L.R. 238, C.A.; 43 Digest 62, *641*.

(5) *Grey* v. *Pearson* (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 44 Digest 533, *3502*.

(6) *Abbott* v. *Middleton*, *Ricketts* v. *Carpenter* (1858), 7 H.L.Cas. 68; 28 L.J.Ch. 110; 33 L.T.O.S. 66; 5 Jur.N.S. 717; 11 E.R. 28, H.L.; 44 Digest 557, *3735*.

(7) *Herbert Morris, Ltd.* v. *Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 Sol. Jo. 305, H.L.; 43 Digest 24, *154*.

Appeal by the defendant from the decision of PETERSON, J.
The facts appear in the judgment of the learned MASTER OF THE ROLLS.

Hughes, K.C., and *Cyril J. Parton* for the defendant.
Tomlin, K.C., and *Owen Thompson* for the plaintiffs.

SWINFEN EADY, M.R.—This is an appeal by the defendant, Frank Challis King, from the judgment of PETERSON, J., at the trial of the action which was brought by the plaintiffs, Whitmore and Parmenter, the executors of Leonard Alexander Christie and the plaintiffs, William Brown & Co. (Ipswich), Ltd., to enforce a restrictive covenant contained in an agreement of employment. The learned judge granted an injunction following the language of the covenant, and against that order the defendant appeals.

The claim against the defendant is based upon an agreement dated Mar. 31, 1906. It was made between Frank Alexander Christie and Leonard Alexander Christie, then trading in co-partnership as F. A. Christie & Son, of the one part, and the defendant, King, of the other part. It provided by cl. 1 that King should, as from Mar. 3, 1906, enter the service of Messrs. Christie and be employed by them as clerk, traveller, and representative for the sale of commodities of wood and slate. By cl. 2 the service was to continue for five years. By cl. 5 King was to devote the whole of his time and attention to the business of Messrs. Christie and to the development and extension thereof. Clause 8 contains the restrictive covenant. It provides:

> "The said Frank Challis King shall not at any time during the period of five years after he shall cease to be in the service of the said Frank Alexander Christie and Leonard Alexander Christie be engaged or concerned either alone, or with, or on behalf of any other person or persons in any business whatsoever in any way connected with the wood and slate business in the counties of Norfolk, Suffolk, Essex, and Cambridgeshire without the consent in writing of the said Frank Alexander Christie and Leonard Alexander Christie, and if he shall carry on or be connected with any such business whatsoever as aforesaid within the said limit without such consent as aforesaid is obtained he shall pay Frank Alexander Christie on demand the sum of £300 as damages now ascertained and agreed upon for such breach of this agreement, and not by way of penalty."

The five years expired on Mar. 3, 1911. Before the expiration of the term one of the two partners had died—Frank Christie, on Jan. 22, 1907—and the defendant remained in the employ of the surviving partner, Leonard Christie. Shortly before or about the time of the agreement running out, negotiations took place with regard to King remaining for a further period, and on Mar. 14, 1911, an agreement was come to which is evidenced by the exchange of two letters dated that day extending the term of the agreement for a further three years, but all other terms as per the last agreement. So that the restrictive covenant was continued for the term expiring on Mar. 3, 1914. But although no further agreement was come to, King remained in the service of Leonard Christie, the surviving partner upon the terms of the old agreement until Leonard Christie died on Nov. 14, 1917.

There were then negotiations by the executors for the sale of the business and goodwill, but in the meantime King and the other employees remained carrying on the business. It appears that there was another branch of the business with which we are not concerned at all—a coal business—which was offered by the executors to one of the employees. The wood business was offered to another employee named Johnson. The slate business had many years before been discontinued. To see whether it would be a good thing for him to purchase, apparently with a view to re-selling, Johnson saw Gabriels, well-known timber merchants, in London, and after an interview with them and certain correspondence, he determined not to buy. Gabriels also determined not to entertain a proposal of some kind that Johnson had made to them. It appeared doubtful whether the business

would be sold or not, and King was told that, if the business was not sold, it would be shut down as from Mar. 25, 1918. But negotiations took place between the executors and William Brown & Co. (Ipswich), Ltd.. It appearing that there was a probability that the business would no longer be carried on, King negotiated with Gabriels and offered his services to them with the consent of Johnson who was then carrying on Christie's business for the executors. [HIS LORDSHIP said that the defendant, King, was engaged by Gabriels with Johnson's knowledge and permission, and was in January, 1918, appointed manager of a branch office opened by Gabriels at Ipswich. About the same time the business of Christie & Son was sold to the defendants, William Brown & Co.] On King being appointed manager of the Ipswich office, William Brown & Co. brought this action, joining the executors of Leonard Christie, the surviving partner, in which they seek to restrain King from being engaged at Ipswich in breach of his agreement, the performance of which they seek to obtain in this action.

Various points were raised. The covenant had reference to a wood and slate business. The slate business, as I have already stated, has long since been dropped. But I think it is clear that the covenant is severable, and in fact it was not argued to the contrary, and no point in the case turns upon the abandonment and discontinuance of the slate business. It was then said that the restrictive covenant was one with the two partners of the name of Christie in the first instance, and afterwards with Leonard Christie only, and that as it provided that King should not do certain things without the consent of the two Christies, it implied that it was only to last during their lifetime, and was a personal arrangement with them, they or one of them being the persons or person to consent. But the real substantive question raised on the appeal was that the covenant was too wide —that it was so wide, within the meaning of what the authorities have laid down, that it was unreasonable, void and unenforceable.

I think the law has been settled by frequent cases that have arisen on restrictive covenants. The test to be applied in considering whether the covenant is too wide or not has been stated in various ways. It was formulated by LORD MOULTON in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1) where the question to which an answer must be given was stated as follows ([1913] A.C. at p. 742):

> "Are the restrictions which the covenant imposes upon the freedom of action of the servant after he has left the service of the master greater than are reasonably necessary for the protection of the master in his business?"

Now, some comment has been made upon the expression "reasonably necessary." It is said that if it is necessary for his protection it is involved in it that it must be reasonably necessary, but I apprehend that what the language actually means is greater than is necessary for the reasonable protection of the master. The test was previously formulated in the Court of Common Pleas in 1831, by SIR NICHOLAS TINDAL, C.J., in *Horner* v. *Graves* (2), and it was adopted by LORD HERSCHELL as the test in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co., Ltd.* (3). TINDAL, C.J., put the test in this way ([1894] A.C. at p. 549):

> "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable."

So the test which we have to apply is this: Is the restraint imposed by this restrictive covenant larger than is necessary for the reasonable protection of the covenantees? The covenant in question is not skilfully drawn, and we have had considerable argument as to what it really means, and we have been referred to rules for the construction of documents. It has been said that if the covenant is

not clear, if it is ambiguous, certain rules have been laid down to guide the court in its construction. Much stress was laid on the observations of KAY, L.J., in *Mills* v. *Dunham* (4), where the lord justice said, dealing with restrictive stipulations ([1891] 1 Ch. at p. 589):

> "Stipulations of this kind are looked upon as advantageous to the public if so restricted as not to go beyond what is needed for the protection of the employer. They ought not to be construed with a bias as being primâ facie illegal, but construed fairly. . . . If there is any ambiguity in a stipulation between employer and employed imposing a restriction on the latter, it ought to receive the narrower construction rather than the wider—the employed ought to have the benefit of the doubt. It would not be following out that principle correctly to give the stipulation a wide construction so as to make it illegal and thus set the employed free from all restraint. It is also a settled canon of construction that where a clause is ambiguous, a construction which will make it valid is to be preferred to one which will make it void. This is analogous to the rule laid down in *Grey* v. *Pearson* (5), referred to in *Abbott* v. *Middleton*, *Ricketts* v. *Carpenter* (6)."

With that assistance I approach the construction of the covenant in the clause in question. It is not a long clause. King

> "shall not at any time during the period of five years after he shall cease to be in the service of Frank Alexander Christie and Leonard Alexander Christie . . ."

No question arises upon that. Leonard Alexander Christie died on Nov. 14, 1917, so that—King being in Leonard's service until his death—it is obvious that the period is a subsisting period. During this subsisting period King shall not

> "be engaged or concerned either alone, or with, or on behalf of any other person or persons, in any business whatsoever in any way connected with the wood and slate business in the counties of Norfolk, Suffolk, Essex, and Cambridgeshire without the consent in writing of Frank Alexander Christie and Leonard Alexander Christie."

That is the covenant. The words that follow assist in its construction:

> "and if he shall carry on or be connected with any such business whatsoever as aforesaid within the said limit without such consent as aforesaid is obtained he shall pay Frank Leonard Christie on demand the sum of £300 as damages now ascertained and agreed upon for such breach of this agreement, and not by way of penalty."

It is to be observed that the clause says that King shall not be engaged or concerned in any business whatsoever. Counsel for the plaintiffs urged that that ought to be read in a restricted sense as meaning in any business transaction, in any individual transaction, he is not to be engaged or concerned in any business dealing. But, after having pressed that point for some little time, he abandoned it because the later part of the clause shows that that could not be the sense in which the word "business" is used there, for the later clause is "and if he shall carry on or be connected with any such business." The word "business," therefore, in the earlier part of the clause obviously refers to a business which a man may carry on—that is to say, the entirety of a business. I use the word, therefore, in that sense—to be engaged or concerned, either alone or with or on behalf of any other person or persons, in any business whatsoever in any way connected with the wood (I omit the words "and slate") business in the counties of Norfolk, Suffolk, Essex and Cambridgeshire.

The business which the employers carried on and in which they were concerned was the wood business in those counties. It was the business of buying and selling wood. They imported wood and they bought wood from others and re-sold —that is to say, bought it after it had been imported as well as importing it themselves. Their trade appears to have been in the woods produced in Northern

Europe, Scandinavia and Canada, and in home-grown timber. We have heard nothing at all about any tropical or hard wood that they dealt with in any way. It is to be observed that the covenant is not in any way restricted to King being engaged in a business within the prohibited area similar to that in which his employers were engaged. The language is far more comprehensive, and the agreement was obviously drawn in this form in order to give a wide protection to the employers. He is not to be engaged or concerned in any business whatsoever in any way connected with the wood business. In my judgment, that language is clear and free from ambiguity, and the clause must be considered in the natural and ordinary sense and meaning that the words can bear. The restriction is not limited to the wood business or the timber business as carried on by the employers. It was urged by counsel for the plaintiffs that what is really meant was any business which is a section or a branch or a department of the trade carried on by the employers. But the language does not bear that interpretation. That would be to re-model the agreement altogether, to re-draw it in a different sense. The restriction is against carrying on any business whatsoever in any way connected with the wood business within the prohibited area. In my judgment, the language as so drawn is much wider than anything necessary for the reasonable protection of the business of the vendors, and that being so, it is a covenant which the courts will not enforce. For these reasons I am of opinion that the appeal should be allowed and the order or judgment of the court below discharged, and the action dismissed with costs here and below.

WARRINGTON, L.J.—I am of the same opinion. I agree with the learned judge in the court below that the stipulation in question is one the benefit of which was capable of being assigned, and was in this case assigned, with the goodwill of the business of Messrs. Christie. I also agree that the stipulation in question is one which is severable—that is to say, we may disregard altogether the insertion of the words "and slate," and take it as if it had been confined to the wood business.

The only question, then, which we have to determine is whether the restriction imposed by this agreement goes further than is necessary for the reasonable protection of the employers. The clause in question comes in an agreement under which the servant was employed by the masters as clerk, traveller, and representative for the sale of the commodity of wood, leaving out slate. That is the only reference in the agreement itself to the business in which the masters were concerned. Passing over immaterial clauses, we come to the clause in question containing the restriction. He shall not for a certain period, which it is immaterial to mention, be engaged or concerned either alone or on behalf of any other person or persons in any business whatsoever in any way connected with the wood business in the counties of Norfolk, Suffolk, Essex and Cambridgeshire without the consent in writing of the masters, and, if he shall carry on or be connected with any such business whatsoever as aforesaid within the said limit without such consent as aforesaid is obtained, he shall pay a sum by way of liquidated damages. We have had much discussion as to what the clause actually means, and I think it is very likely that half-a-dozen people might in some particulars come to half-a-dozen different conclusions as to what it does mean. But, speaking for myself, I think that the matter is reasonably clear. First, the business in which the servant is not to be engaged or concerned is the trade or business of some person or persons, either himself or someone else, not merely some separate transaction. I think also that that business is qualified by two adjectival expressions. The first is that it is to be connected with the wood business. The second is that it is to be in the counties of Norfolk, Suffolk, Essex and Cambridgeshire. I think, therefore, so far, that he is restrained from being engaged in any business connected with the wood business in the counties of Norfolk, Suffolk, Essex and Cambridgeshire, and I think that it is unnecessary to go any farther in reference to the meaning of the clause. But it has been contended that the words "connected with" may be neglected, and that the clause in truth means that he is not to be engaged in the

wood business in the four counties or in any branch or section of that business. Can the words have that meaning? If that was what was intended, I cannot conceive why plain words to that effect were not used.

The whole case, in my judgment, turns upon the words "connected with." It is an exceedingly vague and general expression. What it means and includes it may be extremely difficult to say, but, in my judgment, it certainly means and includes something, and is intended to include something, which is not the wood business itself. To say that a thing is connected with something else is in terms to say that it is not itself that something else. In my judgment, therefore, the clause is not confined to a restraint upon the carrying on of the business in which the employers were concerned. If that is so then it seems to me it goes plainly beyond what is necessary for the reasonable protection of the masters.

In such a case, what is the protection which a master is reasonably justified in exacting from his servant? The servant in a case like the present when in his master's employment has the opportunity of knowing and becoming acquainted with the customers of the firm, to use a business expression, of making a connection, and that which the master, it seems to me, is reasonably entitled to be protected against is the carrying of that connection to some other person. But the danger which the master runs is that that connection should be carried to somebody who is carrying on the kind of business in which he is engaged and may become a competitor with him in the trade, and for that reason a restriction which prevents the servant from being engaged in, within certain limits of space or time, the business in which the master is engaged is one that has been frequently upheld in these courts. It makes no difference, however, to the master if the servant engages in some business which is in some way or another not defined connected with that business which the master is carrying on. The expression would include some business, the carrying on of which by somebody else could not by any conceivable means injure the master. It is because this clause purports to prevent the defendant from being engaged in some business, the carrying on of which cannot or may not interfere with or injure that of the master, that this agreement goes beyond what is necessary for the reasonable protection of the master. It is for that reason I think this covenant is bad, and that the judgment of the learned judge in the court below ought to be reversed.

DUKE, L.J.—I am of the same opinion. Counsel for the plaintiffs had a difficulty in arriving at a construction of the covenant in question on which he could rely on behalf of the plaintiffs, and I am not surprised that he found that difficulty. He made a very strenuous effort to satisfy the court that being engaged in the wood business and being engaged in a business connected with the wood business are the same thing. I cannot take the view that the wood business and a business connected with the wood business are the same thing. The plaintiffs were entitled to take measures of protection against unfair use by their employee of the information and the association which he got in their employment, but I cannot help thinking that they never applied their minds to consider what was the protection which was required and which they could have. As was said in *Horner* v. *Graves* (2), they may enforce such a restraint as affords a fair protection to the interests of the party in favour of whom it is given. I notice that Lord Haldane in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1) paraphrased that expression as being equivalent to protection of the rights of the employer, and illustration was made in *Mason's Case* (1) and also in *Herbert Morris, Ltd.* v. *Saxelby* (7) of what are the rights of the employer which he is entitled to protect by a covenant which on the face of it is in restraint of trade. There is no doubt as to certain things which an employer may do. Lord Haldane in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1) said ([1913] A.C. at p. 731):

> "Had [the employers] been content with asking [the employee] to bind himself not to canvass within the area where he had actually assisted in building up the goodwill of this business, or in an area restricted to places

where the knowledge which he had acquired in his employment could obviously have been used to their prejudice, they might have secured a right to restrain him within those limits."

LORD SHAW said (ibid. at p. 741):

"A very reasonable restriction of a canvasser in such circumstances as are here disclosed might no doubt have been that he should not canvass his old customers or in the limited locality of his former labour."

I thought it worth while to refer to those declarations by the noble and learned Lords of what an employer may do for his own protection in view of the tendency which showed itself in one part of the discussion of this case to treat covenants in restraint of the liberty of employment as though at the present time they might be regarded as not having the force and effect which they ought properly to have. I agree that the appeal will be allowed, the judgment of the court below will be discharged, and the action dismissed with costs here and below.

Appeal allowed.

Solicitors: *Drake, Son & Parton*; *Elvy Robb & Welch*, for *W. E. Kersey*, Ipswich.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

OLLETT *v.* JORDAN

[KING'S BENCH DIVISION (Darling, Avory and Atkin, JJ.), April 12, 1918]

[Reported [1918] 2 K.B. 41; 87 L.J.K.B. 934; 119 L.T. 50; 83 J.P. 221; 62 Sol. Jo. 636; 16 L.G.R. 487; 26 Cox, C.C. 275]

Food—Unsound—Exposure for sale—Examination on arrival at purchaser's premises—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 117.

The respondent, who was a fish merchant at Hull, received an order for the supply of a quantity of pickled herrings to a hospital at Eastbourne and dispatched them by rail. When they were delivered to the railway company they were fit for human food, but on their arrival at the hospital at Eastbourne on the following day they were unfit for human food. The principal of the hospital did not accept them, but sent for the appellant, the inspector of nuisances, and the herrings were seized and condemned. On an information under s. 117 of the Public Health Act, 1875, against the respondent as being the person to whom the herrings belonged at the time of their exposure for sale,

Held: the sale of the fish was subject to the implied condition that it should be fit for human consumption when it arrived at Eastbourne and was examined within a reasonable time by the intending purchaser; that condition was not complied with; and, therefore, the property in the fish had not passed when it was rejected, and the respondent was still the owner: "exposure for sale" within s. 117 was not limited to a public exposure such as that by a shopkeeper in his shop, by a wholesale merchant in a warehouse, or by a vendor in a market, but it included exposure for the purpose of completing an agreement to sell, as was the exposure in the present case: and, accordingly, the respondent was liable to conviction under the section.

Notes. Sections 116 and 117 of the Public Health Act, 1875, were repealed by the Food and Drugs Act, 1938, itself repealed by the Food and Drugs Act, 1955, of which now see s. 8 and s. 9: 35 HALSBURY'S STATUTES (2nd Edn.) 107, 108.

See also s. 34 of the Sale of Goods Act, 1893, which does not appear to have been referred to in this case.

As to examination and seizure of unsound food, see 17 HALSBURY'S LAWS (2nd Edn.) 504–507; and for cases see 25 DIGEST 108 et seq.

Cases referred to:

(1) *Salt* v. *Tomlinson*, [1911] 2 K.B. 391; 80 L.J.K.B. 897; 105 L.T. 31; 75 J.P. 398; 27 T.L.R. 427; 9 L.G.R. 822; 22 Cox, C.C. 479, D.C.; 25 Digest 109, *326*.

(2) *Beer* v. *Walker* (1877), 46 L.J.C.P. 677; 37 L.T. 278; 41 J.P. 728; 25 W.R. 880; 39 Digest 442, *714*.

(3) *Bigge* v. *Parkinson* (1862), 7 H. & N. 955; 31 L.J.Ex. 301; 8 Jur.N.S. 1014; 10 W.R. 349; sub nom. *Smith* v. *Parkinson*, 7 L.T. 92, Ex. Ch.; 39 Digest 465, *908*.

Also referred to in argument:

Varley v. *Whipp*, [1900] 1 Q.B. 513; 69 L.J.Q.B. 333; 48 W.R. 363; 44 Sol. Jo. 263; 39 Digest 432, *616*.

Crane v. *Lawrence* (1890), 25 Q.B.D. 152; 59 L.J.M.C. 110; 63 L.T. 197; 54 J.P. 471; 38 W.R. 620; 6 T.L.R. 370; 17 Cox, C.C. 135, D.C.; 25 Digest 124, *456*.

Wheat v. *Brown*, [1892] 1 Q.B. 418; 61 L.J.M.C. 94; 66 L.T. 464; 56 J.P. 153; 40 W.R. 462; 8 T.L.R. 294; 36 Sol. Jo. 257; 25 Digest 124, *457*.

Daly v. *Webb* (1869), I.R. 4 C.L. 309.

Webb v. *Baker*, [1916] 2 K.B. 753; 86 L.J.K.B. 36; 115 L.T. 630; 80 J.P. 449; 61 Sol. Jo. 72; 14 L.G.R. 1158; 25 Cox, C.C. 547, D.C.; 25 Digest 110, *346*.

Bothamley v. *Jolly*, [1915] 3 K.B. 425; 84 L.J.K.B. 2223; 113 L.T. 999; 79 J.P. 548; 31 T.L.R. 626; 14 L.G.R. 109; 25 Cox, C.C. 199, D.C.; 25 Digest 109, *335*.

Case Stated by Eastbourne justices.

On June 8, 1917, at a court of summary jurisdiction holden at the petty sessional court in and for the county borough of Eastbourne, an information under s. 117 of the Public Health Act, 1875, was preferred by John Henry Ollett (hereinafter called "the appellant"), an inspector of nuisances for the county borough, on behalf of the corporation thereof, against Christopher William Jordan (hereinafter called "the respondent"). The information was as follows:

"For that on the 9th day of May, 1917, at the county borough aforesaid the appellant as such inspector of nuisances did inspect and examine 225 fish which had been sold to Mrs. Burke or exposed for sale or deposited in a place for the purpose of sale and intended for the food of man, and that, the said fish appearing to him to be unwholesome and unfit for the food of man, he did seize and carry away the same in order to have the same dealt with by a justice, and afterwards, to wit, on the 9th day of May, 1917, complaint was made to Henry Dawson Farnell, Esq., that the said fish were unwholesome and unfit for the food of man, and the said justice, being satisfied that the said fish were unwholesome and unfit for the food of man, did in due course of law condemn the same and order them to be destroyed so as to prevent the same from being used for the food of man, and that the respondent was the person to whom the said fish belonged and did belong at the time when such fish were so exposed or deposited for the purpose of sale or in whose possession the same were found."

Upon the hearing of the information it was proved or admitted that the respondent was a wholesale fish and ice merchant at Billingsgate, Hull; that on or about Apr. 26, 1917, the respondent sent the following letter or circular to the town clerk of Eastbourne:

"Dear Sir,— . . . the government have bought the whole Norwegian supply of herrings. . . . They are a splendid food when properly prepared and cooked. At the request of the Fish Food Controller I am doing my best to get this food

distributed. I am asking all institutions that I can to put this on their daily menu. I write you to ask the various institutions in your town to apply to me for all particulars and requirements. The price fixed is 4s. 6d. per stone, carriage paid. . . Yours faithfully, C. W. JORDAN."

That the said town clerk sent a copy of this letter or circular to the hospitals and camps in the borough, including the commandant of "Urmston" V.A.D. Hospital (Mrs. May Burke), who in consequence thereof, on May 4, 1917, wrote to the respondent at Billingsgate, Hull, the following letter:

"Dear Sir,—I am obliged by your letter re herrings, and I should be glad to avail myself of your offer to supply this hospital at the rate of 4s. 6d. per stone, carriage paid. Could you supply me with about 200 at a time as that would be the most convenient amount, or, if you cannot do it in such small quantities, would you kindly let me know the smallest number over 200 that I could have.—Yours faithfully, M. BURKE, Commandant."

On receipt of the order the respondent forwarded to Mrs. Burke by rail, carriage paid, two boxes containing in all 225 herrings. These were dispatched from Hull on May 7, 1917, by the train which left at 6 p.m., and arrived at Eastbourne Railway Station at 11.6 a.m. the next day, May 8, where they were put outside the parcels office because "they smelt so," and were delivered by the railway company at "Urmston" V.A.D. Hospital about 1 p.m. on that day. Soon after their arrival at "Urmston" Hospital, namely, between 2 and 3 p.m. on May 8, one of the boxes was opened and the herrings were found to smell unpleasantly, but the head cook declined to swear positively that they were then bad. About thirty were placed in water and put in the basement larder and not in the larder where the fresh food was kept, and the next morning, viz., on May 9, the appellant (the inspector of nuisances) was sent for by Mrs. Burke. The appellant opened the box which was closed, and, being of opinion that the herrings from both boxes were unwholesome and unfit for the food of man, he seized the same and had them examined by a justice (a medical practitioner), who, being satisfied that the same were unwholesome and unfit for the food of man, ordered them to be destroyed so as to prevent the same from being used for the food of man. The justices found that the herrings were unwholesome and unfit for the food of man when they were delivered at the hospital; the weather temperature, which was low, could not account for any decomposition during transit or after delivery; and sound herrings properly pickled in brine would remain wholesome for months and even years. They also found that Mrs. Burke never accepted the herrings.

The respondent stated in evidence that the herrings, when caught, were packed in brine in barrels, and while so packed would be preserved for two or three years; that during the afternoon of May 7, 1917, he personally inspected the herrings in question at Billingsgate, Hull, and saw them packed, and caused them to be dispatched from Hull by the 6 p.m. express fish train to London, and that they were then perfectly fresh and sound and fit for food; and that the herrings on arrival should have been taken out of the boxes and hung up separately, and that if left in the boxes they would ferment, but if hung up separately in a dry place they would keep sound for a long time. It was contended on his behalf that to secure a conviction the herrings must be proved to have been unsound or unfit for the food of man at the time of the sale: see *Salt* v. *Tomlinson* (1); that under the Sale of Goods Act, 1893, s. 18, r. 5, the property in the herrings passed from the respondent to Mrs. Burke at Hull at 6 p.m. on May 7, 1917, when they were with the assent of the buyer unconditionally appropriated to the contract, and in pursuance of the contract were delivered to the carrier, carriage paid, for transmission to the buyer, the respondent not reserving the right of disposal, and that the sale then and there took place; and that the respondent had proved that the herrings were sound and fit for the food of man at the time of sale as aforesaid. For the prosecution it was contended that the fish were exposed for sale or deposited for the purpose of sale in Eastbourne; that, there being no acceptance of the herrings by the purchaser, they

belonged to the respondent when they were exposed for sale or deposited for the purpose of sale; that there had been no unconditional appropriation to the contract of the herrings in question within the meaning of r. 5 of s. 18 of the Sale of Goods Act, 1893, inasmuch as that rule required, where the appropriation was made by the seller, that it should be done with the assent of the buyer, and that there had been no assent of the buyer in this case either express or implied.

The majority of the justices came to the conclusion to dismiss the case, being actuated by one or other of the following reasons: (i) They were not satisfied that the fish was unsound or unfit for the food of man when it was dispatched by the respondent from Hull, upon which dispatch the responsibility of the respondent in their opinion ceased; (ii) there was no satisfactory evidence that the fish was unfit for human food on delivery at Urmston Hospital; (iii) on the merits (but not agreeing that respondent's responsibility ceased at Hull).

When the case originally came before the court it was remitted to the justices to answer certain questions, which with their answers were as follows:

(i) Whether the herrings were unfit for human food when they were handed in by the respondent at Hull to the railway company for dispatch to Eastbourne?—No.

(ii) Whether the herrings were unfit for human food when delivered at the hospital at Eastbourne?—Yes.

(iii) Whether the herrings were deposited for sale at the hospital at Eastbourne? —Yes.

By the Public Health Act, 1875, s. 116:

"Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

By s. 117:

"If it appears to the justice that any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding £20 for every animal, carcase, or fish, or piece of meat, flesh, or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread, or flour, or for the milk so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months. . . ."

Montgomery, K.C. (*L. Horton-Smith* with him) for the appellant.
W. H. Moresby for the respondent.

DARLING, J.—The respondent was charged under s. 117 of the Public Health Act, 1875, with being the person to whom certain herrings belonged at the time of their exposure for sale at Eastbourne, and it appears from the findings of the magistrates, who dismissed the charge, that a Mrs. Burke, the commandant of a hospital at Eastbourne, had been in correspondence with the respondent as to supplies of herrings for the hospital. The respondent was a fish merchant at Hull, and he put on the railway at Hull for delivery at Eastbourne two boxes of herrings

which had been preserved in a particular way and were intended to be cooked and eaten by persons in the hospital. It has been found by the magistrates that the herrings were not unfit for human food when handed over by the respondent to the railway company at Hull, but were unfit for human food when they were delivered at the hospital at Eastbourne. As to whether the herrings were deposited for sale at the hospital at Eastbourne, the magistrates were of opinion that they were so deposited.

The question we have to decide is whether they were exposed for sale at Eastbourne. In my opinion, there was a conditional contract for the sale of the herrings to Mrs. Burke. That contract was made before the herrings reached Eastbourne. By s. 1 (2) of the Sale of Goods Act, 1893:

> "A contract of sale may be absolute or conditional."

I think that this contract was conditional on the goods being, when Mrs. Burke had inspected them, such as she had ordered. Section 1 (4) says:

> "An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

There was a conditional sale at Hull when the goods were put on the railway, but I do not think the property was to be transferred to Mrs. Burke until certain conditions were fulfilled. The goods were sold, as it seems to me, subject to an implied condition, as is shown by *Beer* v. *Walker* (2). There GROVE, J., said (46 L.J.C.P. at p. 678):

> "The case finds that what took place was in the ordinary course of business, so that there was nothing in the mode of sending the rabbits which was out of the usual course."

That is so here with regard to the herrings. GROVE, J., continued (ibid.):

> "And, therefore, the rabbits which were unfit for human food had become so in the ordinary course of transit. Then, that being so, the question is, was there an implied warranty that they should be fit for food? It cannot, I think, be contended that when a person undertakes to supply another with goods which are not specific goods, there is not an implied warranty that the goods shall be fit for the purpose for which they ordinarily would be intended to be used, and that with regard to animals used for human food that they are fit to be so used; the case of *Bigge* v. *Parkinson* (3) is a strong authority to that effect."

When one applies that to this case, this sale was a sale subject to the implied condition that the fish should be fit for human food not only when put on the railway at Hull, but also when in the ordinary course of things they arrived by rail at Eastbourne, and when the box was opened, if it was opened within a reasonable time and was examined by the intending purchaser. I do not think that there was any complete contract of sale until Mrs. Burke had had an opportunity of inspecting the goods and seeing whether they were fit for human food. If they were not fit for human food she was not bound to take them. Section 117 of the Public Health Act, 1875, says that the offence is committed by exposure for sale. In my opinion, exposure for sale includes not only a case where the fishmonger puts the fish for sale on a slab in his shop, but there may be an exposure for sale if something remains to be done before the goods become the property of the purchaser. Exposure for sale, in my opinion, includes the completion of the sale by the passing of the property. The case finds that there was an exposure for sale at Eastbourne to Mrs. Burke, and, therefore, the magistrates, instead of dismissing the information, ought to have convicted.

AVORY, J.—I agree that the magistrates ought to have convicted. The respondent was charged under s. 117 of the Public Health Act, 1875. The form of the charge was that he was the person to whom the fish belonged at the time when they were exposed for the purpose of sale. It is true that the words "or in whose

possession the same were found" also appeared in the information. But those words are immaterial. The case proceeded on the ground that the respondent was the person to whom the goods belonged when they were exposed for the purpose of sale. Two questions are involved—(i) whether there was an exposure for sale at Eastbourne, and (ii) whether the goods belonged to the respondent at the time of such exposure. I agree that the words "exposure for sale" in ss. 116 and 117 are not to be limited to what may be called a public exposure for sale, such as that by a shopkeeper in his shop or a wholesale merchant in a warehouse, or by any vendor in a market. The argument for the respondent amounted to saying that those words must be limited to an original exposure for sale in a shop or warehouse. But the only way in which practical effect can be given to those sections is by holding that the words extend to an exposure which is an exposure for any purpose of the sale—that is to say, for the purpose of completing the sale—and the fact that there has already been an agreement for sale or a conditional contract of sale does not prevent an exposure of the goods, for the purpose of the exercise by the purchaser of his right of inspection and his right of rejection, from being an exposure for the purpose of sale. In a case like this an exposure for sale is necessary in order to complete the sale. It is a necessary part of the vendor's contract in a case like this that he shall expose the fish so as to give the purchaser an opportunity of inspection or rejection. Therefore, I think that there was an exposure for sale by the vendor at Eastbourne. The other question is whether the fish belonged at that time to the vendor. That question is in fact already answered by the answer to the first question, because, if the contract was not complete and the purchaser had a right to reject and did reject, the property never passed to the purchaser, but remained in the seller. For those reasons the justices ought to have convicted.

ATKIN, J.—I agree. Exposure for sale includes exposure for the purpose of completing an agreement to sell, and in this case there was an agreement to sell and there was an exposure to the purchaser for the purpose of completing that agreement. I think, therefore, that there was an exposure by the respondent for the purpose of sale. The only other question that arises is whether these goods were in fact the property of the respondent. There is, I think, no doubt that the result of *Beer* v. *Walker* (2) is that the condition that the goods should be merchantable was not complied with, and I think that that case shows that the condition that the goods should be merchantable means that they should be in such a condition, when they are appropriated to the contract, that they will remain merchantable under reasonable conditions for a reasonable time. I do not think that it necessarily means that they should be merchantable when they reach the vendee, for the vendee may require such a mode of transit that they would not be merchantable on delivery. Without, however, expressing any definite opinion on that point, I think that the property had not passed to the purchaser and the goods remained the property of the respondent. In these circumstances the justices ought to have convicted. As to the suggestion that there ought to have been an express finding that the goods were exposed for sale, I think that, so far as that is a question of fact, the justices intended to find it by their answer that the goods were deposited for sale in the circumstances of this case.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, for *H. W. Fovargue*, Eastbourne; *Hart, Reade & Co.*, for *Payne & Payne*, Hull.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

LITCHFIELD-SPEER AND ANOTHER v. QUEEN ANNE'S GATE SYNDICATE (NO. 2), LTD.

[CHANCERY DIVISION (P. O. Lawrence, J.), January 28, 29, 30, 31, February 3, 10, 1919]

[Reported [1919] 1 Ch. 407; 88 L.J.Ch. 137; 120 L.T. 565; 35 T.L.R. 253; 63 Sol. Jo. 390]

Injunction—Easement—Nuisance—Quia timet action—Need to prove substantial damage by what defendant about to do—Inadequacy of damages—Duty of court in doubtful case—"Irreparable damage."

An action to restrain a threatened obstruction of ancient lights is governed by precisely the same principles as those which govern an action to restrain any other apprehended nuisance. In all cases of apprehended nuisance the authorities show that, if the plaintiff proves that he will certainly suffer substantial damage by what the defendant is about to do, the court will restrain the defendant from doing the act, and will not wait until the plaintiff has suffered the damage. If, however, the act which it is sought to restrain is in itself lawful and does not per se constitute a nuisance, e.g., the erection of an engine which is not objectionable in itself, but might become so if worked in a certain manner (*Earl of Ripon* v. *Hobart* (1) (1834), 3 My. & K. 169), the court will not in general restrain it, although the consequence of the act may be that a nuisance will result. In a really doubtful case it may be that it is the duty of the court to hold that the plaintiff ought to have waited and ascertained the result of the erection of the new building or of the other nuisance in question in the case before bringing his action, but the court should not adopt this course merely because the question whether an illegal obstruction or a nuisance will result is one on which there may be an honest difference of opinion.

Observations as to the obstruction of light to a basement room so constructed originally that artificial light was needed for the ordinary purposes for which the room was used or could reasonably be used.

Per P. O. LAWRENCE, J.: In determining whether an injunction should be granted quia timet to restrain anticipated interference with an easement it is relevant to consider whether the damage resulting from the interference would be "irreparable" in the sense that the damage must be substantial and not such as could be adequately remedied by a pecuniary payment.

Notes. Referred to: *Slack* v. *Leeds Industrial Co-operative Society*, [1923] 1 Ch. 431; *Medcalf* v. *Strawbridge, Ltd.*, [1937] 2 All E.R. 393.

As to injunctions to restrain nuisances and to prevent interference with easements, see 28 HALSBURY'S LAWS (3rd Edn.) 165–168, and ibid., vol. 12, pp. 618–619. For cases see 19 DIGEST 187 et seq., and 36 DIGEST (Repl.) 327–332.

Cases referred to:

(1) *Earl of Ripon* v. *Hobart* (1834), 3 My. & K. 169; Coop. temp. Brough. 333; 3 L.J.Ch. 145; 40 E.R. 65, L.C.; 28 Digest (Repl.) 784, *342*.

(2) *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest 123, *830*.

(3) *Fletcher* v. *Bealey* (1885), 28 Ch.D. 688; 54 L.J.Ch. 424; 52 L.T. 541; 33 W.R. 745; 1 T.L.R. 233; 28 Digest (Repl.) 784, *344*.

(4) *A.-G.* v. *Manchester Corpn.*, [1893] 2 Ch. 87; 62 L.J.Ch. 459; 68 L.T. 608; 41 W.R. 459; 9 T.L.R. 315; 37 Sol. Jo. 325; 3 R. 427; 28 Digest (Repl.) 785, *346*.

Also referred to in argument:

Shelfer v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34;

43 W.R. 238; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112, C.A.; 19 Digest 185, *1356*.

Kine v. *Jolly*, [1905] 1 Ch. 480; 74 L.J.Ch. 174; 92 L.T. 209; 53 W.R. 462; 21 T.L.R. 128; 49 Sol. Jo. 164, C.A.; affirmed sub nom. *Jolly* v. *Kine*, [1907] A.C. 1; 76 L.J.Ch. 1; 95 L.T. 656; 23 T.L.R. 1; 51 Sol. Jo. 11, H.L.; 19 Digest 194, *1468*.

Higgins v. *Betts*, [1905] 2 Ch. 210; 74 L.J.Ch. 621; 92 L.T. 850; 53 W.R. 549; 21 T.L.R. 552; 49 Sol. Jo. 535; 19 Digest 123, *829*.

Back v. *Stacey* (1826), 2 C. & P. 465, N.P.; 19 Digest 134, *911*.

Pattisson v. *Gilford* (1874), L.R. 18 Eq. 259; 43 L.J.Ch. 524; 22 W.R. 673; 28 Digest (Repl.) 781, *324*.

Cowper v. *Laidler*, [1903] 2 Ch. 337; 72 L.J.Ch. 578; 89 L.T. 469; sub nom. *Cooper* v. *Laidler*, 51 W.R. 539; 47 Sol. Jo. 548; 19 Digest 189, *1397*.

Dreyfus v. *Peruvian Guano Co.* (1889), 43 Ch.D. 316; 62 L.T. 518; 6 Asp.M.L.C. 492, C.A.; on appeal sub nom. *Peruvian Guano Co., Ltd.* v. *Dreyfus Bros. & Co.*, [1892] A.C. 166; 61 L.J.Ch. 749; 66 L.T. 536; 7 Asp.M.L.C. 225, H.L.; 28 Digest (Repl.) 791, *404*.

Martin v. *Price*, [1894] 1 Ch. 276; 63 L.J.Ch. 209; 70 L.T. 202; 42 W.R. 262; 10 T.L.R. 172; 38 Sol. Jo. 127; 7 R. 90, C.A.; 28 Digest (Repl.) 788, *377*.

Elwell v. *Crowther* (1862), 31 Beav. 163; 31 L.J.Ch. 763; 6 L.T. 596; 8 Jur.N.S. 1004; 10 W.R. 615; 54 E.R. 1100; 19 Digest 189, *1400*.

Salvin v. *North Brancepeth Coal Co.* (1874), 9 Ch. App. 705; 44 L.J.Ch. 149; 31 L.T. 154; 22 W.R. 904, L.JJ.; 28 Digest (Repl.) 889, *1183*.

Yates v. *Jack* (1866), 1 Ch. App. 295; 35 L.J.Ch. 539; 14 L.T. 151; 30 J.P. 324; 12 Jur.N.S. 305; 14 W.R. 618, L.C.; 19 Digest 136, *920*.

Witness Action brought by the plaintiffs, Marianne Frances Cecilia Litchfield-Spier, as the owner, and Leo Francis Howard Schuster, as the lessee and occupier, of a house, No. 22, Old Queen Street, in the city of Westminster, against the defendants, the Queen Anne's Gate Syndicate (No. 2), Ltd., and Ford and Walton, Ltd., contractors, claiming an injunction to restrain the defendants, their contractors, agents, servants and workmen from continuing the erection of certain buildings so as to cause a nuisance or illegal obstruction to the plaintiffs' ancient windows and lights, or any of them, and, if necessary, to have such buildings pulled down, or damages for the injury sustained if the buildings were completed and not pulled down.

The facts appear in his Lordship's judgment.

Ward Coldridge, *K.C.*, and *G. A. Scott* for the plaintiffs.

Jenkins, *K.C.*, and *Vaisey* for the defendants.

Cur. adv. vult.

Feb. 10, 1919. **P. O. LAWRENCE, J.**, read the following judgment.—The plaintiff Mrs. Litchfield-Spier is the owner in fee, and the plaintiff Mr. Schuster is the lessee and occupier, of a dwelling-house known as No. 22, Old Queen Street, in the city of Westminster. The plaintiffs' house stands on the north side of the street and contains (inter alia) the following two rooms—namely, in the basement a kitchen measuring 21 ft. 3 in. by 18 ft., and having two windows looking south with a total glazed area of 30 superficial square feet, and, on the ground floor, a room used as a music room, measuring 24 ft. 6 in. by 21 ft. 10 in., and having two windows, one looking south and the other south-west, with a total glazed area of about 66½ superficial square feet. The windows in both these rooms are ancient lights. The defendant syndicate is causing certain buildings to be erected on the site of two houses formerly known as Nos. 25 and 27, Old Queen Street (which together with the adjoining house, formerly known as No. 23, Old Queen Street, have recently been pulled down) under an agreement for a building lease dated Apr. 12, 1917. The defendants, Ford and Walton, Ltd., are the contractors engaged by the syndicate to carry out the building operations. The new buildings now in course of erection are situate on the south side of Old Queen Street, and lie

to the south-west of the plaintiffs' house, from which they are distant, at the nearest point, 42 ft. The old buildings, Nos. 25 and 27, Old Queen Street, had a frontage to Old Queen Street of 40 ft. They were 35 ft. high to the coping of the parapet, and above that had a sloping roof, which was carried up to a further height of 11 ft. making the total height of the old buildings 46 ft. from the ground level to the ridge of the roof. The new buildings will, when completed, be 64 ft. high to the coping of the parapet, and 83 ft. to the ridge of the roof. The roof is to have four sets of projecting dormer windows, and a chimney stack is to be carried up at the eastern end of the buildings. At the time of the trial the new buildings had not quite reached the height of the coping to the parapet of the old buildings. The plaintiffs' case is that the new buildings, when completed, will materially diminish the light coming through the windows to the kitchen and music-room, and they claim an injunction to restrain the defendants from continuing the erection of the new buildings so as to cause a nuisance or illegal obstruction to their ancient lights.

From the foregoing statement it will be seen that this action is purely a quia timet action. Counsel for the defendants has argued that the plaintiffs have no cause of action at law, as no damage has, in fact, been suffered by them, and further that the plaintiffs have no cause of action in equity because a court of equity has no jurisdiction to entertain (or if that is putting it too high, that it is contrary to the practice of a court of equity to entertain) a quia timet action unless both of the following two conditions are fulfilled—namely, first, unless the act sought to be restrained will inevitably result in substantial damage; and, secondly, unless such resultant damage will be irreparable. In order to judge of the soundness of the proposition so advanced it is necessary in the first instance to arrive at an understanding as to what is meant by the term "irreparable damage." If by that term is meant that there must be no physical possibility of repairing the damage, then I dissent from the proposition, but if the term is used in the sense in which the court generally uses it in this class of cases, and all that is meant is that the damage must be substantial, and must be damage which could not be adequately remedied by a pecuniary payment, I am not disposed to quarrel with the proposition. I have been reminded that since the decision in *Colls* v. *Home and Colonial Stores, Ltd.* (2) the question to be determined in every case of obstruction to ancient lights is not merely how much light has been obstructed, but rather how much light is left, and whether the dominant tenement, or the particular room in the dominant tenement, has, by reason of the obstruction, been rendered uncomfortable and substantially less suitable for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, regard being had to the locality in which the premises are situated. I need hardly say that in deciding this case I intend to follow the principles laid down in *Colls* v. *Home and Colonial Stores, Ltd.* (2) and the subsequent cases on this subject. It has been stated by counsel for the defendants that since the decision in *Colls* v. *Home and Colonial Stores, Ltd.* (2) there is no reported case of any purely quia timet action for threatened obstruction of ancient lights, and I have not been referred to any reported case where the proposed new buildings had not exceeded the height of the old buildings at the date of the issue of the writ.

It is contended that the reason for this absence of authority is because no such action will lie, since in no case of obstruction to ancient lights can it be said that the damage is irreparable, as the new buildings can always be ordered to be pulled down. I do not agree with this contention. Whatever may be the true explanation of the alleged absence of reported cases, I think that the principles which are applicable to actions of this class since the decision in *Colls* v. *Home and Colonial Stores, Ltd.* (2) are not in doubt. An action to restrain a threatened obstruction of ancient lights is, in my opinion, governed by precisely the same principles as those which govern an action to restrain any other apprehended nuisance. In all cases of apprehended nuisance the authorities show that, if the plaintiff proves that he will certainly suffer substantial damage by what the defendant is about to

do, the court will restrain the defendant from doing the act, and will not wait until the plaintiff has suffered the damage. If, however, the act which it is sought to restrain is an act which is in itself lawful, and does not per se constitute a nuisance, the court will not in general restrain it, although the consequence of the act may be that a nuisance will result. The cases cited by counsel (which are only a selection from the numerous authorities on this subject) sufficiently illustrate this principle—that is, the court will not restrain the erection of an engine which is not objectionable in itself, but may only become so if it is worked in a certain manner (*Earl of Ripon* v. *Hobart* (1)), nor the deposit of a refuse heap which will only become objectionable if the liquid oozing from it is not diverted (*Fletcher* v. *Bealey* (3)), nor the erection of a smallpox hospital where it is not proved that it will, when used for smallpox patients, necessarily cause infection (*A.-G.* v. *Manchester Corpn.* (4)). If it were true to say that no quia timet action for a threatened obstruction of ancient lights will lie, because the court can order the offending building to be pulled down, the owner of the dominant tenement (although he knows that it is intended to take the offending building to a height at which it must necessarily be a nuisance) would have to wait until the offending building had reached a height at which he could safely rely upon being able to prove that it had already caused a nuisance before he could issue his writ—a result much to be deprecated in the interests both of the owner of the dominant tenement and of the building owner.

Before the decision in *Colls* v. *Home and Colonial Stores, Ltd.* (2) the court always regarded with favour a plaintiff who came for relief promptly after he had become aware of the intentions of the building owner. In my judgment, the decision in *Colls* v. *Home and Colonial Stores, Ltd.* (2) has not abrogated the jurisdiction of the court to entertain quia timet actions in cases of obstruction of ancient lights, and, for my own part, until I am corrected by a higher tribunal, I shall still regard favourably a plaintiff who comes promptly, although I realise that the onus upon him to prove that a nuisance will result from the defendant's building involves his adducing different evidence from that which was formerly required, and is probably more difficult to discharge than it was when he had merely to prove that the new building would obstruct a certain quantity of light. In a really doubtful case it may be that it is the duty of the court to hold that the plaintiff ought to have waited and ascertained the result of the erection of the new building before bringing his action, but I do not think that the court ought to adopt this course merely because the question whether an illegal obstruction will result is one upon which there may be an honest difference of opinion. In all purely quia timet actions of this kind the court must to a great extent, if not altogether, be guided by expert evidence, which is hardly ever wholly satisfactory, as experts generally become advocates in the witness-box, and it is not often possible to shake their opinions, which they are paid to maintain, by cross-examination. In spite of this difficulty, however, I consider that it is the duty of the judge, whenever possible, to make up his mind as to the value of the opinions expressed by the expert witnesses, and if he is convinced one way or the other, to give effect to the conclusion at which he has arrived. In the present case I have arrived at a clear conclusion as to the weight to be attached to the evidence given on both sides and as to the true result to be deduced from the opinions given by the experts who were called before me.

I intend, therefore, to decide the case and not to accept the tempting invitation to adopt the easier course of holding that, as there is a conflict of expert evidence whether the defendants' buildings will be a nuisance or not, the action ought to be dismissed and the plaintiffs left to bring another action when the new buildings are complete if they then find that their ancient lights have been illegally obstructed. With these preliminary remarks I will now consider the evidence and state the conclusions which I have come to. At the request of both parties I have visited the premises in order that I might the better understand the evidence.

Dealing first with the kitchen. The two windows open out on to a small area about 13 ft. long and 5½ ft. wide, which is fenced off from the pavement of the

street by iron railings. The top of the windows are about level with the pavement. The light coming into the kitchen through these windows is poor at all times, necessitating the use of artificial light throughout the day on most days in the year in spite of the additional light which is now enjoyed owing to the site of No. 23, Old Queen Street, being temporarily vacant. A person of average height standing in the kitchen at a distance of 1 ft. 6 in. from either window cannot see the sky at all, and, as may be supposed, the only direct light which reaches the window strikes them at a very steep angle and penetrates at most only about 5 ft. into the room. The new buildings will obstruct a considerable amount of lateral light which is now and was formerly enjoyed, and the direct rays of the sun which at present strikes the windows on a clear day will be prevented from reaching them for a short time on every afternoon (when the sun happens to be shining) during a period of about two months in the year. Although I think that both the direct and the diffused light in the kitchen will be materially affected by the new buildings I have come to the conclusion that owing to the situation of the kitchen and the size and arrangement of the windows it would be unreasonable to hold that the new buildings will cause a nuisance to the kitchen. If an owner builds a room in the basement of his house so poorly lighted as to render it uncomfortable as regards light from the start and so as to necessitate the use of artificial light for the ordinary purposes for which it is (or can reasonably be) used, it cannot, in my judgment, be said a further diminution of light, to the extent which will occur in the present case, will render the room substantially more uncomfortable and less suitable for the purposes of inhabitancy or business because the artificial light, which has to be used, whether the defendants' buildings are erected or not, will make the decrease of natural light practically unnoticeable. For these reasons I hold that the plaintiffs' case fails as regards the kitchen.

As regards the music-room, however, the circumstances are different. The two windows in that room are at present glazed with straw-tinted cathedral glass which, to a considerable extent, obstructs the light from penetrating into the room, but counsel for the defendants at the outset admitted that, as the owners could at any moment change the cathedral glass to clear glass, the case must be dealt with as if that change had taken place and I intend to decide the case on that footing. Given clear glass, I hold that the music-room is a well-lighted room. There is nothing exceptional about it either in its size or in its shape or in the size of its windows. One of the windows faces south and has been called "the eastern window"; the other window is a bow window facing south-west, and has been called "the round window." The evidence has satisfied me that if the defendants' new buildings are completed according to their present design, the light coming to both these windows, but more particularly to the round window, will be materially affected, and the music-room will be rendered uncomfortable and substantially less suitable for the purpose of inhabitancy or business in consequence. Evidence has been given of the loss of some direct sunshine for a portion of each afternoon if the sun happens to be shining during a period of, approximately, two months in each year —viz., from Mar. 26 to May 3, and from Aug. 11 to Sept. 18. That some such loss will be sustained is admitted, but I have been left in doubt as to the extent of this loss, and, on the whole, I have come to the conclusion that I ought to attach very little weight to the evidence as regards the loss of direct sunshine. The light coming to the eastern window, which will be obstructed by the new buildings, is entirely lateral. The new buildings are situate to the south-west of and are 45 ft. distant from this window, and, without counting the chimney stack, they will be 83 ft. high when completed. Whereas formerly this window enjoyed 50 degrees of direct light from the sky in a south-westerly direction over the old building it will on the completion of the new buildings only enjoy 36 degrees of direct light over the new buildings, being a loss of 14 degrees. The quantity of direct light thus obstructed, though lateral, is, in my judgment substantial, and this loss and the loss of diffused light will, according to the plaintiff's evidence (which I accept on this point), cause a material diminution of the light in the music-room. The

more serious obstruction of light, however, in my judgment, will occur to the round window. The new buildings will, owing to the situation and shape of the round window, obstruct both frontal and lateral light. The new buildings at their nearest point are only 42 ft. distant from this window, and the loss of direct light from the sky will amount to no less than 17 degrees over a sky area representing, roughly, 1160 square feet. It is true that this window, in my judgment, enjoyed more light than it might reasonably be expected to retain in the locality in which it is situate. The angle of light coming over the old buildings was proved to average about 56 degrees, which I think might be obstructed to some extent without giving the plaintiffs any legal ground of complaint, but, in my judgment, the obstruction of 17 degrees, reducing the angle of unobstructed direct light coming over the new buildings to 39 degrees, is excessive and cannot be justified. The plaintiff's evidence, which on this point I accept in substance, has convinced me that the new buildings, which are a continuation of a large block of buildings already completed on the sites of Nos. 29 to 35, Old Queen Street, will, if completed to the height contemplated, be a nuisance to the music-room.

In coming to this conclusion I have not overlooked the fact that the round window derives a considerable portion of its light from the west, which will remain unobstructed, but I consider that the plaintiff's witnesses are right in saying that the light coming from this direction does not serve the north-western portion of the music-room and that, therefore, the direct light which will be obstructed to the south-west is of great importance to the comfortable enjoyment of this room. Nor, on the other hand, have I overlooked the fact that the site of No. 23, Old Queen Street is vacant and that a considerable amount of light is at present derived over this vacant site which light will be obstructed again if and when No. 23 is re-built. In stating that I substantially accept the evidence of the plaintiffs' witnesses I must not be understood as holding that the selling and letting value of the plaintiffs' premises would be diminished to the full extent deposed to by the plaintiffs' witnesses. My view is that the amount of the damage in this respect has been placed somewhat too high, but that there would be a substantial loss in the selling and letting value if these new buildings are allowed to proceed to their proposed height I have no doubt.

Counsel for the defendants has invited me, if I should come to the conclusion that the new buildings will cause a nuisance, to award damages in lieu of granting an injunction. I do not propose to consider whether the court has any such power as I have come to the conclusion in this case that the plaintiffs are entitled to an injunction. To refuse an injunction and award damages would mean compelling the plaintiffs to submit to a permanent nuisance seriously affecting the comfort and value of their property in consideration of a money payment. This, even if I have the power, I do not intend to do. Counsel has further urged that, even if I were to hold that the plaintiffs are entitled to an injunction, I should not grant an injunction at the present time but should make a declaration with liberty to apply for an injunction in case it should hereafter become necessary which he did not anticipate. In the circumstances of this case I think this request is not unreasonable and counsel for the plaintiffs has not seriously resisted my adopting this course. I, therefore, make a declaration that the defendants are not entitled to erect any buildings so as to cause a nuisance or illegal obstruction to the plaintiffs' ancient lights to the windows in the music-room at No. 22, Old Queen Street as the same existed previously to the taking down of the houses known as Nos. 25 and 27, Old Queen Street which formerly stood on the site of the defendants new buildings, with liberty to apply for an injunction and generally.

[Bearing in mind all the circumstances of the case his LORDSHIP made an order for the payment by the defendants of half the plaintiffs' costs of the action, but made no order as to the rest of the plaintiffs' costs or as to the defendants' costs.]

Solicitors: *Trollope & Winkworth*; *Preston & Foster*.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law*.]

STUBBS, LTD. *v.* MAZURE

[House of Lords (Viscount Finlay, Viscount Cave, Lord Dunedin, Lord Shaw and Lord Wrenbury), July 8, 10, 28, 1919]

[Reported [1920] A.C. 66; 88 L.J.P.C. 135; 122 L.T. 5; 35 T.L.R. 697; 25 Com. Cas. 36]

Libel—Defence—Statement in document containing words complained of limiting meaning of contents of document—Effect where words complained of untrue.

The appellants were the proprietors and publishers of a periodical in which there appeared a list of the names and addresses of traders and others against whom decrees in absence had been obtained in the Small Debt Courts. The list was headed with a statement that "in no case does publication of the decree imply inability to pay on the part of anyone named or anything more than the fact that the entry published appeared in the court books." By mistake the name of the respondent appeared in the list, it being stated that the respondent, a business man, had had pronounced against him in the Small Debt Court at D. a decree in absence for £12 11s. In an action for defamation brought by the respondent against the appellants the respondent pleaded that this false statement meant, and was understood to mean, that "he was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given."

Held: proof of the publication in the appellants' periodical of the words complained of and that they had been understood in the sense pleaded by the respondent in the innuendo supported that innuendo; the explanatory statement at the head of the list could not be effective to protect the appellants in the case of information published by them which, as in the present case, was untrue, and, in any case, the respondent had not pleaded that the publication implied inability on his part to pay; and, therefore, the respondent was entitled to succeed in the action.

Stubbs, Ltd. v. *Russell* (1), [1913] A.C. 386, distinguished.

Decision of the Second Division of the Court of Session (55 Sc.L.R. 765) affirmed.

Notes. As to defamatory statements, see 24 Halsbury's Laws (3rd Edn.) 17 et seq.; and for cases see 32 Digest 17 et seq.

Case referred to:

(1) *Stubbs, Ltd.* v. *Russell*, [1913] A.C. 386; 82 L.J.P.C. 98; 108 L.T. 529; 29 T.L.R. 409; 1913 S.C. (H.L.) 14; 32 Digest 34, *292*.

Also referred to in argument:

Crabbe and Robertson v. *Stubbs, Ltd.* (1895), 22 R. (Ct. of Sess.) 860; 32 Sc.L.R. 650; 3 S.L.T. 73; 32 Digest 33, **l*.

Gibson & Co. v. *Anderson & Co.* (1897), 24 R. (Ct. of Sess.) 556; 17 Digest (Repl.) 115, **203*.

Searles v. *Scarlett*, [1892] 2 Q.B. 56; 61 L.J.Q.B. 573; 66 L.T. 837; 56 J.P. 789; 40 W.R. 696; 8 T.L.R. 562, C.A.; 32 Digest 127, *1586*.

Williams v. *Smith* (1888), 22 Q.B.D. 134; 58 L.J.Q.B. 21; 59 L.T. 757; 52 J.P. 823; 37 W.R. 93; 5 T.L.R. 23, D.C.; 32 Digest 75, *1051*.

Annaly v. *Trade Auxiliary Co.* (1890), 26 L.R.Ir. 394; 32 Digest 132, *o*.

Capital and Counties Bank v. *Henty* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, *121*.

Rarity v. *Stubbs & Co.* (1893), 1 S.L.T. 74.

Hunter & Co. v. *Stubbs, Ltd.* (1903), 5 F. (Ct. of Sess.) 920.

Appeal by the defenders from an interlocutor of the Second Division of the Court of Session.

The facts appear in the opinion of Viscount Finlay.

The Solicitor-General for Scotland (*T. B. Morison, K.C.*) and *H. Cassie Holden* for the appellants.

J. A. Christie and *E. O. Inglis* (both of the Scottish Bar) for the respondent.

The House took time for consideration.

July 28, 1919. The following opinions were read.

VISCOUNT FINLAY.—This is an action for libel, and it came before LORD ANDERSON twice. On the first occasion by his interlocutor of May 31, 1917, he repelled the defenders' plea in law of irrelevancy and allowed proof. On the second occasion after the proof had been taken, LORD ANDERSON, by his interlocutor of Jan. 18, 1918, sustained the pursuer's first plea in law that the pursuer having been slandered by the defenders was entitled to reparation, and assessed the damages at £50. A reclaiming note was presented by the defenders and the Second Division, on July 20, 1918, dismissed the appeal with costs. This appeal to your Lordships' House asks that the interlocutor should be recalled on the ground that the pursuer's averments are not relevant.

I adopt the following statement of facts made by LORD ANDERSON on the first occasion on which the case came before him: In this action the pursuer, who is a licensed broker carrying on business at Dumbarton, sues the defenders for damages in respect of defamation. On Oct. 12, 1916, the defenders published, in their well-known WEEKLY GAZETTE, an entry to the effect that decree in absence for £12 11s. had been pronounced against the pursuer on Oct. 3, 1916, in the Small Debt Court at Dumbarton. That statement regarding the pursuer was false. No such decree was pronounced against the pursuer, and the books of court never contained any entry to the effect that any such decree had been pronounced. The pursuer pleads that the said publication by the defenders was not only false, but also calumnious, and he alleges that the innuendo which the entry bears is "that the pursuer was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given." The pursuer further avers that he had always regularly met his obligations as they fell due. He states that as a result of the publication of the said entry he has suffered great damage in his credit and business, and he makes specific averments to substantiate this general allegation of injury.

STUBBS' GAZETTE publishes extracts from the court books of decrees granted in absence in the Small Debt Courts, and this action was brought in respect of a false allegation of such an entry with regard to the pursuer. The allegation complained of was that decree in absence for £12 10s. had passed in the Small Debt Court of Dumbarton against the pursuer, who carried on business at Dumbarton. Prefixed to the list in which this allegation occurs was the following:

> "Extract from the court books of decrees in absence in the Small Debt Courts.—Note.—The following extracts from the court books have been received since our last issue, made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled, or paid, and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the court books."

Condescendence 2 made the following averments:

> ". . . The said STUBBS' WEEKLY GAZETTE has a wide circulation among the trading community and others through Scotland, and also in England and Ireland. It has a special portion devoted to the publication of the names and addresses of traders and others by and against whom decrees in absence have been taken. This is popularly known as and called the "Black List," and any trader appearing in that list is looked upon with great suspicion as being a person to whom it is unsafe to give credit, as he will or may refuse or delay to make payments of his just debts. The object of the said list is to give

information to tradesmen and the mercantile community generally as to persons against whom it has been necessary to take decrees in order to enforce payment of their debts."

Condescendence 4 set out the passage in the GAZETTE complained of, and condescendence 5 made the following allegations:

"The said entry is of and concerning the pursuer, and is false and calumnious. It falsely represented that a decree in absence had been pronounced against the pursuer for the sum of £12 11s., and that the pursuer was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given. It was so understood by the public, and in particular by the pursuer's creditors and customers."

No such decree in absence had, in fact, ever passed against the pursuer, and the statement to that effect in STUBBS' GAZETTE was the result of a blunder on the part of the clerk employed to examine the lists.

It was contended by the Solicitor-General, on behalf of the appellants, that the appeal must be allowed on the ground that the averments are not relevant, and the decision of your Lordships' House in *Stubbs, Ltd.* v. *Russell* (1) was pressed upon us. The facts and the allegations in the case were similar to those in the present case, with the very material exception that the innuendo was different, being that the pursuer was unable to pay his debts.

In my opinion the averments of the pursuer are relevant and were properly admitted to proof. In other words, I think that the entry in the GAZETTE of which he complained of and the allegations in the pleadings are such as to support the innuendo alleged, and LORD ANDERSON so found at the trial. There was evidence that the entry had been understood in this sense and that damage to the pursuer had been thereby caused. The object with which the list is published is that tradesmen and merchants may have material for forming a judgment whether credit may safely be allowed in any particular case. There was evidence that the list is known as the "Black List," and that the appearance of the name of any person in it is calculated to excite suspicion. The appellant relied on the note prefixed to the entry in the GAZETTE to the effect that in no case does publication of the decree imply inability to pay on the part of any person named. But without imputing insolvency such a publication might suggest that the person named was a bad payer, and that inquiry should be made before giving credit to him. If the entry is capable of being read in this defamatory sense, it is no answer to an action for a false allegation that such an entry had appeared in the court books to say that it is stated in the note that the publication of the decree does not impute insolvency. It may be defamatory without imputing actual insolvency. There was evidence to support the pursuer's averments, their sufficiency was a matter for the Lord Ordinary, by whom the case was tried without a jury, and there is no ground for interfering with his conclusion or for treating the damages as excessive.

Very great pains were taken in the judgments in *Stubbs, Ltd.* v. *Russell* (1) to show that the decision was confined to the innuendo there alleged—namely, that the pursuer "was unable to pay his debts, was in insolvent circumstances and in pecuniary embarrassment, and was avoiding payment of a just debt." The decision proceeded on the ground that such an imputation of insolvency was negatived by the note. That note was in the same terms as in the present case, but the innuendo is different. LORD KINNEAR's judgment is rested on the ground that the imputation charged was one of insolvency, and that the note in the publication complained of expressly stated that insolvency was not to be inferred. LORD SHAW makes it quite clear that this was the ground, and the only ground, for the decision. He says ([1913] A.C. at p. 397):

"For such a decree might pass for a large variety of reasons, none of which would injuriously affect the reputation or trade of the debtor. One quite natural interpretation of the entry would be that the alleged debtor had forgotten to pay the small sum sued for. Another reason might be that he was

—having certain opinions as to the injustice of the claim or the full amount of it—determined not to pay except under force of law. A third reason for such a decree might be that he was absent and knew nothing about the summons. A fourth that he was a person given to refusing or delaying to pay his debts in ordinary and proper course. The last might possibly affect the reputation and credit of the alleged debtor. And I am not prepared to say that there may not be circumstances in which injury, more particularly to a trader in humble and struggling circumstances, would not be produced if the erroneous entry had been taken up in the last-mentioned sense. Such a person might never have been in a court, might always have met his obligations with regularity, might be in a critical stage in the development of his business, and, as at present advised, I should not say that it was a strained construction to put upon the entry that it was reasonably likely to imply that he was given to or had begun the practice of refusing or delaying to make payment of his debts, and that the public or those dealing with him had understood it in that sense. The position taken up by the respondent, the pursuer in the action, is that he has put forward in issue the erroneous entry with a much more sweeping and serious innuendo. That innuendo is that the entry 'falsely and calumniously represented that the pursuer was unable to pay his debts.' He has, in short, taken upon himself the burden of saying that the entry of a decree in absence having passed against him for £9 odd was equivalent to or implied an imputation of his insolvency. After much consideration, I am of opinion that this innuendo imports into the erroneous entry more than it can reasonably bear."

LORD HALDANE, L.C., expressed his concurrence with the judgments of LORD KINNEAR and of LORD SHAW. LORD SHAW'S judgment seems to make it quite clear that the appellant's argument proceeds on a misunderstanding of *Stubbs, Ltd.* v. *Russell* (1). The innuendo charged in the present case is practically in the same terms as the innuendo suggested by LORD SHAW as being one which might be supported by the publication of such an entry. The contention of the Solicitor-General that LORD SHAW'S observations must be considered as referring only to the case of a trader in humble and struggling circumstances appears to me to be quite untenable. Such a set of circumstances might render damage more likely to ensue from such a statement, but can have no bearing upon the question of relevancy.

I am, therefore, of opinion that the decision in *Stubbs, Ltd.* v. *Russell* (1) has not the effect contended for by the appellants, and, indeed, a careful examination of the judgments show that they are rather against than in favour of the appellant in the present case. It is one thing to impute insolvency, it is another thing altogether to say, as is said here, that the pursuer was given to or had begun to refuse or to delay to make payments of his debts, and the statement in the note as to insolvency not being imputed by the publication of the entry does not rebut the possibility that the entry might be understood as importing a slighter degree of embarrassment, an imputation which might nevertheless prejudicially affect the trader. For these reasons, I am of opinion that this appeal should be dismissed with costs. **LORD DUNEDIN** desires me to say he concurs in this judgment.

VISCOUNT CAVE stated the facts and continued: It was hardly denied before this House that the statement in the GAZETTE, if read in accordance with the innuendo in condescendence 5 was defamatory; but it was argued on behalf of the appellants that the statement does not justify that innuendo. It may be that the statement taken by itself would not bear the meaning ascribed to it; but I think that, when taken in conjunction with the circumstances alleged in condescendence 2, it is fully capable of bearing that meaning. Assuming, as for the purpose of considering whether proof should have been allowed, we must assume that the statements in that condescendence are true, the result is that in a paper published as a means of enabling traders to avoid making bad debts, and in a special portion

of that paper devoted to the publication of the means of traders against whom decrees in absence have been taken, such portion being popularly known as the "Black List," it was falsely stated that a decree for the small sum of £12 11s. had been obtained in absence against the respondent. It appears to me that such a statement made under such conditions is reasonably capable of bearing the meaning attributed to it in condescendence 5; and I am confirmed in this view by the fact that not only the pursuer's customers who were called as witnesses, but no less than five learned judges in the courts below have found that meaning in it. Reliance is placed by the appellants upon a prefatory note which is contained in the GAZETTE, and appears immediately under the heading "Extracts from the Court Books of Decrees in Absence in the Small Debt Courts." The material part of this note is as follows:

> "The following extracts from the court books have been received since our last issue, made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the court books."

The portion of the above note which is relied upon in the present case is the statement that in no case does publication of a decree imply anything more than the fact that the entry published appeared in the court books. If this means that readers of the GAZETTE are invited to rely upon the statement that the entry has appeared in the court books as a true statement of fact, and to draw all proper inferences from it, then the statement does not assist the appellants. But, if it means that readers are not to draw from the fact stated any inference prejudicial to the credit of the person named, then I do not think that serious reliance can be placed upon a warning so contradictory to the nature of the publication itself. The GAZETTE is published and circulated in order that its readers may draw inferences as to the credit of the traders named; and it appears to me to be futile to suggest that the publishers of such a GAZETTE are protected by a mere warning that no such inference is to be drawn. So to hold would be in effect to hold them immune from responsibility for their mistakes, however serious the consequences which may ensue.

It is said that the case is concluded in favour of the appellants by the decision in *Stubbs, Ltd.* v. *Russell* (1), but, in my view, that case is clearly distinguishable from the present. In that case the entry and the prefatory note were indeed similar to those which are in question in this case, and the record included a statement of circumstances similar to those contained in condescendence 2. But in *Russell's Case* (1) the pursuer, doubtless for good reasons, sought to attribute to the entry a different meaning, alleging that the statement "amounted to a false and calumnious representation that the pursuer was unable to pay his debts"; and the decision of the case in this House turned entirely on that innuendo. Of the two leading judgments that delivered by LORD KINNEAR laid stress on the fact that the meaning ascribed by the innuendo to the false entry was in terms negatived by the prefatory note, which stated that in no case did publication of a decree imply inability to pay. The judgment of LORD SHAW, with which I respectfully agree, was to the effect that, quite apart from any argument to be drawn from the note, the entry in question would not, even with the special circumstances alleged, bear the particular meaning sought to be put upon it, namely, that it imputed total insolvency. His judgment did not exclude the possibility of another interpretation prejudicial to the credit of the person referred to, and was certainly not unfavourable to the view put forward by the pursuer in the present case. The decision in *Russell's Case* (1) is, therefore, not an authority for the appellants. For these reasons I am of opinion that proof was properly allowed. With regard to the hearing, I think it clear that the evidence, which has been read to your Lordships, contained ample material on which the Lord Ordinary could find for

the pursuer. No question is raised as to the amount of damages. In my opinion, the appeal fails and should be dismissed.

LORD SHAW.—I agree. In my opinion, the case is not excluded by the decision in *Stubbs, Ltd.* v. *Russell* (1). That case and the opinions delivered in this House have been most searchingly analysed in the courts below. A formidable attack was made by the learned Solicitor-General upon that analysis, and in particular upon the very thorough and careful examination of *Russell's Case* (1) by LORD SALVESEN. This has made me—although unwilling in one sense to do anything but accept loyally the former decision of this House—re-examine *Russell's Case* (1) and the position from the foundations. I think it right to confess to your lordships that the result has been to confirm the judgment which I formed in regard to that case and to uphold the decisions of the courts below in regard to it.

I trouble your Lordships only with these observations. It is apt to be forgotten that the necessity for a direct weighing up of the breadth and the significance of the issue presented in *Russell's Case* (1) arose from these circumstances. Undoubtedly, there, as here, Messrs. Stubbs' newspaper contained an erroneous entry that a decree in absence against the pursuer had been passed. This was not the case, and the sheriff court books did not contain such a record. But although that mistake had been made, yet the broad facts were that not very long before the erroneous entry appeared there were nine or ten other decrees in absence which had, in point of fact, been obtained against the pursuer. The innuendo, however, that was formulated was that the one erroneous insertion of an announcement that a decree in absence had been passed against the pursuer meant that the pursuer was unable to pay his debts—in other words, meant his insolvency. It was held by the Court of Session that this issue should be allowed, and, accordingly, that the defenders could not put forward a counter-issue containing any lesser allegation, as, for instance, that this pursuer was the same person who had figured so frequently in lists of decrees in absence, and that, therefore, he was a person who neglected or declined to pay his debts. The answer was made: He might be all that, and yet not be unable to pay his debts, or insolvent; and unless you plead the veritas to all the breadth and gravity of that innuendo, the jury will be told that there is no true answer to the pursuer's case because it has not risen to the measure of the pursuer's case. This seemed to me like blocking the way to the real truth of the case and paving the way to an unjust result. But it was this very consideration which made *Russell's Case* (1) one in which it was most necessary to see whether a wide innuendo of inability to pay debts or of insolvency could be truly said to arise out of a single false allegation that a decree in absence had been passed against a debtor. The learned judges in the courts below were, I think, right in discerning in this circumstance the true significance of the decision in *Russell's Case* (1). In the course of that case, if I may mention my own opinion, I thought it right to say that I could not see my way to exclude in all circumstances from responsibility the makers or circulators of a false accusation that a decree in absence had been passed against a tradesman. And I pointed out the responsibility which newspapers must accept which, in course of their business, circulate a false statement of that character. With regard to the procedure I indicated the more reasonable innuendo which has been in terms adopted in this case. I think it was rightly adopted, and the careful judgment of the Lord Ordinary seems to show that, under the principle, a reasonable case for damages can be made out and a just and moderate result be reached. The judgments of both the courts appear to me to be sound.

Further reflection, however, inclines me to add one remark as to the heading or cautionary notes placed by Messrs. Stubbs at the top of their lists of such decrees. I think that I must amplify one observation made in *Russell's Case* (1) upon that subject. These notes are notes applicable to true statements, and not to false statements. The assertion is made that the entry which has been advertised is an extract from the court books, that it is a publication of a decree, and that it

represents neither insolvency nor anything else than the bare record. I do not think it is legitimate to apply any such cautionary preface to what was, not a true, but a false, assertion, and the statement as to what a publication of the decree might imply seems to have no application to a case in which no such decree was granted. In short, unless this view be taken, very serious consequences might arise and harm to business and reputation might result when a newspaper is made, whether inadvertently or in the way of business, the vehicle for launching upon the public a false and calumnious statement. The limits of protection for both parties are found in the law itself; and it is not open to the author or circulator of a calumny to say to the public that they must take up a falsehood in one sense and no other and by doing so to close the door to all remedy. A conditioned or specialised slander of that kind is not known to the law, the results of a calumnious falsehood arise from the impression which it—all of it, including reservations, cautions, and all the rest—makes upon the minds of the readers, an impression which may be quite apart from any artificial restriction which the author of the falsehood sought to impose. It is for those results that the author or promulgator of the libel is responsible. The law itself is not inconsiderate of all the legitimate excuses for error in such publications, but it cannot accept the will of the author of a wrong as the measure of the consequences of that wrong.

LORD WRENBURY.—A large part of the matter which has been debated before your Lordships would have given me ground for serious consideration if *Stubbs, Ltd.* v. *Russell* (1) had not been decided in this House. That case seems to me to affirm the proposition that the statement in the prefatory note that "in no case does publication of the decree imply inability to pay on the part of anyone named" precludes an action for libel resting on the ground that it does involve such an implication. The proposition expressed in general terms seems to be as follows. If one makes and published as regards A. falsely and without malice a statement that something is a fact which is not a fact and which, if it were a fact, would or might impute to A. something discreditable, then, if the writer by way of prefatory note or the like states that he does not make or ask the reader to imply from the fact stated a calumnious imputation, he is not guilty of libel. Had I been a party to the decision in *Stubbs, Ltd.* v. *Russell* (1) I fear that as in the present case I should have found myself in a minority of one. I should have thought that the question was what the reader would or might reasonably imply from the alleged facts, even if the writer told him that he (the writer) did not imply and did not invite the reader to imply anything discreditable. But for the decision in *Russell's Case* (1) I should have been of opinion with your Lordships in the present case.

The innuendo which the pursuer puts forward in the present case is "that the pursuer was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given." This divides itself into two parts which must be considered separately. The first is: "That the pursuer was given to or had begun to refuse or delay to make payments of his debts." I cannot see that this is calumnious unless you add such words as "because he was unable so to do" or "because he was insolvent." A man may refuse or delay to make payment of his debts for a variety of reasons perfectly consistent with solvency and honest intention as, for instance, that he disputes the debt, or that he has overlooked it, or that he is absent from the country, or that he is so overwhelmed with engagements (say, of a political nature) that no one need feel surprised. It may be, of course, because of inability to pay, but when there may be many reasons which are not discreditable what ground is there for selecting and attributing to the defender the imputation of one which is? I, therefore, do not regard the suggested innuendo without the addition of some such words as above suggested as being calumnious. If the suggested words are to be taken as added the innuendo becomes equivalent to that in *Stubbs, Ltd.* v. *Russell* (1) and the decision in that case is directly in point. There is no libel because the

entry read with the explanatory note is incapable of bearing the defamatory meaning ascribed to it.

The second is "that he was not a person to whom credit should be given." This, I do not doubt, is calumnious. But how is it got out of the language of the publication unless it be confined to the same meaning as before? Upon this part of the case, argument was advanced before your Lordships that STUBBS' WEEKLY GAZETTE is regarded as being a sort of black list, and that to include the pursuer's name is equivalent to saying that he is on a "black list." I cannot adopt this contention. The heading of the GAZETTE shows that it contains among other things dissolution of partnerships, applications for appointments of executors, new companies registered, and registration under the Limited Partnership Act—matters to which no stigma can possibly attach. And as regards the particular matter with which your Lordships are concerned, viz., decrees granted in absence in the small debts courts, the prefatory note expressly states that publication of the decree does not imply inability to pay. To call the list under these circumstances a black list seems to me to beg the question. It was contended, however, and the Lord Ordinary in this case accepted the contention, that inasmuch as there was not in fact in the court books an entry such as the appellants stated was there contained, the explanatory note did not apply to it for that it applied only to published extracts from the book. My Lords, this contention seems to me self-destructive. It involves the conception, first, that there is no such entry as is said to impute insolvency (in which case there is, of course, no libel), and, secondly, that there is such an entry, but that it is not qualified and explained by the explanatory note. Regard the case how you will, it is, in my judgment, covered by the principle of the decision in *Stubbs, Ltd.* v. *Russell* (1). The appeal, I think, should be allowed. Those who hereafter have to apply the two decisions of this House will find in your Lordships' judgment the grounds upon which *Stubbs, Ltd.* v. *Russell* (1) and *Stubbs, Ltd.* v. *Mazure* are to be reconciled.

Solicitors: *M'Kenna & Co.*, for *Balfour & Manson*, S.S.C., Edinburgh; *Simmons & Simmons*, for *Manson & Turner Macfarlane*, W.S., Edinburgh.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

EARL HOWE *v.* INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Swinfen Eady, M.R., Warrington and Scrutton, L.JJ.), April 2, 3, 4, 16, 1919]

[Reported [1919] 2 K.B. 336; 88 L.J.K.B. 821; 121 L.T. 161; 35 T.L.R. 461; 63 Sol. Jo. 516; 7 Tax Cas. 289]

Surtax—Deductions—Annual payments—Insurance premiums—Income Tax Act, 1842 (5 & 6, *Vict.*, *c.* 35), *s.* 164.

The taxpayer, for the purpose of raising money, assigned his life interest in settled property to an assurance company by way of mortgage, together with policies of assurance on his life. He covenanted with the company to pay the premiums on the policies and the interest on the sums of money advanced to him. In order to compute his total income for the purposes of supertax, the taxpayer claimed to deduct from his gross income not only the interest payable by him, but also the premiums on the policies.

Held: the taxpayer was not entitled to deduct the premiums since they were not "annual payments" within the Income Tax Act, 1842, s. 164.

Lord Massy v. *I.R.Comrs.* (1), [1918] 2 K.B. 598, disapproved.

Decision of SANKEY, J., [1918] 2 K.B. 584, reversed.

Notes. The Income Tax Act, 1842, s. 164, is reproduced with amendments by the Income Tax Act, 1952, Sch. 6, para. 1 (1).

Considered: *Rossdale* v. *Fryer*, [1922] 2 K.B. 303. Distinguished: *Lord Wolverton* v. *I.R.Comrs.* (1931), 16 Tax Cas. 467. Applied: *Bingham* v. *I.R.Comrs.*, [1955] 3 All E.R. 321. Referred to: *Stocker* v. *I.R.Comrs.*, [1919] 2 K.B. 702; *Williams* v. *Singer*, *Pool* v. *Royal Exchange Assurance*, [1919] 2 K.B. 108; *Smith* v. *Smith*, [1923] All E.R.Rep. 362; *I.R.Comrs.* v. *Hay* (1924), 8 Tax Cas. 636; *I.R.Comrs.* v. *Pakenham*, *I.R.Comrs.* v. *Longford*, *Gascoigne* v. *I.R.Comrs.*, [1927] 1 K.B. 594, *Jones* v. *Wright* (1927), 139 L.T. 43; *Perrin* v. *Dickson* (1929), 98 L.J.K.B. 683; *I.R.Comrs.* v. *Nettlefold*, *Nettlefold* v. *I.R.Comrs.* (1933), 18 Tax Cas. 235; *Solomon* v. *I.R.Comrs.* (1934), 18 Tax Cas. 227; *Dealler* v. *Bruce* (1934), 19 Tax Cas. 1; *Fenton's Trustee* v. *I.R.Comrs.*, [1936] 1 All E.R. 116; *Carnarvon* v. *I.R.Comrs.* (1934), 19 Tax Cas. 455; *Marland* v. *I.R.Comrs.* (1934), 19 Tax Cas. 467; *Westminster* v. *I.R.Comrs.* (1935), 19 Tax Cas. 490; *British Sugar Manufacturers, Ltd.* v. *Harris*, [1937] 3 All E.R. 702; *Watkins* v. *I.R.Comrs.*, [1939] 3 All E.R. 165; *I.R.Comrs.* v. *Compton* (1946), 175 L.T. 486; *Re Vernon*, *Edwards* v. *Vernon* (1946), 175 L.T. 421; *I.R.Comrs.* v. *City of London Corpn.* (*as Epping Forest Conservators*), [1953] 1 All E.R. 1075; *I.R.Comrs.* v. *Whitworth Park Coal Co.*, [1958] 2 All E.R. 91.

As to computation of deductions in calculating total income, see 20 HALSBURY'S LAWS (3rd Edn.) 431 et seq.; and for cases see 28 DIGEST (Repl.) 351.

Cases referred to:

(1) *Lord Massy* v. *I.R.Comrs.* (1915), [1919] 2 K.B. 354, n.; [1918] 2 K.B. 598; 28 Digest (Repl.) 357, **811.*

(2) *L.C.C.* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest (Repl.) 191, *790.*

(3) *Hill* v. *Gregory*, [1912] 2 K.B. 61; 81 L.J.K.B. 730; 106 L.T. 603; 6 Tax Cas. 39; 28 Digest (Repl.) 159, *625.*

(4) *Alexandria Water Co.* v. *Musgrave* (1883), 11 Q.B.D. 174; 52 L.J.Q.B. 349; 49 L.T. 287; 32 W.R. 146; 1 Tax Cas. 521, C.A.; 28 Digest (Repl.) 128, *486.*

(5) *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 56 J.P. 709; 41 W.R. 270; 8 T.L.R. 618; 3 Tax Cas. 185, H.L.; 28 Digest (Repl.) 83, *315.*

(6) *Lady Foley* v. *Fletcher* (1858), 3 H. & N. 769; 28 L.J.Ex. 100; 33 L.T.O.S. 11; 22 J.P. 819; 5 Jur.N.S. 342; 7 W.R. 141; 157 E.R. 678; 28 Digest (Repl.) 167, *671.*

Also referred to in argument:

Taylor v. *Evans* (1856), 1 H. & N. 101; 25 L.J.Ex. 269; 27 L.T.O.S. 110; 20 J.P. 711; 156 E.R. 1134; 28 Digest (Repl.) 167, *670.*

Re Middlesbrough, Redcar, Saltburn-by-the-Sea and Cleveland District Permanent Benefit Building Society, Ex parte Wythes (1885), 53 L.T. 492; 28 Digest (Repl.) 182, *742.*

Secretary of State in Council of India v. *Scoble*, [1903] A.C. 299; 72 L.J.K.B. 617; 89 L.T. 1; 51 W.R. 675; 19 T.L.R. 550; sub nom. *Scoble* v. *Secretary of State for India*, 4 Tax Cas. 618, H.L.; 28 Digest (Repl.) 167, *672.*

Psalms and Hymns (*Baptist*) *Trustees* v. *Whitwell* (1890), 7 T.L.R. 164; 3 Tax Cas. 7, D.C.; 28 Digest (Repl.) 321, *1414.*

Appeal by the Crown from an order of SANKEY, J., dated July 9, 1918, and reported [1918] 2 K.B. 584, made on a Special Case stated under s. 72 (6) of the Finance (1909–10) Act, 1910, and s. 59 of the Taxes Management Act, 1880, by the Special Commissioners of Income Tax for the opinion of the King's Bench Division of the High Court.

1. At a meeting of the Special Commissioners of Income Tax, held on Apr. 19, 1917, the appellant (the taxpayer) appealed against an assessment to supertax in

the sum of £27,466 for the year ended Apr. 5, 1917, made on him under the provisions of s. 66 of the Finance (1909–10) Act, 1910.

2. The appellant claimed a deduction of £815 under the provisions of s. 66 (2) (a) of the aforesaid Act. The respondents did not contest this claim, which was therefore allowed, and the assessment was thus reduced to £26,651.

3. From this sum of £26,651 the appellant claimed further deductions in respect of amounts paid by him as premiums on policies of assurance effected on his own life under the circumstances hereinafter set out. This claim was resisted by the respondents (the Crown), and it was on this sole point that the opinion of the High Court was sought.

4. The policies referred to under heading (a) in para. 5 below were policies effected by the appellant on his own life with various insurance companies bearing dates respectively in or between the years 1884 and 1896. The policies referred to under heading (b) were also policies on his own life bearing dates respectively in or between the years 1883 and 1891.

5. The payments in question fell under the two following heads:—

(a) The appellant, by a series of deeds commencing July 5, 1902, granted his life interest in certain estates and also assigned the policies of assurance described in para. 4 above effected by him on his own life to the Guardian Fire and Life Assurance Co., Ltd., by way of mortgage and further charge to secure sums advanced to him by the company, each deed containing or incorporating a covenant to the effect that none of the policies of assurance thereby mortgaged should become void or voidable, and that he would not do or suffer anything whereby the company might be prevented from receiving any of the moneys to become payable thereunder respectively or any part thereof, and that if any of the said policies had or should become voidable he would immediately thereupon at his own cost do all things necessary for restoring or keeping on foot the same; and that if any of the said policies or any new policy or policies to be effected as thereinafter mentioned had or should become void he would immediately thereupon at his own cost effect or enable the company to effect a new policy or policies on his life in his or their name in such sum or sums as would have been payable under the policy or policies which should have become void if he had died; and that every such substituted policy and the moneys to become payable thereunder should be subject to that security and the power of sale and other powers, trusts, and provisions contained in or incident to those presents in relation to the said original policies and the moneys to become payable thereunder; and further, that he would during the continuance of that security duly and punctually pay the annual premiums and other sums of money (if any) necessary for keeping on foot the said original policies and any substituted policy or policies when the same should have become due or within one week thereafter, and would forthwith deliver the receipt for every such payment to the company, and that if he should at any time neglect or refuse to make the payments aforesaid or any of them it should be lawful for the company to pay the same and that all moneys and expenses which should be paid or incurred by the company in keeping on foot the said original policies or any of them or in effecting or keeping on foot any such substituted policy or policies as aforesaid or otherwise with relation to the premises with interest for the same at the rate of 5 per cent. per annum from the time or respective times of the same having been paid or expended should be repaid to the company by the appellant on demand and on repayment should be charged on the premises thereby mortgaged.

(b) The appellant in consideration of sums advanced to him by the said insurance company and under the powers conferred on him by an indenture of settlement dated May 31, 1883 (the principal indenture), had jointly with his father, the late earl, appointed by an indenture of mortgage dated Mar. 1, 1894, certain estates from and after the death of the late earl to the use of the said insurance company by way of mortgage and on the execution of such mortgage it was agreed that the present earl (then Viscount Curzon) should assign to the said insurance company

the policies of insurance on his own life described in para. 4 above, and in such assignment there was contained a covenant by the then viscount that he would not by any act or omission cause or allow any policy thereby assigned or any policy substituted therefor as thereinafter provided to become void or voidable, and would during his life from time to time duly pay all money payable for keeping on foot any policy thereby assigned or any policy substituted as aforesaid, or for restoring the same respectively if and when voidable, and if any such policy should become void would effect on his life a new substituted policy or policies with such office and in such names or name as the trustees or trustee of the principal indenture should direct and for an amount equal to the sum which would have been payable under the void policy if it had not become void and the viscount had then died, and would deliver and if necessary also assign every such substituted policy and deliver the receipt of every such payment to the trustees or trustee, but subject to the right of any mortgagee thereto, and would not do or suffer any act or thing by means whereof the trustees or trustee might be prevented from receiving any money assured by any policy whether original or substituted, subject to the trusts of these presents, and that the life estate of the viscount under the principal indenture should stand charged with all money thereby covenanted to be paid to him.

6. The late earl died on Sept. 25, 1900.

7. The appellant had always himself paid the interest on the sums advanced by the insurance company as mentioned in para. 5 above, and in computing the said assessment to supertax for the year ended Apr. 5, 1917, due allowance had been made for such interest. The appellant had always himself paid the premiums on the policies in question to the insurance company, and from such payments no deduction had even been claimed in respect of income tax. No allowance in respect of such premiums had been made in computing the said assessment for the year ended Apr. 5, 1917.

At the hearing before the special commissioners it was contended on behalf of the appellant: (a) That the payments of the premiums being annual, and being payments which the appellant under the covenants contained in the several deeds had covenanted to pay, were "annual payments" within the meaning of s. 164 of the Income Tax Act, 1842, and within r. 17 of Sched. G of s. 190 of that Act, which sections were made applicable to supertax by s. 66 (2) of the Finance (1909–10) Act, 1910. (b) That for the purposes of supertax the income to be estimated was the true and real income of the taxpayer after deducting annual interest or other annual payments reserved or charged thereon. (c) That there was no distinction in principle between the annual premiums payable and paid by the appellant and the annual mortgage interest which admittedly was properly deducted. (d) That the appellant had covenanted to pay the annual premiums and his income was charged with the payment thereof, and that s. 36 (1) of the Finance Act, 1916, had no application. (e) That the principle which applied was that stated by Lord Davey in *L.C.C.* v. *A.-G.* (2), where he said ([1901] A.C. at p. 42):

> "It was, no doubt, considered that the real income of an owner of incumbered property, or of property charged, say, with an annuity under a will, is the annual income of the property less the interest on the incumbrance or the annuity."

On behalf of the respondents it was contended (inter alia): (a) That the payments of premiums arose and were payable solely under the contracts or policies with the insurance companies, and that as between the appellant and such companies those payments were not annual payments reserved or charged on the appellant's income within the meaning of s. 164 of the Income Tax Act, 1842. (b) That the words "other annual payments" in the aforesaid section were subject to the rule of ejusdem generis, and referred only to payments which were of a like nature with annual interest, and from which the taxpayer had a legal right to enforce, and the receiver was legally bound to allow, deduction of income tax, and

that premiums on a policy of life assurance were of an essentially different character. (c) That the claim was in effect a claim to deduct life insurance premiums, which as such would be prohibited by s. 36 (1) of the Finance Act, 1916.

The respondents were of opinion that in computing the total income of an individual from all sources for the purposes of exemption or abatement under the Income Tax Acts, and therefore pursuant to s. 66 (2) of the Finance (1909–10) Act, 1910, for the purposes of supertax, such annual payments only could be deducted as were reserved or charged on income and operated wholly and exclusively by way of diminution of income, and that payment of premiums on policies of life assurance were not such annual payments, as they were in fact allocations of income to the formation of a capital fund. They therefore refused to make the deductions claimed by the appellant under the headings (a) and (b) of para. 5 of the Case, and fixed the assessment at £26,651.

SANKEY, J., held that the Special Commissioners of Income Tax had arrived at an erroneous conclusion, and that the taxpayer was entitled to have the amount of the premiums paid on the life assurance policies deducted from his income in arriving at the assessment made upon him for the purposes of supertax.

The Attorney-General (*Sir Gordon Hewart, K.C.*) and *T. H. Parr* for the Crown. *Tomlin, K.C., William Finlay, K.C.*, and *A. M. Bremner* for the taxpayer.

Cur. adv. vult.

Apr. 16, 1919. The following judgments were read.

SWINFEN EADY, M.R.—The Commissioners of Inland Revenue appeal from a judgment of SANKEY, J., whereby he allowed an appeal on a Case stated by the Special Commissioners of Income Tax, and remitted the Case to the Special Commissioners. In so deciding the learned judge acted contrary to his own view, but considered that it was his duty to follow a decision on the same point of a majority of the judges of the King's Bench Division in Ireland.

The point which has to be decided arises in this way. Earl Howe is tenant for life of settled estates, and, in order to raise money, has conveyed such life estate by way of mortgage, including in the security policies on his life in respect of which he has covenanted to pay the assurance premiums. In calculating Earl Howe's income for supertax purposes it is not disputed that he is entitled to deduct from his gross income the interest payable on his mortgages. He claims, however, also to deduct the annual premiums payable in respect of his life policies. The Inland Revenue Commissioners deny that he has any right to make this deduction, and whether he is so or not is the question to be decided.

Earl Howe, in support of his claim to make the deduction, relies mainly on s. 164 and s. 190, Sched. G., r. XVII, of the Income Tax Act, 1842.

Supertax was imposed by the Finance (1909–10) Act, 1910, as an additional duty of income tax, and by s. 66 (2) of that Act, for the purposes of the supertax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatement under the Income Tax Acts. The right to deduct life assurance premiums as such for supertax purposes was taken away by the Finance Act, 1916, s. 36 (1). But the claim to deduct is based on these premiums being at all events "annual payments" and as falling within the language of s. 164 of the Act of 1842. That section provides that every person claiming to be entitled to exemption shall deliver to the assessor a notice of his claim to exemption, together with a declaration and statement setting forth the sources of his income, and the particular amount arising from each source

> "and also every sum of annual interest or other annual payment reserved or charged thereon, whereby the income shall or may be diminished."

By s. 190 it is enacted that Sched. G, with the rules and directions contained in it, shall be observed in making returns of the amount of annual value or profits on which any duty is chargeable under the Act, so far as the same are respectively applicable to the case of each person. Schedule G, r. XVII, is headed:

> "Lists, declarations, and statements of discharge, or in order to obtain exemptions. Third: Declaration of the amount of interest, annuities, or other annual payments to be made out of the property or profits assessed on the claimant distinguishing each source."

The contention on behalf of Earl Howe is that the annual premiums on the policies are "annual payments" and that they have to be made out of the profits brought into charge and are charged thereon. And they are charged on his income in this manner, that if he fails to pay the premiums, in accordance with his covenant, his mortgagees have power to pay them and may resort to the security for what they shall so pay.

It cannot be disputed that these annual premiums are, in one sense, "annual payments." But the question is—are they "annual payments" within the meaning of s. 164? The Inland Revenue Commissioners contend that no annual payment is within the section unless the payment is one in respect of which the person paying can deduct from it the income tax he may have paid in respect of it, and so pass on the burden of the tax to the recipient of the income. Of course, premiums on life insurance must be paid in full to the assurance company, and no deduction therefrom on account of income tax is permissible. On the other hand, interest from which tax has been deducted will form part of the income of the payee, and will have to be treated by him as part of his income. Unless the payer could deduct the interest from his income, the result would be that such income would be subjected to double taxation.

On the other hand, premiums of life assurance paid to an assurance company are not subject to assessment as annual payments, although they doubtless form items in an account on which the gains and profits of the assurance company for the year are to be arrived at.

Section 164 is one of a series of sections, beginning with s. 163 and ending with s. 170, dealing with exemptions and the mode of claiming exemption. Under s. 163 any person charged or chargeable to income tax, either by assessment or by way of deduction from any rent, annuity, interest, "or other annual payment," to which he may be entitled, whose aggregate annual income, estimated according to the several rules and directions of the Act, is less than £150, shall be exempted from the duties of income tax, and shall be entitled to be repaid the amount of all deductions or payments, except so much of such duties as the person claiming such exemption may be entitled to charge against any other person, or to deduct or retain out of any payment to which the claimant may be liable. The next section (s. 164) prescribes the mode for proceeding on any such claim of exemption. I am of opinion that s. 164 does not confer any new right, but merely prescribes the mode for carrying into effect the exemption granted by s. 163. If this be the true construction of s. 164, it follows that no deduction can be made in respect of "any sums of annual interest or other annual payment reserved or charged thereon" which is not authorised by some rule or direction of the Act—or, in other words, which is not an annual payment subject to income tax. Moreover, this construction of the Acts leads to a reasonable result. In the case of a mortgage of a life estate, the interest on the money lent is payable out of the income of the estate. But on the cesser of the life estate, there would be no further funds either to keep down further interest, or to repay the principal, were it not for the policies on the life of the tenant for life. The premiums are in effect annual contributions towards a sinking fund. The sums assured by the policies form a fund to repay the loan on the dropping of the life, with the additional advantage that even if the life drops prematurely and before the ordinary expectation of life is exhausted, yet the policy moneys become presently payable and available to discharge the principal of the

loan. Although the premiums on the policies are payable annually, they are not in the nature of income payments, and Earl Howe is not entitled to deduct the amount of them in estimating his income for the purposes of supertax.

I agree with the opinion of PALLES, C.B., in the Irish High Court of Justice, who delivered a dissenting judgment in the unreported case of *Lord Massy* v. *I.R.Comrs.* (1), and also with the opinion which SANKEY, J., would himself have given effect to if he had not considered himself bound by the judgment of the majority in the Irish court.

I am of opinion that the appeal of the Inland Revenue Commissioners should be allowed, and the decision of the special commissioners restored.

WARRINGTON, L.J.—The question in this case is whether the Earl Howe is entitled, in estimating the amount of his total income for the purposes of supertax, to deduct annual sums paid as premiums on policies of assurance on his own life pursuant to covenants contained in mortgages of a life estate coupled with such policies of assurance. SANKEY, J., contrary to his own opinion, but in deference to that of a majority of the judges in the King's Bench Division in Ireland, expressed in *Lord Massy* v. *I.R.Comrs.* (1), has given judgment in favour of Lord Howe's claims. The Commissioners of Inland Revenue appeal.

There are two mortgages of the life estate and policies. In each case the mortgagor covenanted to pay the premiums. In one of them power is given to the mortgagees in the event of default on the part of the mortgagor to pay the premiums and any moneys so expended are to be a charge on the mortgaged premises. In the other case the charge is "of all money hereby covenanted to be paid by him." The effect of the two provisions is substantially the same—viz., that if default is made and the mortgagees pay, they will be entitled to a charge. In fact Lord Howe has regularly paid the premiums, and none of them has so far become actually charged on the life interest.

Under s. 66 (2) of the Finance (1909–10) Act, 1910, for the purposes of supertax the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts. No deduction is now allowed, as it was originally, for premiums on policies on the individual's own life or that of his wife.

The sections of the Income Tax Act, 1842, relating to exemptions and abatements are s. 163 and s. 164. The material part of s. 163 is as follows:

> "Any person charged or chargeable to the duties granted by this Act, either by assessment, or by way of deduction from any rent, annuity, interest or other annual payment to which he may be entitled, who shall prove before the commissioners for general purposes, in the manner hereinafter mentioned, that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act, is less than [so much] shall be exempted from the said duties, and shall be entitled to be repaid the amount of all deductions or payments on account thereof in the manner hereinafter directed, except so much of such duties as the person claiming such exemption shall or may be entitled to charge against another person, or to deduct or retain from or out of any payment to which such claimant may be or become liable."

The mode in which the claim for exemption or abatement is to be made is provided for in s. 164:

> "Every person claiming to be entitled to such exemption as last aforesaid shall, within the time to be limited as hereinbefore directed for delivering in the lists, declarations, and statements required by this Act . . . deliver or cause to be delivered . . . a notice of his claim for such exemption, together with a declaration and statement signed by such claimant, and in such form

as may be provided under the authority of this Act, declaring and setting forth therein all the particular sources from whence the income of such claimant shall arise, and the particular amount arising from such source, and also every sum of annual interest or other annual payment reserved or charged thereon, whereby the income shall or may be diminished, also every sum which such claimant may have charged or may be entitled to charge against any other person for or on account of the duty made payable by this Act, or which he may have deducted or retained, or may be entitled to deduct or retain, under the authority of this Act, from or out of any payment to which he may be or become liable."

The form there referred to is described in Sched. G. of s. 190, r. XVII, which is headed: "Lists, declarations, and statements of discharge or in order to obtain exemption," and the third head is as follows:

"Declaration of the amount of interest, annuities, or other annual payments, to be made out of the property or profits assessed on the claimant, distinguishing each source."

I agree with KENNY, J., and PALLES, C.B., that the only deductions which can be made are such as are authorised by some direction of the Act. The obvious object of the provisions I have read is to ascertain the amount of income which but for the exemption would be chargeable with tax. Primâ facie a man is chargeable in respect of all the income he receives and the mode in which he expends it is immaterial. But there are certain payments which are in the first instance treated as included in his own income for the purpose of assessment on him, but the tax on which he is entitled to retain on making the payment to the recipient with the result that the tax is ultimately borne and paid by the latter. These payments are part of the taxable income of the recipient and not of the person who makes them: (see s. 102 of the Act of 1842 and s. 40 of the Act of 1853). There may also be annual payments the amount of which is not even in the first instance included in the taxable income of the payer but which are subject to tax in the hands of the recipient. An example of such a payment is to be found in *Hill* v. *Gregory* (3).

In my opinion the actual payments referred to in s. 164 and in s. 190, Sched. G, r. XVII, are those and those only which for taxation purposes are treated as income not of the payer but of the recipient, in respect of which the latter has to bear the duty. Do the annual payments in question fall within this category? In my opinion they do not. They are clearly not annual payments within s. 102 of the Act of 1842 or s. 40 of the Act of 1853. They are in truth instalments of purchase money for a capital sum payable on death. They go no doubt to swell the profits and gains arising or accruing to the assurance company on which income tax is chargeable. But the tax is not charged on the premiums themselves.

In this respect there is a clear distinction between interest payable under the mortgage and the amount of the premiums. The interest is within the express terms of s. 102 of the Act of 1842 and s. 40 of the Act of 1853 and the person liable to pay is entitled to deduct the tax on making his payment.

Having regard to the view that I take as to the meaning of the expression "annual payments" in s. 164, it is unnecessary to decide whether, if the payments in question were such annual payments, they could be said to be "reserved or charged on the income whereby the income shall or may be diminished." If these words are to receive a strict interpretation the sums paid for premiums are not either reserved or charged on the income. Any sums which the mortgagees may pay would no doubt be so charged, but, so long as the mortgagor pays, the income is not subject to any charge in respect thereof. But I think that these words are not used in a strict sense. If they were they would exclude for the purposes of exemption annual payments made in pursuance of a personal obligation as to which under s. 102 the liability to the tax is cast on the payer. Moreover, any annual sum charged in the proper sense upon income diminishes that income, and

if such a sum alone were referred to the words "whereby the income shall or may be diminished" would be unnecessary.

Again in s. 190, Sched. G., r. XVII, the expression used apparently in reference to the same subject-matter as that referred to in s. 164, is "out of," and not "reserved or charged on" the income. I think the words now in question are used in what I may call an income tax sense; that is to say, they connote all annual sums which, though in the first instance treated as included in a man's income, are not part of it for taxation purposes, but are for these purposes part of the income of the recipient. If, therefore, contrary to the view which I have expressed, the amount of the premiums could be treated as an annual payment within the section, the words "reserved or charged thereon" would not prevent their being deducted.

The result is that in my judgment the appeal should be allowed and the decision of the commissioners restored. This gives effect to the opinion of SANKEY, J., although the order made by him is reversed.

SCRUTTON, L.J.—Lord Howe has an income from various sources which renders him liable to supertax. He has also, through family circumstances immaterial to the present case, to pay interest on borrowed money, and to pay premiums on policies of insurance effected to provide a security for his loan. He claims to deduct from his income, in order to ascertain the amount on which he should pay supertax, the annual interest which he pays on the loans and the premiums on the policies. The Crown, for reasons appearing hereafter, admit his claim to deduct interest, but object to his claim to deduct premiums, and he was assessed on these lines. On appeal SANKEY, J., against his own view but following the views of the majority of the Irish Court of King's Bench (PALLES, C.B., dissenting) in *Lord Massy* v. *I.R.Comrs.* (1), allowed the deduction of premiums. The Crown appealed.

Under s. 66 of the Finance Act, 1910, the income liable to supertax is to be the total income of the individual from all sources for the previous year estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts. By present legislation, however, insurance premiums cannot be deducted in ascertaining the amount of supertax (Finance Act, 1916, s. 36 (1)). The taxpayer, therefore, must found his claim to deduct on some other quality of the payments, and I understood that he endeavoured to do so, by referring to s. 164 of the Income Tax Act, 1842, and asserting that the premiums were annual payments reserved or charged on his income or the sources thereof, whereby the income would or might be diminished, and he was therefore entitled to deduct them.

The facts as to the premiums are these: By a deed of 1894 Lord Howe, then Viscount Curzon, assigned to trustees certain policies of assurance on his own life, and covenanted that he would pay the premiums thereon, and if the policies lapsed would effect substituted policies, and that his life estate should stand charged with all moneys covenanted to be paid "to" (which it was agreed should be "by") him. The payment of premiums was therefore secured by a charge on the life estate. The premiums have always been paid.

Under a second deed of 1902 Lord Howe mortgaged among other things three policies of assurance, and covenanted that he would keep in force the policies or others substituted for them; and that he would pay the premiums; that if he failed to do so the lender might pay the premiums, whether on the original or substituted policies, the cost of which to the lenders should be a charge on the life estate. It will be seen that this charge is for sums paid, if any, on the failure of Lord Howe to keep up the policies and need not be for the amount of the original premiums, but may be for more or less. All these premiums have been paid by Lord Howe.

Section 164 of the Act of 1842 on which the taxpayer relies is merely a machinery section, prescribing the method of making a claim to the exemption given by s. 163

and later sections. To understand its language one must remember that Sched. D in the Act of 1842 did not contain any express provision for charged "interest of money, annuities and other annual profits and gains not charged by virtue of any of the other schedules," such as was subsequently inserted in Sched. D in the Act of 1853. The charging section in the Act of 1842 for interest and annuities was s. 102, which provides (i) that "annuities, yearly interest of money, or other annual payments" whether charged on property of the person paying or reserved thereout, or due as a personal debt or obligation under a contract shall be charged to income tax. Whether the annual payment was or was not a charge on the property was therefore immaterial; (ii) that if the annual payments are payable out of profits and gains brought into charge, the receiver of the annuity, &c., shall not be assessed, but the payer shall be assessed and authorised to deduct a proportionate amount of tax from the receiver, who must allow the deduction, as payment of a corresponding amount of the sum to him; (iii) that where the payment is made out of profits and gains not brought into charge the assessment shall be made on the person receiving the profits according to Case 3 of Sched. D.

There was machinery in s. 104 for making the deduction. But the machinery was made more effective by s. 40 of the Act of 1853, and s. 24 (3) of the Act of 1888 as explained by LORD MACNAGHTEN in *L.C.C.* v. *A.-G.* (2) ([1901] A.C. at pp. 38 to 40).

This being in 1842 the charging section on annual payments, s. 163 provided for total exemption from duties of a person chargeable to duties, either by direct assessment or because a payer of interest to them was entitled under s. 102 to deduct it from their assessment, who proved that his annual income, estimated according to the rules and directions of the Act, was less than £150, and further provided that he should be entitled to be repaid any deductions made from him, except such as he could deduct from another person. The rules and directions of the Act forbade any deductions. See, for instance, r. 4 of Case I of Sched. D:

> "In estimating the amount of profits and gains no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains."

Lord Howe would therefore be bound to bring into his assessment for Sched. D the amount of his "annual payments." The same thing is said in s. 159, which provides that no deduction shall be made on account of any annual interest, annuity, or other annual payment "in regard that a proportionate part of the duty so to be charged is allowed [by s. 102] to be deducted on making such payments": see *Alexandria Water Co.* v. *Musgrave* (4); *Gresham Life Assurance* v. *Styles* (5).

Section 164 then provides for the mode of claiming exemption. The claimant is to deliver in the "form" provided by the Act (which refers to Sched. G, s. 190, r. XVII) a declaration setting forth the sources of his income and the receipts from each source, "and also (i) every sum of annual interest or other annual payment reserved or charged thereon whereby the income shall or may be diminished"; and also (ii) any sum which he may be entitled to charge against another person, or (iii) to deduct from any other person. Heads (ii) and (iii) refer to the amounts of tax which under s. 163 he cannot recover, because he can deduct it from another person. The reason for head (i) is not expressly stated. But I think it must mean the provision of means of calculating deductions from income to obtain exemption, and must involve an authority to deduct those sums from the total income to get the income for the purpose of exemption. It will be noticed that the claimant is not required to return "the sums payable as a personal debt or obligation by virtue of any covenant," though s. 159 uses general words covering them. When one seeks further light from the "form" prescribed in Sched. G, s. 190, r. XVII, the first and second heads give the total amount of income for which the claimant is either (i) assessed or (ii) has to allow deduction of duty by others who are assessed; (iii) is the amounts he can deduct from the total of (i) and (ii); (iv) gives the sum arrived at by deducting head (iii) from heads (i) and (ii); head (v) is

apparently to inform the revenue as to other persons who have income from which tax is deducted at the source.

The result of these sections seems to be that the "annuities, interest, and other annual payments" which can be deducted to obtain exemption are those from which the claimant can deduct tax on behalf of the recipient. Being in effect the profits of the recipient who bears the tax, they are not also to be treated as profits of the persons paying them. If no tax can be deducted on behalf of the recipient they cannot be treated as profits of the recipient, and must be treated as paid out of profits of the person paying, who is therefore to be taxed on them.

It is not all payments made every year from which income tax can be deducted. For instance, if a man agrees to pay a motor garage £500 a year for five years for the hire and upkeep of a car, no one suggests the person paying can deduct income tax from each yearly payment. So if he contracted with a butcher for an annual sum to supply all his meat for a year. The annual instalment would not be subject to tax as a whole in the hands of the payee, but only that part of it which was profits.

I never heard the suggestion that income tax could be deducted from premiums on a life policy till I saw it in the judgments of KENNY and MADDEN, JJ., in the Irish case of *Lord Massy* v. *I.R.Comrs.* (1), and I respectfully concur with PALLES, C.B., in disapproval of the suggestion. As said by BRAMWELL, B., in *Lady Foley* v. *Fletcher* (6) (3 H. & N. at p. 783), it cannot be taken that the legislature meant to impose a duty on that which is not profit derived from property, but the price of it.

These premiums are either payments of capital to obtain on the death a sinking fund—the policy moneys—or the price of such a payment or fund. They do not seem to me to be annual payments ejusdem generis with annual interest or annuities, and as income tax on them cannot be deducted against the recipient, I see no reason why the person paying should deduct them from his taxable income. To allow this would be to establish a kind of profits which would escape taxation, in the hands of the person paying because he could deduct it as an annual payment; in the hands of the recipient because it did not represent his profits. From this point of view it is immaterial whether the payment is charged or not; it is not an "annual payment" within s. 102, s. 163, or s. 164.

In taking this view I am agreeing with what would have been the view of the learned judge in the court below but for the Irish decision in *Lord Massy* v. *I.R.Comrs.* (1). I have considered the matter independently and come to the same conclusion as PALLES, C.B., with whose judgment I respectfully concur. I think also the result of this decision is in accordance with the intention of the legislature when they refused to allow any premiums as such to be deducted in getting at the income assessable to supertax.

In my view the appeal should be allowed with costs, and the assessment of £26,651, not including interest, but including premiums, restored.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Trower, Still, Parkin & Keeling.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A. COKER & CO., LTD. *v.* LIMERICK STEAMSHIP CO., LTD.

[HOUSE OF LORDS (Lord Dunedin, Lord Atkinson, Lord Parker, Lord Sumner, Lord Parmoor), November 30, December 4, 6, 1917, March 7, 1918]

[Reported 87 L.J.K.B. 767; 118 L.T. 726; 34 T.L.R. 296; 14 Asp.M.L.C. 287]

Shipping—Freight—Advance freight—"Payable on signing bills of lading"—Sinking of ship in dock before cargo fully loaded—Bulk of loaded cargo covered by signed bills of lading—Liability of charterers to pay freight in respect thereof.

Charterers chartered a ship from shipowners to carry a cargo from Liverpool to Archangel, the charter freight to be payable less 3 per cent. in Liverpool before sailing on signing bills of lading. When 1,430 tons of cargo had been shipped, of which 1,300 tons were covered by bills of lading then or subsequently signed, and 94 tons remained on the wharf or in railway waggons, the vessel caught fire and subsequently sank in the dock.

Held: as and when each bill of lading was signed a proportional part of the advance freight became payable, and could, notwithstanding the sinking of the vessel, be recovered by the shipowners.

Notes. As to the payment of freight, see 30 HALSBURY'S LAWS (2nd Edn.) 564 et seq.; and for cases see 41 DIGEST 623 et seq.

Appeal by the defendants in the action from an order of the Court of Appeal affirming a judgment of BAILHACHE, J.

The action was commenced by the present respondents, who were the owners of the steamship *Coonagh*. The appellants were a company carrying on business in Liverpool as a steamship line carrying goods from Liverpool and Manchester to, among other places, Archangel. They owned no steamers themselves, but for the purposes of their line they chartered steamers sometimes on time charter and sometimes on voyage charter. They had a home flag and a settled form of bill of lading which was headed with the name and flag, "Coker Line," and they advertised to intending shippers by means of printed cards the prospective sailings of vessels which they had chartered. By a charterparty, dated Nov. 19, 1915, the appellants chartered from the respondents the steamship *Coonagh* for a voyage from Liverpool to Archangel. The chartered freight was 225s. per ton delivered, payable on signing bills of lading, less 3 per cent. in Liverpool in cash before sailing. Before the loading was completed the steamship *Coonagh* caught fire and the efforts made to extinguish the fire resulted in her sinking in the dock. The action was brought by the shipowners claiming from the appellants the balance of her chartered freight.

Leslie Scott, K.C., and *Raeburn* for the appellants.
R. A. Wright, K.C., and *Le Quesne* for the respondents.

The House took time for consideration.

Mar. 7, 1918. The following opinions were read.

LORD ATKINSON.—In this case the ship *Coonagh*, belonging to the respondents, was chartered to carry a full and complete cargo of merchandise from Liverpool to Archangel. Mr. Roycroft, the manager of the respondents, said in his evidence that, having regard to the nature of this cargo, it was practically certain he would have to ascertain, and in fact he did have to ascertain, by measurement the weight of several portions of the cargo actually shipped. He was not contradicted in this. The parties evidently contemplated that the full cargo might be so light that when fully loaded the ship would not be sunk to her marks. They, accordingly, provided that "should the cargo not be of a nature to load steamer to draught required, charterers to pay freight on guaranteed dead weight"

of the ship, that is 225s. per ton on 1,950 tons, her registered dead weight, less 3 per cent. As soon as it became reasonably certain that the cargo to be loaded would not sink the vessel to her marks, the owner became entitled to be paid the advanced freight on 1,950 tons at this rate, less 3 per cent., unless there was some condition precedent to be performed before they were entitled to assert this claim. The appellants, as I understand, contended that there was a condition precedent, which, in fact, was not performed, namely, that all the bills of lading should be signed before the advanced freight became payable in Liverpool in cash before clearing. All the bills of lading had not been signed before the ship sank. It was admitted—it could not, upon the authorities, be successfully disputed—that, if the advanced freight became payable under the terms of the charterparty, the subsequent loss of the cargo could not affect the owners' right to that freight.

The provision in the charterparty on which this alleged contention was based is contained in two lines which run thus:

> "225s. per ton of 20 cwt. delivered. The freight to be payable on signing bills of lading less 3 per cent. in Liverpool in cash before clearing."

If this contention were sound, it would mean that the owners would be bound by the contracts with the shippers contained in the bills of lading to carry to Archangel and there deliver the goods shipped under all the bills of lading before they had received, or were entitled to receive, any portion of the advanced freight. If the captain should refuse to start till he had received the whole of the advanced freight he might thereby break the contract made with each of the shippers. It is scarcely conceivable that business men would enter into such a contract, and it certainly appears to me that on the true construction of the charterparty they never did so in this case. The words, "the freight to be payable on signing bills of lading," must mean, I think, that some kind of freight became payable on signing each bill of lading. It could not, of course, be the entire advanced freight, since that becomes payable in cash on clearing, not on signing each bill of lading. Neither can the clause, I think, mean that only the portion of the freight payable by the shipper proper to be appropriated to satisfy the advanced freight is to be then paid. Primâ facie the freight payable on signing a bill of lading is the freight the shipper, by virtue of the bill of lading, becomes bound to pay. And two provisions of the charterparty make it, in my opinion, perfectly clear that this, which may be called the shipper's freight, was the freight which, according to the terms of the charterparty, the owners were entitled to receive on the signature, on their behalf, by the captain or other authorised agent of each bill of lading.

The wharfinger's receipt provided that the freight is to be paid on delivery of the bill of lading, and that the receipt is to be sent in along with the bill of lading, and a shipping note is to accompany each load of goods. The freight here mentioned is evidently the freight payable by the shipper. On the front of the bill of lading is stamped the words: "Freight payable in Liverpool," and in the body of the bill is found the clause:

> "Freight and charges for the said goods as per margin with primage accustomed, to be due on the delivery of the goods for shipment and to be payable vessel lost or not lost by the shippers in Liverpool before the departure of the vessel at shipowner's option, and if not so paid shippers and consignees to be liable to the owners for the said freight and charges without prejudice to the right of lien therein after referred to."

The first of the above-mentioned provisions goes to show that the captain was to have nothing to do with the fixing of the amount of the freight, but that the freight mentioned in each bill of lading was, on the signing of the bill, to be taken as paid in discharge pro tanto of the advance freight, and that, if the aggregate of these sums should not equal the entire advanced freight, the balance should be paid in cash. The bill of lading is to be sent along with the wharfinger's receipt and a shipping note is to accompany each load of goods, and the bills of lading are

to be signed by the master as presented to him. There is no stipulation that they are all to be presented to him at the same time. The words suggest the contrary. For some reason, inscrutable to me, the first of the above provisions is said to be inapplicable to the present case. I cannot concur in that. I think they are entirely applicable to it. The provisions run as follows:

"The master to sign bills of lading as presented in accordance with wharfingers' or mates' receipts at any rate of freight, without prejudice to this charter, but, should the aggregate not amount to chartered rate of freight, difference to be paid on clearing in cash."

The second provision runs as follows:

"The owner or master to have an absolute charge and lien on the cargo for the security and payment of all freight."

No reference whatever is made in the charter to the receipt by the owners of only that portion of the freight payable by the shipper appropriate to the payment of the advanced freight. It would be rather a difficult matter to ascertain what that portion was, and it is, I think, certain that if it alone was meant to be paid, some method would have been suggested by which to ascertain it. It appears to me that these clauses plainly provide that the entirety of the freight payable by each shipper should be paid or taken as having been paid to the owners through their agents, the captain, or other accredited agent, against the advance freight, and accounted for by the owners, any balance of the advance freight remaining undischarged being paid in cash on clearing. No condition precedent remained, therefore, unperformed by the owners to disentitle them to this advance freight of £11 5s. per ton on the registered dead weight of the ship, when once it was definitely ascertained, as it admittedly was at an early stage of the loading, that the provided cargo would not sink the ship to her marks. These appear to me to be the plain rights and obligations of the parties on the face of the provisions of the charterparty. Any difficulty that has arisen is due to the fact that a course of dealing was adopted different altogether from that which the terms of the charterparty would suggest. The appellants were themselves wharfingers; they charter steamers for their trade but do not own any. When goods are sent to their wharves or warehouses for shipment they give wharfingers' receipts. They arrange the freight with the shipper, fill up the bill of lading, and on payment of this freight exchange the bill of lading for this receipt. The freight having been paid in advance is not mentioned in the bill of lading at all. The appellants then sign the bill of lading for the master. The specimen bill of lading is signed thus for the master: "J. J. Peters." That is the only contract the shippers have with the owners. It is not a contract made between the appellants and the shippers. If it were, why sign the captain's name? I concur with BAILHACHE, J., and the Court of Appeal in thinking that the appellants signed these bills of lading and received these freights for and on behalf of the shipowners. I also concur with them in thinking that the sum of £10,000 paid by the appellants, which forms the subject of the counterclaim, was not a loan but a payment on account of the advance freight, and that the counterclaim, therefore, fails. In my opinion, the respondents are entitled to judgment as found by the Court of Appeal, varied by substituting for the sum of £1,025 11s. 7d. mentioned therein the sum of £286 13s. 6d. and that subject thereto the appeal be dismissed with costs here and below.

LORD PARKER OF WADDINGTON.—I am asked to say that **LORD DUNEDIN** and **LORD SUMNER** concur in this judgment which I am about to deliver.

The question for decision turns entirely on the true construction of the agreement contained in the charterparty. Under this agreement, the cargo is to be delivered at Archangel or as near thereto as the vessel may safely get, and freight is to be paid at the rate of 225s. per ton delivered, but there is a subsequent clause under which, if the cargo is not of such a nature as to load the vessel to the draught

required the charterers are to pay freight on the guaranteed dead weight, namely, 1,950 tons. Inasmuch as freight is not as a general rule payable until it is earned, the freight under these provisions would not be payable, whether at the rate of 225s. per ton delivered, or at the alternative rate of 225s. dead weight capacity, unless and until the vessel had arrived at its port of destination and delivered the cargo. This event never happened, the vessel having sunk in dock before sailing. It is, however, quite a common thing for a charterparty to provide for advance payment in respect of freight and advance freight, once it becomes due, may be recovered, notwithstanding it is never in fact earned. In the present charterparty there is a clause in the following words: "The freight to be payable on signing bills of lading less 3 per cent. in Liverpool in cash before sailing." The effect of this clause is either to make 97 per cent. of the freight payable in advance, leaving the remaining 3 per cent. to be payable if and when the freight is earned, or to make the whole freight payable in advance, less 3 per cent. by way of discount or commission. It is not very material which view is taken. In the latter case the result of the freight (as opposed to advance freight) being made payable on delivery at the port of discharge would be limited to enabling the shipowner on weighing out the cargo to claim freight on any actual tonnage in respect of which advance freight owing to mistake or otherwise had not already been paid.

The real difficulty is to determine the effect of the words "payable on signing bills of lading." They may, as the appellants contend, mean that advance freight is only payable when the master has signed bills of lading covering the whole cargo. If this be the true construction no advance freight ever became payable, the loading being incomplete when the vessel sank. On the other hand, they may mean, as the respondents contend, that as and when each bill of lading is signed an appropriate part of the freight becomes payable in respect of the goods covered by such bill. In support of the former construction, stress was rightly laid on the following consideration. Primâ facie, no doubt, the freight is fixed by reference to the actual weight of the cargo, and it would be simple enough to weigh the goods put on board and to arrive at the proper proportion of the advance freight payable in respect of the goods covered by each bill of lading by taking 225s. per ton of the actual weight of such goods. But the possibility of measurement (as opposed to weight) cargo is clearly contemplated, and if measurement cargo so predominates that the vessel is not down to her marks, the freight is to be calculated, not on the actual weight of the cargo, but on the dead weight capacity of the vessel. Obviously, it is impossible to say whether a vessel will be loaded down to her marks until the whole or a large portion of the cargo is on board or otherwise ascertained. When, therefore, the first bill of lading comes to be signed the parties would not know whether the advance freight was to be calculated on the actual weight of the cargo to be shipped or on the dead weight capacity of the vessel. They could not, therefore, arrive at the proper sum to be paid by way of advance freight on the goods covered by the bill. This, it is argued, points strongly in favour of a construction which would not make any advance freight payable until the loading was complete and all the bills of lading signed. On the other hand, the following considerations appear to be material. It is contemplated that the bills of lading will be in the form usually adopted by the charterers, according to which the bill of lading freight will be payable on shipment. The master is by the charterparty bound to sign bills of lading as and when presented at any rate of freight. In doing so he will enter into a separate contract of carriage with the individual shipper and will lose any lien he would have under the charterparty for the chartered freight without obtaining any substituted lien for the bill of lading freights which have been paid on shipment. It is, therefore, reasonable to expect that on the signing of each bill he will at any rate get the advance chartered freight attributable to the goods covered by the bill. This freight may possibly be increased by events which happen subsequently, but it must in any event amount to 225s. on the actual weight of the goods covered by the bill. If it turns out afterwards that the chartered freight falls to be calculated on the dead weight

capacity of the vessel the owners must, it is true, look to the charterers for the difference; but this is a small matter compared with having to rely on their personal remedy against the charterers for the whole advance freight.

It appears to me that the solution of these difficulties lies in the course of business which is evidently contemplated. The charterparty contains a provision that if the bill of lading freights do not amount in the aggregate to the chartered rate of freight the difference is to be paid on clearing in cash. This contemplates that the bill of lading freights will in the first instance be received on behalf of the ship and accounted for before the ship sails, any balance being paid by or to the charterers to or by the shipowners as the case may require. If this course of business were followed, the difficulty of ascertaining the advance freight payable as each bill of lading was signed would be unimportant, nor would it be very material that in signing the bill the master was abandoning his lien on the goods comprised in the bill. He would get the security of the bill of lading freights instead. The fact that under the charterparty the master might have been required to sign bills even when the freights were purely nominal does not really affect this point, for it is quite clear that no one was contemplating the ship being loaded with charterers' own merchandise or carrying the merchandise of third parties otherwise than at full freights. I agree, therefore, with BAILHACHE, J., and the Court of Appeal in thinking that as and when each bill of lading was signed a proportional part of the advance freight became payable and can, notwithstanding the vessel was sunk in dock, be now recovered by the shipowners from the charterers.

There still remains the difficulty of arriving at the exact amount which the respondents are entitled to recover on this footing. When the vessel sank 1,430 tons of cargo had been shipped, of which 1,300 tons were covered by bills of lading then or subsequently signed. There were 130 tons on board for which no bills of lading were signed because the shippers never paid the bill of lading freights. No point as to this was made in argument. It was assumed that the appellants, as agents for the master, might have signed bills for all the cargo on board, and that their failure to do so ought not to prejudice the respondents. The remaining cargo, consisting of 94 tons, was ascertained and ready for shipment. It was already clear that the chartered freight fell to be calculated on the dead weight capacity of the vessel. The chartered freight was, therefore, in the events which had happened, 1,950 times 225s. This amounts to £21,937 10s. The advance freight would be this sum less 3 per cent., i.e., £21,279 7s. 7d.

The problem is to apportion this sum between the goods for which bills of lading were or might have been signed and the remaining cargo. The first question is as to the basis on which the apportionment is to be made. There appear to be only two possible bases. The first and most obvious basis is that of actual tonnage. On this basis the £21,279 7s. 7d. must be divided in the proportion which the 1,430 tons on board bears to the remaining 94 tons, and the respondents would be entitled to recover the amount attributable to the 1,430 tons less the £10,000 they have been paid on account. The second possible basis of apportionment is what I may call the conventional tonnage basis. The freight being calculated on the dead weight capacity of the vessel, it would appear reasonable to carry out the apportionment on the basis suggested by BAILHACHE, J. He appears to have taken weight cargo at the actual weight and reduced measurement cargo to tons at the conventional rate of 1 ton to 40 cubic feet, a rate which was accepted as appropriate to the circumstances of the case. Unfortunately, he did not, as he ought to have done, reduce the 94 tons to conventional tonnage in the same way and then apportion the actual advance freight of £21,279 7s. 7d. on that basis. He gave judgment for 225s. on the conventional tonnage of the goods on board less 3 per cent., the result being that the respondents recovered considerably more than they could have recovered if the total advance freight of £21,279 7s. 7d. had been actually due and there were no case for apportionment at all. The Court of Appeal recognised this error and endeavoured to correct it, but apparently on the footing of an apportionment by reference to actual and not conventional tonnage. They

first reduced the amount for which judgment had been given to the amount which could have been recoverable if the whole advance freight had become actually due, and then made a further deduction of 225s. per ton on the 94 tons not yet shipped, less 3 per cent. But why a deduction of 225s. per ton instead of the proper proportion of the total advance freight attributable to these 94 tons? I have come to the conclusion that the apportionment ought to be made on the actual and not on the conventional tonnage. On this footing, as I work out the figures, the respondents are entitled to the £21,279 7s. 7d. less £1,312 9s. 6d. The Court of Appeal gave them this sum less £1,025 16s. only. They have, therefore, obtained judgment for £286 13s. 6d. more than was due to them. This must be set right, but ought not to affect the costs of the appeal, which has substantially failed, and should be dismissed with costs.

LORD PARMOOR.—On Nov. 19, 1915, the appellants chartered from the respondents the steamship *Coonagh* for a voyage from Liverpool to Archangel. Before the loading was completed the *Coonagh* caught fire in the dock at Liverpool and sank in the dock, sustaining such damage that the cargo had to be discharged and the vessel had to undergo extensive repairs. The voyage was treated as abandoned, and none of the cargo has been carried by the respondents to Archangel. At the time of the accident about 1,430 tons of cargo were on board the steamer and there were 40 tons on the quay and 54 tons in railway waggons alongside the quay remaining for shipment to complete the cargo. No bills of lading had been signed by the master of the ship before the accident, but 163 bills of lading had been signed "for the master, J. J. Peters," J. J. Peters being a director of the appellants' company. The ship was chartered for use as a general ship, and the question for debate in the appeal depends upon the construction of the charterparty. The charterparty provides: "Should cargo not be of a nature to load steamer to draught required, charterers to pay freight on guaranteed dead weight." The cargo was, in fact, not of a nature to load steamer to the draught required, and consequently this provision becomes operative. The guaranteed dead weight was 1,950 tons.

The first question which arises is whether the freight had become payable at the time of the accident, and this depends upon a term of the charterparty: "the freight to be payable on signed bills of lading, less 3 per cent. in Liverpool in cash before sailing." It was argued on behalf of the appellants that freight had not become payable until all the bills of lading had been signed, and that, as this event had not happened, the liability of the respondents to pay freight had not arisen at the time of the accident. This argument was founded on the statement that estimated freight or advance freight implied a lump sum, and that such sum could not be ascertained until after all the bills of lading had been signed. I am not prepared to assent to this general proposition. In my opinion, the natural meaning of the charterparty is that the freight is payable distributively as bills of lading are signed. There is no maritime law or custom which imports into this term of the contract between the charterer and the shipowner any generally understood specialised interpretation other than that which the words naturally bear. There was a suggestion of difficulty in carrying out the bargain owing to a considerable portion of the cargo being shipped on the basis of measurement, but it does not appear that any difficulty did in fact arise, and in any case it would be a matter of business adjustment. Whether this be so or not, the nature of the bargain must be determined by the terms of the charterparty.

Assuming that freight has become due, I agree that the amount should be calculated on the principle expressed by Swinfen Eady, L.J., and approved by other members of the Court of Appeal. In my opinion, however, in the application of this principle, a sufficient deduction has not been made in respect of the 40 tons on the quay and the 54 tons on the railway waggons, which had not been loaded. If this tonnage had been loaded, the total amount which the ship could have carried would have been 1,524 tons. The freight payable would then have been

1,950 tons × £11 5s. less 3 per cent., or £21,279 7s. 7d. On this basis the actual payment for freight per ton would be £21,279 7s. 7d. divided by 1,524, which works out at a figure of £13 19s. 3d. per ton, and the deduction to be made in respect of 94 tons on the quay and railway waggons should be made at this rate, and not at the rate of £11 5s. per ton. The result is that the amount for which judgment has been entered is in excess to the amount by £286 13s. 6d., and that it should be reduced by this amount. Subject to this correction in the amount of the judgment, the appeal should be dismissed with costs.

Solicitors: *Lightbound, Owen & Co.*; *Alfred Bright & Sons*, for *Bateson, Warr & Wimshurst*, Liverpool.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

CROFT *v.* WILLIAM F. BLAY, LTD.

[COURT OF APPEAL (Warrington and Duke, L.JJ., and Eve, J.), May 28, 29, 30, 1919]

[Reported [1919] 2 Ch. 343; 88 L.J.Ch. 545; 121 L.T. 18; 35 T.L.R. 556; 63 Sol. Jo. 607]

Landlord and Tenant—Yearly tenancy—Commencement—Holding over—Holding over after end of fixed term of a year or years plus a fraction of a year.

Where a tenant is holding over as a yearly tenant after the expiration by effluxion of time of a tenancy for a fixed period of a year or years plus a fraction of a year the implied tenancy from year to year must be deemed to have commenced at the end and not at the beginning of the original term.

So, where parties entered into a tenancy agreement by which premises were let by the landlord to the tenants for a term of one and one-eighth of a year from Nov. 11, 1915, i.e., until Dec. 25, 1916, and after Christmas, 1916, the tenants held over and paid a quarter's rent on Mar. 25, 1917, but on June 8, 1917, gave notice to terminate the tenancy,

Held: the tenancy from year to year began on Dec. 25, 1916, and the notice of June 8, 1917, was valid and effective to terminate it.

Notes. Referred to: *Rhyl U.D.C.* v. *Rhyl Amusements, Ltd.*, [1959] 1 All E.R. 257.

As to tenancies from year to year, see 23 HALSBURY'S LAWS (3rd Edn.) 510 et seq.; and for cases see 31 DIGEST (Repl.) 45 et seq., 478, 492, 493.

Cases referred to:

(1) *Morgan* v. *William Harrison, Ltd.*, [1907] 2 Ch. 137; 76 L.J.Ch. 548; 97 L.T. 445, C.A.; 31 Digest (Repl.) 35, *1914.*

(2) *Berrey* v. *Lindley* (1841), 3 Man. & G. 498; 4 Scott, N.R. 61; 11 L.J.C.P. 27; 5 Jur. 1061; 133 E.R. 1240; 31 Digest (Repl.) 492, *6183.*

(3) *Doe d. Robinson* v. *Dobell* (1841), 1 Q.B. 806; 1 Gal. & Dav. 218; 10 L.J.Q.B. 242; 5 Jur. 434; 113 E.R. 1340; 31 Digest (Repl.) 492, *6179.*

(4) *Kemp* v. *Derrett* (1814), 3 Camp. 510, N.P.; 31 Digest (Repl.) 490, *6161.*

(5) *Doe d. Buddle* v. *Lines* (1848), 11 Q.B. 402; 17 L.J.Q.B. 108; 10 L.T.O.S. 390; 12 Jur. 80; 116 E.R. 527; 31 Digest (Repl.) 493, *6186.*

(6) *Kelly* v. *Patterrson* (1874), L.R. 9 C.P. 681; 43 L.J.C.P. 320; 30 L.T. 842; 31 Digest (Repl.) 493, *6187.*

(7) *Doe d. Holcomb* v. *Johnson* (1806), 6 Esp. 10, N.P.; 31 Digest (Repl.) 491, *6166.*

(8) *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378; 64 L.J.Q.B. 200; 72 L.T. 62; 43 W.R. 228; 11 T.L.R. 154; 39 Sol. Jo. 165; 14 R. 135, C.A.; 31 Digest (Repl.) 488, *6136*.

(9) *Right d. Flower* v. *Darby and Bristow* (1786), 1 Term Rep. 159; 99 E.R. 1029; 31 Digest (Repl.) 58, *2149*.

(10) *Doe d. Savage* v. *Stapleton* (1828), 3 C. & P. 275, N.P.; 31 Digest (Repl.) 491, *6167*.

(11) *Doe d. King* v. *Grafton* (1852), 18 Q.B. 496; 21 L.J.Q.B. 276; 19 L.T.O.S. 108; 16 Jur. 833; 118 E.R. 188; 31 Digest (Repl.) 491, *6168*.

Also referred to in argument:

Soames v. *Nicholson*, [1902] 1 K.B. 157; 71 L.J.K.B. 24; 85 L.T. 614; 50 W.R. 169; 46 Sol. Jo. 52, D.C.; 31 Digest (Repl.) 487, *6130*.

Dixon v. *Bradford and District Railway Servants' Coal Supply Society*, [1904] 1 K.B. 444; 73 L.J.K.B. 136; 90 L.T. 122; 20 T.L.R. 159; 31 Digest (Repl.) 488, *6133*.

Doe d. Clarke v. *Smaridge* (1845), 7 Q.B. 957; 14 L.J.Q.B. 327; 6 L.T.O.S. 172; 9 Jur. 781; 115 E.R. 748; 31 Digest (Repl.) 486, *6114*.

Doe d. Spicer v. *Lea* (1809), 11 East, 312; 103 E.R. 1024; 31 Digest (Repl.) 489, *6145*.

Doe d. Shore v. *Porter* (1789), 3 Term Rep. 13; 100 E.R. 429; 31 Digest (Repl.) 483, *6087*.

Roe d. Jordan v. *Ward* (1789), 1 Hy. Bl. 97; 126 E.R. 58; 31 Digest (Repl.) 492, *6178*.

Doe d. Collins v. *Weller* (1798), 7 Term Rep. 478; 101 E.R. 1086; 31 Digest (Repl.) 492, *6182*.

Quinn v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 30 Digest (Repl.) 213, *553*.

Humphreys v. *Franks* (1856), 18 C.B. 323; 27 L.T.O.S. 108; 20 J.P. 486; 139 E.R. 1394; 31 Digest (Repl.) 490, *6164*.

Clayton v. *Blakey* (1798), 8 Term Rep. 3; 101 E.R. 1234; 30 Digest (Repl.) 491, *1347*.

Appeal by the tenants from an order of ASTBURY, J., on a summons taken out by the landlord to determine whether the tenants were entitled to terminate, and did by notice to quit, dated June 8, 1917, lawfully terminate, their tenancy of certain premises demised to them by the landlord, or whether they remained tenants of such premises until Nov. 11, 1918, as from which date such tenancy was terminated by notice to quit dated May 6, 1918.

The facts appear in the judgment of WARRINGTON, L.J.

Lyttelton Chubb for the plaintiff, the landlord.

Micklem, K.C., and *Foà* for the defendant company, the tenants.

WARRINGTON, L.J.—The question in this appeal is whether a notice to quit given by the tenant was a valid notice or not. It was a notice to quit expiring at Christmas, 1917. The question is whether that notice was valid or whether the only valid notice would have been one which would expire on Nov. 11. ASTBURY, J., has held that the notice actually given was a valid notice; the landlord appeals and insists that it was not a valid notice.

By an agreement of Nov. 15, 1915, made between the plaintiff, called the landlord, of the one part, and the defendant company, called the tenant, of the other part, the landlord agreed to let and the tenant agreed to take a certain dwelling-house and premises for a term of one year and one-eighth of another year from Nov. 11, 1915, at the yearly rent of £40, payable quarterly on the usual quarter days, the first payment to be for the half quarter ending Dec. 25, 1915, and to be the sum of £5. As to the construction of that agreement there seems to be no doubt whatever. It was an agreement by which the premises were to be let for a definite term expiring at Christmas, 1916. Whether the tenancy began on Nov. 11,

the date from which the period fixed by the agreement was to run, may be a question, and there is no evidence before us to show when the tenant entered into possession, and at what date, therefore, the tenancy under this agreement began. The term unquestionably began on Nov. 11, 1915, and ended on Dec. 25, 1916. But I will assume for the purposes of this judgment that not only did the term begin on Nov. 11, but the tenancy began on that day. At Christmas, 1916, the tenant did not give up possession and the landlord did not require possession. When Mar. 25, 1917, the quarter day next after Dec. 25, arrived, the tenant paid and the landlord accepted a quarter's rent—that is to say, one quarter of the yearly rent stipulated for by the agreement. The result of that was that the tenant thereupon became a tenant from year to year upon the same terms as those expressed in the original agreement and for a definite period so far as such terms were applicable to a tenancy from year to year. The law on that subject is expressed far better than I can express it by COZENS-HARDY, M.R., in *Morgan* v. *William Harrison, Ltd.* (1). He said ([1907] 2 Ch. at p. 143):

> "Now there is ample authority that a tenant holding over after the expiration of a lease, if he pays rent or agrees to pay rent subsequently, becomes, if no other terms are suggested, a tenant from year to year—a yearly tenant—and there is ample authority that under those circumstances the tenant holding over is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy."

The tenant, therefore, became a tenant from year to year. What was the year of that tenancy, dealing with the matter for the moment entirely apart from authority and on the facts as we know them? When did that tenancy from year to year commence and on what date did it terminate? I think that it quite clearly commenced when the fixed term ended—that is to say, at Christmas, 1916. The first year of it would end at Christmas, 1917, and each of the subsequent years, if it were not, in the meantime, determined by a notice applicable to the case of a yearly tenancy, would expire with the Christmas in those subsequent years. Not only does that appear to be plainly the effect of what took place, but it seems to me to be in accordance with obvious common-sense. When a man has property in his possession, and he finds a tenant in the middle of a quarter and makes an agreement such as the present agreement for letting the property for a year plus the amount unexpired of that broken quarter, but provides that the rent shall be paid quarterly, what is he thinking of? He is not thinking of the time when the term shall commence. What he is intending to define and what the tenant is intending to define, is the period of the year at which the tenant shall give up possession and the landlord shall resume possession. In other words, they are creating what would be denominated a Michaelmas tenancy, a Christmas tenancy, a Lady Day tenancy, or a Midsummer Day tenancy, according to the period at which that comes to an end. If, so far, I am right that this was a yearly tenancy commencing with the expiration of a fixed period of a year and one-eighth—that is to say, commencing as from Christmas Day, 1916, then that incident of a yearly tenancy which is undoubtedly a legal incident of such a tenancy—namely, that it is determinable on the anniversary of its commencement by a six months' notice unless there be any stipulation to the contrary—would be applicable to it, and the notice given expiring at Christmas, 1917, would be not only a valid and sufficient notice, but would be the only notice which could effectually determine the tenancy.

It is said, however, that so to decide is contrary to authority, and that that authority compels one to come to the conclusion that there is a rule of law which prevents one from giving that construction and effect to the documents and the acts of the parties which I think ought to be given to them and compels one to come to the conclusion that the yearly tenancy, which never had any existence until the determination of the previous fixed term, is to be deemed to have commenced on the anniversary of the commencement of the fixed term—that is to say, in the

present case to be deemed to have commenced, not at the time the tenant began to hold over, but on Nov. 11, 1916, while the original term was still subsisting. If the authorities compel one to come to that conclusion one must give effect to them. Accordingly, it is necessary to see what the authorities are and whether they do force one to come to a conclusion which I am bound to say would be one entirely contrary to that which one ought to infer was the real intention of the parties.

The matter stands in rather a curious way. There came into COLE ON EJECTMENT, which was published in the year 1857, this statement which I will read on p. 50 of the book. I refer to this because it seems to me to be the fons et origo mali, if I may so describe it. MR. COLE says this:

> "Generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term, and notice to quit should be given accordingly."

Then he refers to a number of cases, some of which I will mention later on, but none of which in that part of his note is a case of holding over after the determination of a previous term by effluxion of time. So far as they are cases of holding over at all they are cases of holding over by the tenant and adoption by the landlord where the previous term has determined by a defect in the title of the lessor. After that passage MR. COLE adds the following:

> "And this rule prevails even when the original term did not cease at the same time of the year as it commenced. Thus where premises were originally demised for five and a half years and an implied tenancy from year to year was afterwards created."

For that proposition he cites *Berrey* v. *Lindley* (2), *Doe d. Robinson* v. *Dobell* (3), and *Kemp* v. *Derrett* (4). *Berrey* v. *Lindley* (2) and *Doe d. Robinson* v. *Dobell* (3) have been discussed before us, and I propose to say a word about them presently. He goes on:

> "There seems, however, to be some difference in this respect between a holding over by the original tenant and by an under-tenant after the expiration of a term of fourteen and a half years."

Then he refers to *Doe d. Buddle* v. *Lines* (5). It is the middle of that passage, beginning with these words:

> "And this rule prevails even when the original term did not cease at the same time of the year as it commenced,"

on which the present landlord relies as authority for the proposition for which he contends. That statement in COLE ON EJECTMENT appears verbatim in the later editions of WOODFALL ON LANDLORD AND TENANT, the earlier of which were edited by MR. COLE himself. It is simply repeated in the words in which the first two passages of that statement in COLE ON EJECTMENT appear in that book. A similar statement, though not in the same terms and not quite so strong and definite, appears in the later editions of some other text-books. It does not appear in all of them by any means. I need not mention those in which it does appear; some of them text-books of great importance on the subject.

I proceed to consider whether independently of the statement in the text-books there is any authority for the proposition that where a tenant is holding over after the expiration by effluxion of time of a previous lease for a period of years plus a fraction of a year, the implied tenancy from year to year must be deemed to have commenced on the anniversary of the commencement of the original term. Is there any authority for that proposition? In my opinion, and I hope I shall show that opinion is correct, there is no such authority.

The first case that is referred to by MR. COLE is *Berrey* v. *Lindley* (2). That was a somewhat peculiar case. An agreement was made by which a tenant

entered into possession, and the agreement purported to be for five years and a half from Michaelmas, 1823. Notice was given to determine the tenancy at Michaelmas, 1835—that is to say, more than five years after the commencement of the tenancy—and it was held that that notice was a valid notice. Of course, if the original term of five and a half years had in law been a term of that period, this would have been a case of a holding over after the expiration by effluxion of time of a previously existing term, and it would have been a case in which a notice to quit expiring on the anniversary of the commencement of the original term, and not on the anniversary of its determination, would have been held to be a valid notice. There is one material fact which I have not yet stated, and that was that the original lease for a term of five and a half years was void by reason of the Statute of Frauds. Consequently, there was no definite term of five and a half years. But the tenant having been in possession, and he having paid rent, and the landlord having accepted rent, he had been in fact a tenant from year to year from the beginning with the possible stipulation, I will not say at the moment whether effectual or not, that the tenancy from year to year had the peculiar property that it might have been determined by a notice at the end of the first five years and a half. Whether that was so or not does not matter. The point is that that was a tenancy from year to year from the first. It was a Michaelmas tenancy, and it was held to have been rightly determined as a Michaelmas tenancy. There was no case of holding over at all, and for that reason it plainly does not support the proposition stated in the text-books.

The other case was *Doe d. Robinson* v. *Dobell* (3) which is reported in two places. It is reported in 1 QUEEN'S BENCH REPORTS, at p. 806, and also in 1 GALE AND DAVISON'S REPORTS, at p. 218. The reports are extremely meagre, both of them, and it requires some care and the exercise of some ingenuity to find out exactly what was the view taken by the learned judges who decided it, and the grounds on which they proceeded—particularly the latter. The facts were these. The lessor had demised certain premises to the defendant by an agreement dated Aug. 13, 1838, for one year and six months certain from the date of that agreement, at the yearly rent of £26, to be paid quarterly, the first quarterly payment to be made on Sept. 29 then next, but the proportion of the rent to be repaid to the tenant. It is readily seen what that is. The tenant is to make a quarter's payment of rent on Sept. 29, and he is to be allowed for the broken half-quarter. It was further agreed that three calendar months' notice should be given on either side previous to the determination of the tenancy. The defendant entered and held under the agreement to the end of the year and six months and afterwards, until the bringing of the action, which was on Oct. 5, 1840. On May 7, 1840, the landlord gave the defendant notice to quit on or before Aug. 13 next, that is the anniversary of the day on which the tenancy commenced. The notice goes on:

> "Or at the expiration of the current year of your tenancy which will expire next after the end of three months from and after your being served with this notice."

The notice was objected to on the part of the defendant. The judge held it good and the jury under his direction found a verdict for the plaintiff. Then there was a motion for a new trial on the ground of misdirection. The Court of Queen's Bench held that the direction of the learned judge was correct and dismissed the application for a new trial. They refused the rule. If that was a case of a holding over from the determination of a fixed term which had expired by effluxion of time, that would again be an authority in support of the proposition which the landlord contends for here. But when the case is looked at, and when the judgment of the judges who took part in the decision, and especially that of PATTESON, J., are considered it is quite plain that what the court held there was in this case, as in *Berrey* v. *Lindley* (2), that it was really a tenancy from year to year from the first. LORD DENMAN said simply this without giving any reasons whatever (1 Q.B. at p. 808):

"I am of opinion that the three months' notice must be calculated with reference to the original commencement of the tenancy."

I am reading here from the QUEEN'S BENCH REPORT. PATTESON, J., does give a little more, but not much. He says (ibid.):

"In all cases the current quarter refers to the time of entry unless the parties stipulate to the contrary. Here therefore the current year would end on Aug. 13."

I pause there for one moment. The expression "current year" which is placed by the reporter in inverted commas is found not in the agreement for tenancy, but in the notice to quit and it is a little difficult to see why PATTESON, J., refers to it. However, there it is. He goes on thus, and this is what seems to me to be the important part of his judgment as throwing light on what it really means:

"It may be that on this construction the six months certain will have no meaning, but if parties will express themselves so vaguely we cannot help the consequences."

If the judge had been of opinion that this was a case of holding over after the determination of effluxion of time of a fixed period of a year and six months, he would not have been failing to give effect to the expression "six months certain," and I think what is really meant is: "We are of opinion that this was not for a fixed period with a holding over, but that it was a tenancy from year to year from the beginning with, possibly, a minimum duration of a year and six months, and that effect might have been given to the agreement." I think the decision really was that on the true construction and effect of the agreement in the particular case, and having regard in particular to the provisions as to the notice to determine contained in the agreement, this must be regarded, not as a lease for a fixed term followed by a tenancy from year to year implied by law, in fact holding over, but a tenancy from year to year from the first; and that PATTESON, J., did attach considerable importance to the fact that there was in the agreement this provision requiring the three months' notice appears from the reference which he makes to *Doe d. Robinson* v. *Dobell* (3) in the course of the argument in the subsequent case of *Doe d. Buddle* v. *Lines* (5).

So far I have dealt with the only two authorities which are referred to by the text-writers as supporting the proposition that where there is an implied tenancy occasioned by the holding over after the expiration of a fixed term which does not begin and end at the same period of the year the tenancy from year to year dates from the anniversary of the commencement and not from the end of the fixed term. But reliance is also placed on a number of cases which, as I have already mentioned, are cited by MR. COLE as supporting this passage:

"Generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of year as the original term, and notice to quit should be given accordingly."

When you look at those cases you see that they are of this nature. A lease is created, we will say, by a tenant for life for a term exceeding that for which he had power to create a lease. It expires by the death of the tenant for life at an odd period of the year. The reversioner does not desire to disturb the tenant, and the tenant pays and the landlord accepts a quarter's payment of the rent in accordance with the provisions of the lease under which the tenant holds. It has been held that the acceptance of rent by the landlord under those circumstances, unless there is some fact which qualifies its effect, justifies the court in inferring as a matter of fact that he adopts the tenant as his tenant upon the terms of his original lease, including the period of the year for which that lease is a lease. That is to say, if the original lease was a Michaelmas lease and the tenant for life dies at some period not being Michaelmas day, it remains a Michaelmas lease.

Of course it is a tenancy from year to year only, and not for a definite term, but it remains under those circumstances a Michaelmas lease, and it would be determinable by notice expiring at Michaelmas.

A striking example, not cited by MR. COLE because it happens to have been decided many years after his book was published, of that state of things is in *Kelly* v. *Patterrson* (6). The decision there was founded on the principle which I have just been mentioning. I need not go through it in detail, but the facts as stated in the headnote were these (L.R. 9 C.P. 681):

> "Premises were let by the owner in fee of a lease expiring at midsummer, 1866. The lessee underlet to the defendant on a lease from year to year, commencing at Michaelmas The defendant was in possession at midsummer, 1866, when the lease of his immediate lessor came to an end"

that is to say, his immediate lessor had granted him a Michaelmas lease, one which would only expire at Michaelmas, 1866, while he had no power to grant him more than a tenancy which would expire at midsummer, 1866

> "and the owner in fee granted a new lease to the plaintiff as from that time. The defendant, who continued to occupy the premises, paid the plaintiff a sum equal to a quarter's rent on the terms on which he had held the premises as for rent from midsummer to Michaelmas, 1866."

He went on paying rent at an increased rate. But that was a matter of agreement, and in December, 1873, the plaintiff gave the defendant six months' notice to quit at midsummer. The decision of the court there was that the proper inference to draw from those facts was that the new landlord had adopted the sitting tenant as his tenant upon the terms on which he was holding, which gave him a right to have his lease determined at Michaelmas and not at midsummer. That is all—that the proper inference to draw from the facts was that the tenant had been adopted on the old terms.

I think that I have said all that it is necessary to say for the purpose of showing that there is no rule of law which prevents me from coming to the conclusion, as to the true effect of what has taken place in the present case, to which, as I have already said, I think the court ought to have arrived. But there are one or two authorities which I think support the view which I have been expressing because they show that the courts try to hold that where in the case of an ordinary yearly tenancy the rent is payable quarterly on the ordinary quarter days that yearly tenancy shall begin and end on one of those regular quarter days. There are many examples of that. The best one I think, and one of the earliest, is *Doe d. Holcomb* v. *Johnson* (7). A tenant goes into possession at an odd time. He pays rent for the odd time up to the next quarter day, and thereafter he pays and the landlord accepts rent at the regular quarter days. The court under those circumstances comes to the conclusion, as it was bound to do, that there was a tenancy from year to year. But it holds, and if I may say so with all respect, in accordance with supreme common sense, that the tenancy from year to year does not begin at the odd time but that it begins at the first regular quarter day succeeding that odd time and then goes on regularly as a tenancy from year to year determinable as such tenancies are at the end of each succeeding year being the regular quarter day and not the odd time as from which the tenant originally took possession. There are a number of cases of that nature, I need not go through them, which have been cited to us. With reference to that part of the case I must just refer to *Sidebotham* v. *Holland* (8) because a great deal has been said about that in the argument for the landlord. That was a case of a tenancy from year to year and the question arose whether it began on May 19 or whether it began on the succeeding regular quarter day, namely, June 24, and it was held that it began on May 19. But when one looks at it the reason why the court came to that conclusion was that the tenancy there was created by a written agreement and the terms of the written agreement were too much for them to arrive at any other conclusion

than that it began as the agreement provided on May 19. But I think it is clear, if you look at the opening words of LINDLEY, L.J.'s judgment, that, if it had not been for the terms of the agreement the principle of cases such as *Doe d. Holcomb* v. *Johnson* (7) might have been applicable to that case, but that those cases were excluded by the fact that there was an express stipulation excluding their application.

There is only one other matter concerning which I must say a word. The statement in the text-books to which I have referred has appeared now in well-known books for a good many years, and it is suggested that we ought not lightly to express an opinion contrary to the view thereby expressed. In my judgment, in this particular case there is no such objection to the judgment we are pronouncing. It is not a case in which numbers of titles depend upon the law as expressed in the text-books. It may be that the result is that a few notices to quit may have been given and accepted as valid which were not valid or that a few notices to quit may have been given and may have been treated as invalid by reason of the statement in the text-books. But that is the utmost of what will have happened. In these circumstances I think that we are perfectly free to express our own view, and I think, for the reasons which I have stated, that the yearly tenancy in this case began and ended at Christmas, and was duly determined by a notice to quit expiring at Christmas, and that, therefore, this appeal fails and must be dismissed.

DUKE, L.J.—I am of the same opinion. I should add nothing to what has been said by WARRINGTON, L.J., if it were not that the conclusion at which the court has arrived is in contradiction to passages laid down in text-books which have been regarded as works of authority, and, as is said on the part of the landlord, may well be deemed to have been acted upon by a large number of persons. For my part, I think that the rule of law applicable to the present case is clear beyond argument if you consider the true nature of the case. It is, I think, to be regretted that attempts should be made to complicate the simple relations of everyday life, such as those of landlord and tenant under a tenancy from year to year, by arbitrary, and, on the face of them, perverse rules laid down with regard to particular sets of circumstances. The law of landlord and tenant, happily, is well settled in this country. I deem it to have been settled upon the terms of the agreement here beyond all question. If the controversy in this case had been what was the effect of the agreement between the parties here, it would have been sufficient to say that the agreement between them clearly had not the effect which is alleged on behalf of the landlord. The term, which was created by the agreement was a term certain, and it was not a term from year to year, and it lacked some of the necessary ingredients in any written agreement for a term from year to year. In particular, it did not provide for any term of notice. The agreement was for a letting for a broken period in the Christmas quarter of 1915 and for the year 1916 down to Christmas; and it was provided that the broken period should be paid for as a half-quarter and that subsequent to that there should be a quarterly rent. In my opinion, the irresistible conclusion from those facts, when the authorities are taken into consideration, is that that was a tenancy which must be regarded as the beginning of a tenancy from year to year as from Christmas, 1915. That was the obvious convenience of the case. The quarterly rent ran from that period as a quarterly rent and the tenancy was to determine at a period which coincided with that period. Therefore, so far as the elements of a tenancy from year to year were in question at all, you had determination of the year's tenancy at Christmas and you had facts entirely consistent with the commencement of a year's tenancy at Christmas, and, in my opinion, only consistent with that, and the matter is to be regarded as the beginning of a tenancy from year to year, with a tenancy beginning at Christmas.

Therefore, if the matter had been only the construction of this agreement, it appears to me the tenant would have been clearly right, and the attempt to treat him as a tenant who had come in upon a yearly tenancy in the middle of a quarter

would have been a mere piece of vexation. But the conduct of the landlord is deprived of that character in this case, because he has the warrant of text-writers for the view he took of the result of the transaction. What is contended for is that, where you have a tenancy for a term certain, with holding over and the payment of a quarterly rent, there is an inflexible rule of law that the tenancy from year to year, which is to be inferred from the occupation and the payment and receipt of the quarterly rent, shall be deemed to have commenced at the commencement of the term certain. If the law of this country had been decided in that sense it would have been contrary to all the settled habits of the people of this country. To my mind, the proposition is wrong in principle. There is a very interesting statement in PRESTON ON CONVEYANCING, in the part of the treatise which deals with merger, which explains, in what I think is a very lucid and scientific fashion, the process of reasoning by which you arrive at the conclusion that a term which arose under an express agreement and a subsequent term following it which arose by conduct of the parties, may be deemed to be merged in one term. It is a passage in vol. 3 of PRESTON ON CONVEYANCING (Edn., 1829), which begins at p. 76, and, as a matter of instruction, can be pursued with interest to p. 83. It begins, so far as appears to be of interest in this case, with some observations on the applicability of the doctrine of merger to legal entities which differ in their essence. If you are going to merge a term certain with a term of years, in order to make a harmonious merger you certainly must have regard to the characteristics of the term of year. PRESTON says this on the subject at p. 77:

> ". . . the law considers the lease [that is a lease from year to year, which arises by the continued conduct of the parties] with a view to the time which has elapsed as arising from an estate for all that time, including the current year, and with a view to the time to come, as a lease from year to year."

The law treats it as of the essence of the matter that the whole occupation shall have been under a tenancy which had the characteristics of a tenancy from year to year; and if you apply to the various cases in which this matter has been considered the governing consideration that what was being dealt with was a tenancy from year to year, the supposed difficulty in dealing with the authorities entirely disappears. I think that the principle, so far as it appears, is that in the absence of express agreement to the contrary, a tenancy from year to year is to be determined at the end of a year of the tenancy. That seems to me to have been laid down virtually in every case in which the matter has been discussed, so far as the cases have been brought to the attention of the court, and not less in the cases on which the landlord relies than in the general body of cases which are almost innumerable. That was the principle laid down by LORD MANSFIELD and BULL, J., and the other judges of the Court of King's Bench in LORD MANSFIELD's time; it is intelligible, and everybody has always acted upon it.

Three cases were cited as cases to the contrary. Every one of them was a case in which there had been a tenancy with all the characteristics of a tenancy from year to year before the period of holding over, and when the learned judges there said that the tenancy from year to year indicated by the holding over must be deemed to have begun at the commencement of the tenancy, they were referring, I think, quite clearly to the tenancy from year to year. The cases which laid down the general principle, and which I think were all cited to us here, following upon the case to which I refer of *Right d. Flower* v. *Darby and Bristow* (9), began with *Doe d. Holcomb* v. *Johnson* (7), where LORD ELLENBOROUGH made the matter perfectly clear, and in language which, I submit, prevented the possibility of misunderstanding on such facts as have arisen in this case. LORD ELLENBOROUGH said (6 Esp. at p. 10):

> "if the tenant comes in in the middle of a quarter, and he afterwards pays his rent for that half-quarter, and continues then to pay from the commence-

ment of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter day."

LORD ELLENBOROUGH cited no authority for that; nobody thought the matter required authority. Of course the tenant in that case was a tenant from the time of his coming in in a sense. LORD ELLENBOROUGH, however, by speaking of him as tenant from year to year at common law, does not mean that he is a tenant from year to year from the time of his coming in, but from the time of the succeeding quarter.

The same principle was illustrated in *Doe d. Savage* v. *Stapleton* (10), before PARKE, J. PARKE, J., founded himself on the passage in *Doe d. Holcomb* v. *Johnson* (7), and observed in that case that the tenant never supposed that the tenancy was to begin from the half-quarter. The principle also appears in *Doe d. King* v. *Grafton* (11), which is a conspicuous instance of a case very similar in all its material circumstances to the present case. The actual tenancy had begun on Apr. 19. A sum of rent had been paid for the period from Apr. 19 to the quarter day. When the question of notice to quit arose it was held that the tenancy was a tenancy from year to year at the time from which the tenancy from year to year commenced—a simple and intelligent principle, which it is now sought to disturb by leaving the parties to be bound as a matter of law by a supposed principle which has no foundation in reason. The text-books in which the error has sprung up of the extraction from exceptional cases of a supposed novel principle have been fully dealt with by my Lord, and I do not propose to add anything to what my Lord has said. As I stated, at the outset of these remarks, the case seems to me in principle to be one of no difficulty, but only to be complicated by a misunderstanding of one or two decisions which were supposed to have laid down a new principle, contrary to the general rule of law in respect of the relations of landlord and tenant. I think, therefore, that this appeal fails.

EVE, J.—There is no dispute of fact in the present case, and my Lords have dealt so adequately with the legal results brought about by the relations of the parties that I only propose to add a few observations of my own. Accepting the landlord's contention that the effect of the agreement of Nov. 15 was to create a tenancy for a fixed term of one year and one-eighth of another year—that is to say, for a term of which the dates of commencement and determination were not co-incident—the first question that arises is: What is the effect of the payment and acceptance of rent on Mar. 25 following December, 1916. Admittedly that created a tenancy from year to year between the landlord and the tenants, and the next question, the important question, on the appeal is as from what date. The only reported case of all those to which our attention has been drawn in which a similar state of circumstances existed is that of *Doe d. Buddle* v. *Lines* (5). In that case it was held that the tenancy from year to year commenced from the date of the expiration of the previous lease. By what I think is a somewhat inverse process of reasoning it is said that that case is an exception to the rule traceable to, and to be accounted for by, the fact that the sitting tenant was not the lessee who originally entered, but an assignee. But there is no trace, as far as I can see, in the arguments nor in the judgments, of anything which leads to the conclusion that the case was treated as exceptional on that ground, and the attitude which is taken on behalf of the landlord in dealing with that case presupposes the existence of the rule as stated in the text-books to which reference has been made. I do not propose to go through the cases or to re-state the reasons which have been fully and adequately stated by my Lords, why we have come to the conclusion that no such rule exists. When once the existence of the rule is disproved, the assertion that *Doe d. Buddle* v. *Lines* (5) is an exception to the rule of course falls with it. I think that this case comes really within the principle of *Doe d. Buddle* v. *Lines* (5), and we are constrained, and, as it seems to me, happily constrained, to hold that the existence of the state of things which the landlord contends existed here resulted in a tenancy from year to year, which

followed on the holding over by the tenants and ran from the date of the expiration of the fixed term and not as from the date of its commencement. I agree, therefore, in thinking that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *H. M. R. Pothecary*, for *Drummonds*, Croydon; *E. S. Trehearne.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

QUINN *v.* QUINN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Henry Duke, P.), December 17, 1919]

[Reported [1920] P. 65; 89 L.J.P. 38; 122 L.T. 464; 36 T.L.R. 170; 64 Sol. Jo. 226]

Divorce—Petition—Service—Infant respondent—Service in presence of natural guardians—Need of appointment of guardian ad litem—Liability of infant husband respondent for costs.

When a respondent husband, who is an infant, has been served with the petition and citation in the presence of his natural guardian, this is a good service. There is no need to appoint a guardian ad litem, and the infant is liable to be condemned in costs.

Notes. Referred to: *McCausland* v. *McCausland* (1927), 43 T.L.R. 592.

As to service of a document on an infant in a matrimonial proceeding and as to payment of costs by an infant, see 12 HALSBURY'S LAWS (3rd Edn.) 325, 399, and cases there cited.

Case referred to:

(1) *Cooper* v. *Green* (1825), 2 Add. 454; 162 E.R. 361; 23 Digest (Repl.) 288, *3522.*

Also referred to in argument:

Brocklebank v. *Brocklebank and Borlase* (1911), 27 T.L.R. 569; 55 Sol. Jo. 717; 27 Digest (Repl.) 573, *5289.*

Wife's Undefended Petition on the ground of the husband's incestuous adultery. The husband, an infant, was served with the petition and citation in the presence of his mother and step-father.

D. Cotes-Preedy for the wife.

SIR HENRY DUKE, P.—The charge of incestuous adultery is established, but a question arises as to the husband's having been properly made a party, and as to his liability for costs. Service on a minor in the presence of his natural guardians was accepted by the ecclesiastical courts as proper service: see *Cooper* v. *Green* (1). The present respondent was not in the care and custody of the relatives, in whose presence he was served, but they are his natural guardians, and, applying the principles on which the ecclesiastical courts acted, I hold the service sufficient, and that it is unnecessary that anything further should be done to have the husband represented before me. He was legally capable of contracting marriage, and the consequences of marriage must result—one of them being that he is liable for the costs of proceedings, which his misconduct has obliged his wife to take. There will, therefore, be a decree nisi with costs and custody.

Solicitors: *Peacock & Goddard*, for *Warner & Berwick*, Henley.

[*Reported by* G. C. TYNDALE, ESQ., *Barrister-at-Law.*]

MARTIN *v.* MARTIN

[COURT OF APPEAL (Warrington, Duke and Atkin, L.JJ.), June 23, 24, 1919]

[Reported [1919] P. 283; 88 L.J.P. 163; 121 L.T. 337; 35 T.L.R. 602; 63 Sol. Jo. 641]

Judicial Separation—Permanent alimony—Respondent's means—Voluntary allowance—Payment under discretionary trust.

A voluntary allowance receivable by a husband, of which he enjoys the benefit, e.g., sums paid to him by trustees under a discretionary trust, can be taken into account in determining whether any, and, if so, what sum he should be ordered to pay to his wife by way of permanent alimony after she has obtained a decree of judicial separation.

Notes. The provision for the payment of permanent alimony on a decree for judicial separation is now contained in s. 20 of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388).

As to permanent alimony, see 12 HALSBURY'S LAWS (3rd Edn.) 427–430; and for cases see 27 DIGEST (Repl.) 602 et seq.

Cases referred to:

(1) *Haviland* v. *Haviland* (1863), 3 Sw. & Tr. 114; 1 New Rep. 377; 32 L.J.P.M. & A. 67; 7 L.T. 757; 9 Jur.N.S. 208; 11 W.R. 550; 164 E.R. 1216; 27 Digest (Repl.) 493, *4323*.

(2) *Malo* v. *Malo* (1786), 2 Sw. & Tr. 657, n.; 32 L.J.P.A. & A. 67, n.; 7 L.T. 437, n.; 164 E.R. 1153; 27 Digest (Repl.) 493, *4322*.

(3) *Clinton* v. *Clinton* (1866), L.R. 1 P. & D. 215; 14 L.T. 257; 14 W.R. 545; 27 Digest (Repl.) 493, *4325*.

(4) *Bonsor* v. *Bonsor*, [1897] P. 77; 66 L.J.P. 35; 76 L.T. 168; 45 W.R. 304; 13 T.L.R. 184; 27 Digest (Repl.) 610;

(5) *Moss* v. *Moss and Bush* (1867), 15 W.R. 532; 27 Digest (Repl.) 489, *4271*.

(6) *Walton* v. *Walton* (1900), 64 J.P. 264, D.C.; 27 Digest (Repl.) 705, *6735*.

Also referred to in argument:

Eaton v. *Eaton and Campbell* (1870), L.R. 2 P. & D. 51; 21 L.T. 733; 27 Digest (Repl.) 489, *4283*.

Nott v. *Nott*, [1901] P. 241; 70 L.J.P. 94; 84 L.T. 573; 65 J.P. 378; 17 T.L.R. 525, D.C.; 27 Digest (Repl.) 705, *6737*.

Earnshaw v. *Earnshaw*, [1896] P. 160; 65 L.J.P. 89; 74 L.T. 560; 60 J.P. 377; 12 T.L.R. 249, 386, D.C.; 27 Digest (Repl.) 701, *6703*.

Appeal by the husband from the decision of COLERIDGE, J., sitting in chambers. The facts appear in the judgments.

Micklem, K.C., and *W. O. Willis* for the husband.

Bayford, K.C. (with him *Bucknill*), for the wife.

WARRINGTON, L.J.—This is an appeal from an order, dated June 2, 1919, of COLERIDGE, J., dismissing an appeal from Mr. Registrar BARNARD, who had made an order on May 21, 1919, for alimony on the petition of the wife, who had obtained a decree for judicial separation against her husband. The order made by the registrar was as follows:

> "That Noel Martin, the respondent, do out of his present income, and until further order, pay, or cause to be paid, to Ida May Martin, the petitioner, permanent alimony at and after the rate of £2 10s. per week, to commence from the date of the final decree in this cause, and to be payable weekly free of income tax."

The parties were married on Dec. 3, 1898, and there is one child of the marriage. The husband, some few years after his marriage, began to suffer from epileptic fits, and in 1914 was certified as a lunatic. About August, 1917, his wife left him

under advice, and he then went to live with his mother, where he appears to have been nursed by a woman with whom he committed adultery. That was ground for a judicial separation, and a decree for judicial separation was made on May 9, 1918. On Nov. 30, 1918, the wife presented her petition for alimony, and in that petition she stated that

> "Noel Martin is now possessed of or entitled to the income amounting before deduction of tax to the sum of £430 per annum, or thereabout, under the will, dated Oct. 20, 1899, of his father, the late William Martin. . . ."

In answer to that petition the husband made an affidavit in which he stated as follows:

> "I was entitled to the income from a sum of £10,000 under my father's will as alleged in the said petition, but [there being a forfeiture clause in the will] I have forfeited the said income by bankruptcy and am now being supported by a voluntary allowance made by the trustees of the said will [under a discretion given to the trustees by the will]. Save as aforesaid I have no property, means, or sources of income whatsoever."

One of the trustees, Herbert Martin, made an affidavit in which he repeated the facts with regard to the nature of the husband's income, stated that for the year 1917–18 the net amount of the income from the fund was £393 4s. 4d., and added: "This income the trustees have in their discretion applied for the maintenance of the [husband], who has no other means or resources."

It is said on behalf of the husband that the order in question was one which ought not to have been made, and that the case ought to have been treated as if he had no income or means. It is said, and said truly, that he has no legal right to insist upon payment to him of any part of the income of this fund. He has a right, however, and so has his wife and child, to insist upon the exercise by the trustees of their discretion for the application of the income to this fund. But so long as the trustees bona fide and properly exercise their discretion it is not the practice of the court having jurisdiction in these matters to interfere with the trustees. Nothing I propose to say must be taken to amount to any such attempt on the part of the court, or even to any suggestion that this court in any way interferes with their discretion. But the question remains whether the husband is not now in enjoyment of an income of such a nature that, according to the now apparently settled principles of the court, it should be taken into account in settling whether any, and, if any, what, sum should be allowed for the maintenance of the wife. The facts with regard to the husband's income must be supplemented by this, that, so far as can be judged from the returns made by the husband for income tax while he and the wife were living together, this income was treated by him as income of his own, and he obtained the allowance to which he was entitled on that footing. The husband's affidavit in answer to the petition states that he is being "supported by a voluntary allowance made by the trustees of the will," and that "save as aforesaid I have no property, means, or source of income whatsoever." He, therefore, treats the voluntary allowance by the trustees as being in some sense means or source of income. The affidavit of the trustee merely states that the income of the trust fund is being applied for the support and maintenance of the husband. That is ambiguous. It may well be so applied by the payment of the income, or a large portion of it, to the husband himself or to the woman with whom he is now living. There is sufficient evidence before the court to justify the court in acting upon the footing that the husband is now enjoying in some form or another the income which is applicable for the benefit of himself, among other persons, under the trusts of the will of his father.

As to the principle upon which the court acts in cases of this nature, we have been referred to several authorities in which, especially during recent years, voluntary allowances received either by the husband or the wife have been taken into account in determining whether any and, if any, what, sum should be allowed for

the alimony of the wife. It appears that in *Haviland* v. *Haviland* (1) in 1863, where the judge ordinary decided that the voluntary allowance in that case was not to be taken into account, he referred to a previous case of *Malo* v. *Malo* (2), decided by DR. WYNNE in 1786, in which that learned judge did take into account the voluntary allowance made to the husband by his father, saying that in some instances the court was obliged to judge of the husband's faculties according to appearances. But in more recent years the practice appears to have been well settled.

The first case to which we were referred was *Clinton* v. *Clinton* (3). That is not directly in point, because the question actually decided was as to the enforcement of an order for payment of permanent alimony which had previously been made. But it is valuable as showing that such an order as is now in question had been made. In that case the husband was entitled to a rentcharge which was applicable, as the income here is applicable, on his bankruptcy, which event happened, at the discretion of the trustees, for the benefit of the husband, or, in the event of their refusing so to apply it, for the benefit of the tenant for life. The trustees had voluntarily, in the exercise of their discretion, paid that rentcharge to the husband. That, therefore, was a voluntary allowance made by the trustees to the husband, and an order had been made, as in the present case:

> "That the respondent do out of his present income, and until further order of this court, pay or cause to be paid to the petitioner, or Shaen and Roscoe, her solicitors, for her use, on their being authorised by writing under her hand, permanent alimony at the rate of £110 per annum, to be payable quarterly, such payments to continue until the respondent satisfies the court that payment to him of the rentcharge of £400 per annum under the second codicil to the will of Henry Pelham, Duke of Newcastle, deceased, has ceased."

It is unnecessary to refer to any of the other cases except *Bonsor* v. *Bonsor* (4), decided in 1897 by SIR FRANCIS JEUNE, which is, I think, the most recent case directly in point. There the whole income of the husband was a voluntary allowance made to him by his brother of £60 a month as long as he resided out of this country. After reviewing the previous cases, including *Haviland* v. *Haviland* (1), *Clinton* v. *Clinton* (3) and *Moss* v. *Moss and Bush* (5), SIR FRANCIS JEUNE came to the conclusion that the voluntary allowance ought to be taken into account, and he concludes his judgment with this statement:

> "Injustice to the husband is prevented by the provisions in the Act which allow the maintenance to be reduced or suspended if his means of paying it fail."

With reference to that last remark it will be observed that it was made in a case in which the decree was for dissolution of marriage, and the allowance was technically maintenance, and, therefore, subject to the Matrimonial Causes Act, 1866, which dealt only with decrees for dissolution of marriage and maintenance to be given thereunder; but I think that there is no dispute that under r. 92 of the Divorce Rules the court in cases of judicial separation, as well as in cases of dissolution of marriage, has ample power to review orders made for alimony according as the means of the parties increase or decrease.

It is said that we ought not to affirm the order of COLERIDGE, J., because the order, when made, could not be enforced. I am not at all satisfied that the order could not, in some form or another, be enforced. But, whether that is so or not, if it appears, as I think it does appear, that the husband is in enjoyment of the benefit of this income, it is open to the court, according to the principles and according to the practice pursued now for many years, to make an order fixing the amount of alimony payable to the wife after taking into account the income which the husband is receiving.

I should like to add that the trustees, so far, have not formulated any scheme for the maintenance of the husband and wife and the child. All that they have done

at present is to continue, as they did while the husband and wife were living together, to pay, or apply, the entire income for the maintenance of the husband. If the trustees see fit, as I cannot help saying that I hope they will, seriously to consider the position of both husband and wife and the child, and formulate a scheme for the application of the income to the maintenance of these three persons, who are the only objects of the discretionary trust, and under that scheme to allow a fair sum for the maintenance of the wife, it will be competent for the court at any time to review the present order, and, whether the sum allowed to the wife is larger or smaller than that which is allowed under this order, the court will have ample jurisdiction to review or discharge or suspend the order which has been made. But in the existing circumstances the order is one which, in my opinion, the judge in the court below was justified in making, and no reason has been shown why this court should interfere with the discretion which he exercised. For these reasons I think that the present appeal fails, and ought to be dismissed.

DUKE, L.J.—I agree that in this case the appeal fails. This seems to be the first case in which the question here raised has been considered by this court. It is to be borne in mind that in a case of allotment of alimony it is not an apportionment of part of the estate of the husband, but it is an order for the payment by the husband of a fixed sum that is considered proper to be ordered to be paid for the maintenance of his wife "according to his faculties." That is an expression which is found in cases in the ecclesiastical courts, and it is also found in the rules which were framed shortly after the powers of the ecclesiastical courts were vested in the Divorce Court.

This matter has been many times the subject of consideration. The earliest case that has been cited is *Malo* v. *Malo* (2), and it is the decision of a very well-known judge in ecclesiastical cases, DR. WYNNE, who was afterwards SIR WILLIAM WYNNE. That was a suit in the Probate Court to determine upon the facts in that case what the faculties of the husband were for the discharge of his duty of the maintenance of his wife, and there is authority in numerous later cases to the same effect as in that case. In *Haviland* v. *Haviland* (1) SIR CRESSWELL CRESSWELL said that there is power in the court, in cases where the income of the husband was not an income to which he was absolutely entitled, to consider what his faculties were for bringing into existence an income. Therefore, there is not the absolute divergence of opinion which at first sight might be thought to exist. From 1866 onwards there is a clear course of authority. There is a decision of LORD PENZANCE, a decision of LORD TRURO, and a decision of SIR FRANCIS JEUNE in *Bonsor* v. *Bonsor* (4). There is, further, a decision of SIR FRANCIS JEUNE, concurrently with a decision of his very eminent successor LORD GORELL, in *Walton* v. *Walton* (6). There is authority for the proposition that the court has to consider what are the prospective means of the husband for making provision for the discharge of his duties.

It is quite true the ecclesiastical courts were accustomed to apportion a sum not exceeding a certain aliquot part of the income of the husband, but that practice was not to infringe at all upon the general principle. The court may take into consideration not only the income derived from a purely voluntary source, but, as was said by SIR FRANCIS JEUNE and GORELL BARNES, J., also the potential earnings of the husband, that which does not exist at all except in the will and capacity of the husband to bring it into existence—the potential ability of the husband. In that state of things what had to be ascertained was what, upon the evidence which was before the court, were the potential means of the husband for the discharging of his duty to his wife. What is the evidence here? The evidence here, so far as it consists of admissions by the husband which, according to the practice of the courts, are to be taken against him, is that he has made a perfectly distinct answer, and he has produced an income tax return for the year 1917. His answer states that he is in receipt of an income under a voluntary trust which is here in question, and that he has no other property, means, or source of income. To my mind, the

fair inference from the production of the income tax return is that the state of things which existed in 1917 was the state of things which continued in 1918, and continues at the present time. There is no indication to the contrary, and the affidavit of the husband's brother, who is one of the trustees, does not contain evidence to the contrary. It is entirely consistent with the sworn statement of the husband that he has an income from the voluntary source which is here in question. But I would add that his income is not entirely voluntary, and that he has an interest in this income which was not to be found in the case of the respondent in either of the decided cases to which reference has been made. Upon that evidence I think that the learned registrar and the learned judge were warranted in the order which they made. Taking the matter to stand there, not only ought the order not to be disturbed, but it could not properly be disturbed because the matter was within the jurisdiction of the court below, and COLERIDGE, J., has very properly exercised his jurisdiction upon the evidence before him.

Emphasis has been laid upon the question raised whether the income comes to the hands of the husband. That, to my mind, is disposed of by his evidence. The question is then whether it will continue to do so. That must be entirely a forecast. It has continued to come to his hands for a long time. When it ceases to come to his hands, if the trustees in the exercise of their discretion dispose of the whole of this fund so that no part of it can pass through the hands of the husband to the hands of the wife, that may deprive her of any means of livelihood from him. I cannot conceive that that state of things could exist unless the wife were guilty of such gross misconduct as to disentitle her to the consideration of the trustees. I quite agree that there may be a change in the circumstances. I can conceive the trustees taking into account what has been said by the court, and considering it their duty to formulate a scheme—not to bind them in perpetuity, but by which they would allocate this income between the various persons who have a claim upon it. If the result should be that a sum such as the registrar has indicated, or any other sum, be it larger or smaller, ought to be paid as a voluntary payment to the wife, as in the past a voluntary payment has been made to the husband, then such voluntary payment must be paid accordingly. So soon as that assumes any character of regularity it is open to the parties to go again to the registrar and say that a variation ought to be made. It seems to me that the order was consistent with the settled practice—a very proper and just practice—of the Divorce Division. It is an order which does no injustice between the parties, and therefore it should stand.

ATKIN, L.J.—I agree. The question before the learned registrar and the learned judge was whether they were entitled to take into account the income of the trust fund payable by the trustees under the discretionary trust in the circumstances which have been stated to the court.

I think that the first principle to be observed is this. In considering the question of permanent maintenance after dissolution, or permanent alimony after judicial separation, the question to be considered is not whether or not the respondent has rights of property over the particular money that he receives; to my mind, the question to be considered is whether he has the ability to make suitable payments for the support of his wife, and, in considering the question whether he has the ability to make payments, it seems to me plain upon principle, and I think it is also plain upon authority, that one must take into account the means that he receives in fact, whether or not he had the right to receive them before he did receive them or not. I think that is plain. You have only to consider the question of ability. The question of maintenance is made plain by the Matrimonial Causes Act, 1866, which recites as follows:

> "Whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any . . . gross or annual sum can be secured but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives."

Then s. 1 [repealed by Matrimonial Causes Act, 1907] enacted as follows:

> "In every such case it shall be lawful for the court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the court may think reasonable: Provided always that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the court may seem fit."

Though it is true that the provisions as to permanent alimony derive their force, not from that statute, but from the Act of 1857, which applies the whole procedure of the ecclesiastical courts, I can see no difference of principle when you are considering the ability of the husband to pay.

In those circumstances the only question that remains is whether there was evidence before the learned registrar of the ability of the husband to make these payments. That must mean the present ability to make future payments, and it appears to me there is ample evidence. The trustees have a discretion to apply the whole of the income of this trust fund for the benefit of the husband, or the wife, or the child, in their uncontrolled discretion, and while the husband and wife were living together, as they did up till 1917, it appears to me that there is evidence that the husband received the money and made an income tax return for income tax for the purpose of securing the repayment to which he was entitled. At that time I think that he was able, if he so desired, to make an allowance of £130 a year towards his wife's maintenance, and, as far as the evidence is concerned, it appears to me that not only is there no evidence of a change, but the evidence points to there having been no change in fact. There is evidence that the wife has received nothing from the trustees. They must pay the fund to one of them, and, therefore, they are paying the fund to the husband. In those circumstances it appears to me that there is evidence of the husband's ability to pay in the future £130 a year—£2 10s. a week—to his wife, and, therefore, it appears to me the order was right.

I agree that the trustees have a discretion. It is their discretion, not the discretion of the court. I do not think anything which has been said by the court amounts to any kind of criticism of the conduct of the trustees. At the present moment it is obvious that if possible, and we think it is possible, the husband ought to provide for the maintenance of his wife, to whom he has been married for twenty years, by whom he has a child, and against whom he has committed the matrimonial offence that has been proved against him. It may very well be that the trustees will take the view that it is their duty, in the interests of both the wife, whose claims they have to consider, and, indeed, in the interests of the husband, if they look to his interests alone, that they should make some provision for the innocent wife and the innocent child, and, if they do so, we in no way fetter any kind of arrangement that they may make. If they do make an arrangement, or exercise their discretion in favour of the wife and the child, then the circumstances will be reviewed, and, as the court has said, there may be ground for discharging this order, or varying it, or suspending it, as the court thinks fit. That is a matter for them to decide. At the present moment I think that there was ample ground upon which the learned judge could make the order that he did make, and I think, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Burton, Yeates & Hart*, for *Johnson, Elkin & Keeling*, Birmingham; *Emmet & Co.*, for *R. W. H. Green*, Worthing.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

FRED. DRUGHORN, LTD. *v.* REDERIAKT. TRANSATLANTIC

[House of Lords (Viscount Haldane, Lord Shaw, Lord Sumner and Lord Wrenbury), November 11, 12, 1918]

[Reported [1919] A.C. 203; 88 L.J.K.B. 233; 120 L.T. 70; 35 T.L.R. 73; 63 Sol. Jo. 99; 14 Asp.M.L.C. 400; 24 Com. Cas. 45]

Shipping—Charterparty—"Charterer"—Description of contracting party by word "charterer" together with his name—Admissibility of evidence to prove charterer was acting as agent for undisclosed principals.

The description "charterer" in a charterparty, together with the name of the charterer, does not of itself designate the person so described as the only person who is to have the rights and obligations of the charterer under the charterparty. Where, therefore, an action for breach of a charterparty made between shipowners and one L. as "charterer" was sought to be maintained by a company claiming to be L.'s undisclosed principals,

Held: oral evidence was admissible to prove that L. entered into the charterparty as agent for the company since such evidence did not contradict the terms of the written contract.

Humble v. *Hunter* (1) (1848), 12 Q.B. 310, and *Formby Bros.* v. *Formby* (2) (1910), 102 L.T. 116, distinguished.

Notes. Referred to: *Danziger* v. *Thompson*, [1944] 2 All E.R. 151; *Epps* v. *Rothnie*, [1946] 1 All E.R. 146.

As to the parties to a charterparty, see 30 Halsbury's Laws (2nd Edn.) 278–282, paras. 478–480; and for cases see 41 Digest 317, 318.

Cases referred to:

(1) *Humble* v. *Hunter* (1848), 12 Q.B. 310; 17 L.J.Q.B. 350; 11 L.T.O.S. 265; 12 Jur. 1021; 116 E.R. 885; 41 Digest 317, *1768*.

(2) *Formby Bros.* v. *Formby* (1910), 102 L.T. 116; 54 Sol. Jo. 269, C.A.; 1 Digest 638, *2595*.

(3) *Keighley, Maxted & Co.* v. *Durant*, [1901] A.C. 240; 70 L.J.K.B. 662; 84 L.T. 777; 17 T.L.R. 527; 45 Sol. Jo. 536, H.L.; 1 Digest 400, *1009*.

(4) *Rederiakt. Argonaut* v. *Hani*, [1918] 2 K.B. 247; 87 L.J.K.B. 991; 118 L.T. 176; 14 Asp.M.L.C. 310; 41 Digest 317, *1771*.

Appeal from an order of the Court of Appeal, reported [1918] 1 K.B. 394, affirming an interlocutory order made by Lush, J., in an action for damages for breach of a charterparty that evidence that the respondents were undisclosed principals of the charterer, and, therefore, entitled to maintain the action, was admissible.

Compston, K.C., and *Jowitt* for the appellants.

MacKinnon, K.C., and *Simey*, for the respondents, were not called on to argue.

VISCOUNT HALDANE.—This is an appeal from a judgment of the Court of Appeal which affirmed a judgment of Lush, J. The only question before us is whether evidence was admissible on a certain point. The wording of the order might, if unexplained, give some countenance to the proposition that the courts had intended to pronounce upon the effect of the evidence so admitted whether rightly admitted or not; but it is agreed between counsel, and it is plain from what was said by Lush, J., himself subsequently, that that was not the intention. Therefore the only question before the House upon which the House has to pronounce is whether the evidence sought to be admitted was evidence which was in law admissible.

By the law of England, if B. contracts with C., primâ facie that is a contract between these two only; but if at the time B. entered into the contract he was really acting as agent for A., then evidence is generally admissible to show that

A. was the principal, and A. can take advantage of the contract as if it had been actually made between himself and C. That is what is meant by ratification. The limits within which that doctrine is applicable were fully examined in this House in the case of *Keighley, Maxted & Co.* v. *Durant* (3). No question arises with regard to the applicability of the doctrine in this case, because what is said is that the respondents can prove that as a matter of fact B. was acting as agent for them in the case before us at the time when he entered into the contract.

But the principle is limited by another consideration, about which again there is no doubt, and which is a principle the applicability of which to the present case is beyond question. In *Humble* v. *Hunter* (1) it was approved, although it was not necessary to give a decision on the point, and also in *Formby Bros.* v. *Formby* (2) and in other cases. These are authorities for the proposition that evidence of authority of an outside principal is not admissible if to give such evidence would be to contradict some term in the contract itself. It was held in *Humble* v. *Hunter* (1) that where a charterer dealt with somebody described as "the owner," evidence was not admissible to show that somebody else was the owner. That is perfectly intelligible. The question is not before us now, but I see no reason to question that where one has the description of a person as the owner of property, and it is a term of the contract that he should contract as owner of that property, one cannot show that another person is the real owner. That is not a question of agency—that is a question of property. In the same way in *Formby Bros.* v. *Formby* (2) the term was "proprietor," and "proprietor" was treated, in the opinion of the Court of Appeal, as on the same footing as the expression "owner." But we are not dealing with that case here. The principle remains, but the question is whether the principle applies to a charterparty where the person who says that he signed only as agent describes himself as the charterer. There may be something to be said from the heading of the charterparty in this case, and the reference to the company which claims to have been his principal, for the proposition that, reading the document as a whole, there is evidence that he intended to convey that he was acting as agent for somebody else; but, whether that is so or not, the term "charterer" is a very different term from the term "owner" or the term "proprietor." A charterer may be and primâ facie is merely entering into a contract. A charterparty is not a lease—it is a chattel that is being dealt with, a chattel that is essentially a mere subject of contract, and, although rights of ownership may be given under it, primâ facie it is a contract for the hiring or use of the vessel. Under these circumstances it is in accordance with ordinary business common-sense and custom that charterers should be able to contract as agents for undisclosed principals who may come in and take the benefit of the charterparty.

But it is said that in this charterparty the terms are such as to exclude that notion. Why is that said to be so? Because the term "charterer" is used. I have already commented upon that. It is said that the term "charterer" was meant simply to describe a particular person who is to carry out the nomination of arbitrators and everything else which is contained in the charterparty—to give orders which can only be given by one person, and that for the working out of the charterparty it is essential to treat the person so contracting as designated as a person whose identity cannot be varied or contradicted. The answer to that is that the principal may take that place, and that the company, in this case acting through its agent, whoever that agent may be, will be in the same position as the charterer contracting originally. There is nothing in that proposition inconsistent with the stipulations of this charterparty, and therefore it appears to me that the qualifying principle of *Humble* v. *Hunter* (1), that you shall not contradict the instrument by giving evidence of agency, has no application in this case.

The way in which the point arose was this: The owners of the ship, the appellants, dissatisfied with the way in which the ship was being handled by the charterer, withdrew it from his service, with the result that the original charterer, Lundgren, began an action in the King's Bench Division to recover damages. In that action the respondents, alleging that they were his principals and had been throughout,

were substituted as plaintiffs, and apparently no question was raised at the moment of their substitution, which would have been the natural time to raise the point. But later on it was proposed to give evidence, and evidence was tendered to show that the respondents were at the time of the charterparty being entered into the undisclosed principals of Lundgren, and it was upon that application that the question now before the House arose. For the reasons I have already given I think the view taken in the Court of Appeal was right, and that it was properly held, both by LUSH, J., and by that court, that evidence could be properly tendered to prove the agency of Lundgren when he originally entered into this charterparty. I, therefore, move your Lordships that the appeal be dismissed, and dismissed with costs.

LORD SHAW.—I agree with what your Lordship on the Woolsack has said, subject to these two observations. I do not think that in this case I am called upon to express any opinion as to the decision that was reached in *Humble* v. *Hunter* (1) or in *Formby Bros.* v. *Formby* (2). The time may arise when the principles of those two cases may have to be reviewed in this House. My second observation is that I am not prepared to be held as in any sense agreeing with the decision arrived at by ROWLATT, J., in *Rederiakt. Argonaut* v. *Hani* (4). With these observations, I agree in the course proposed by your Lordships.

LORD SUMNER.—I concur. In my opinion this charter cannot be considered as containing a stipulation that no one but Lundgren shall have the rights and liabilities of the charterer under it. I cannot see that the words "Wilh. R. Lundgren, of Gothenburg, charterer," designate Lundgren as the real and only principal, and as the only person who is to have the charterer's rights and obligations under the charter. The contract is on the ordinary printed form. There is a notice on the face of the document that Lundgren is manager of the line which the Rederi Aktiebolaget carry on. Though this forms no part of the contract, the charterers' rights and obligations are in no instance inconsistent with their exercise or performance by Lundgren on behalf of undisclosed principals, especially as the principals, an incorporated company, must in any case act by some officer. Unless this contract is read as stipulating that Lundgren charters for himself only, the appellants fail. I think it cannot be so read. It states that Lundgren charters, and so he does; but it does not say that he is not chartering for others, and, if that is what he has done in fact, the law allows the respondents to prove it.

Rederiakt. Argonaut v. *Hani* (4) was a case in which the charterparty contained different words—namely, "as charterers"—on which rightly or wrongly great stress was laid in the judgment, and I think it is distinguishable. *Humble* v. *Hunter* (1) and *Formby Bros.* v. *Formby* (2) were expressly decided as cases in which the contract itself truly construed excluded the application of the rule as to undisclosed principals. There is a clear distinction between words in a contract which can be construed as saying, "A. B., who prior to this contract, was and who under it is and will be the single owner," and words which can only mean "A. B., who by this contract becomes liable to the obligations and entitled to the rights which this contract allots to the charterers." I think these cases are not in point. That being so, I express no opinion at present about them. Accordingly, I do not see how the evidence objected to contradicts the contract. Lundgren as charterer, albeit on behalf of others, was personally liable to perform the obligations which the contract imposed on the charterers. The fact that he contracted for others was consistent with the contract, and evidence to prove it was admissible.

LORD WRENBURY.—I agree that the evidence is admissible. I think that LUSH, J., and the Court of Appeal were right, and that this appeal should be dismissed with costs.

Solicitors: *J. A. & H. E. Farnfield*; *William A. Crump & Son.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

WICKINS *v.* WICKINS

[Court of Appeal (Swinfen Eady, M.R., Warrington and Duke, L.JJ.), July 8, 1918]

[Reported [1918] P. 282; 87 L.J.P. 169; 119 L.T. 663; 34 T.L.R. 568; 62 Sol. Jo. 702]

Restitution of Conjugal Rights—Periodical payments—Suspension—Adultery by wife—Absolute discretion of court—Wife not precluded from applying at later date for renewal of payments—Form of order of suspension—Matrimonial Causes Act, 1884 (47 & 48 *Vict.*, *c.* 68), *s.* 4.

Section 4 of the Matrimonial Causes Act, 1884 [see now Matrimonial Causes Act, 1950, s. 28], gives to the court an absolute discretion to vary, modify or temporarily suspend any order for the periodical payment of money if the circumstances, including the conduct of the parties, and more particularly that of the wife, justify such action. Therefore, where a wife who had obtained a decree for restitution of conjugal rights and a subsequent order for periodical payments committed adultery, **held,** that the court might exercise its discretion and suspend the order for payments.

Per Swinfen Eady, M.R., and Warrington, L.J.: The suspension order is not final. It will not preclude the wife, at a subsequent date, on showing that she is deserving of an allowance, from applying to the court for a renewal of the payments.

A suspension order, by its terms, should follow the words of the statute, and not, as drawn up, in the present case, state that the husband was no longer liable to make the payments.

Notes. The power of the court to discharge, vary or suspend an order for periodical payments by a husband made on or subsequent to a decree for restitution of conjugal rights is now contained in the Matrimonial Causes Act, 1950, s. 28 (1).

Referred to: *Bullock* v. *Bullock and Vargolici*, [1942] 2 All E.R. 259.

For the Matrimonial Causes Act, 1950, s. 28, see 29 Halsbury's Statutes (2nd Edn.) 414. As to the court's jurisdiction to vary an order for periodical payments in the case of restitution of conjugal rights, see 12 Halsbury's Laws (3rd Edn.) 444, 445, para. 999.

Case referred to in argument:

Ashcroft v. *Ashcroft and Roberts*, [1902] P. 270; 71 L.J.P. 125; 87 L.T. 229; 51 W.R. 292; 18 T.L.R. 821, C.A.; 27 Digest (Repl.) 612, *5735*.

Appeal by wife from an order of McCardie, J., suspending an order made in favour of the wife for periodical payments after she had obtained a decree of restitution of conjugal rights.

On Dec. 22, 1915, the wife filed a petition for restitution of conjugal rights. No answer was filed by the husband, and a decree of restitution was pronounced on Apr. 3, 1916. On June 13, 1916, an order for periodical payments of £4 per week by the husband was made in favour of the wife. The husband duly made the payments under the order. On Feb. 6, 1917, the wife filed a petition for divorce alleging adultery by the husband and statutory desertion, and on Mar. 15, 1917, the suit was set down as undefended. Subsequently, the husband, by leave of the court, filed an answer denying the adultery alleged against him, and charging his wife with adultery in March, April and May, 1917, with a named individual, A. E. Goode. On Nov. 14, 1917, the suit came on for hearing before Horridge, J. The wife offered no evidence in support of her charges and her petition was, therefore, dismissed. The husband proved his allegations of adultery against the wife, but Horridge, J., in the exercise of his discretion under s. 31 of the Matrimonial Causes Act, 1857, declined to grant relief to the husband and dismissed his cross-petition. The husband appealed, but the appeal was dismissed, and the husband

then applied to the registrar to discharge the order for periodical payments of £4 per week. The registrar expressed the view that the order should be set aside because of the wife's adultery. On an appeal by the wife McCardie, J., confirmed the registrar's report. The wife now appealed from the decision of McCardie, J.

Schiller, K.C. (with him *Durley Grazebrook*), for the wife.

Rigby Swift, K.C., and *R. F. Bayford*, for the husband, were not called upon to argue.

SWINFEN EADY, M.R.—This is an appeal by the wife in certain proceedings in the Divorce Division from an order of McCardie, J.

[His Lordship stated the facts.] By s. 2 of the Matrimonial Causes Act, 1884, it is provided that:

> "From and after the passing of this Act a decree for restitution of conjugal rights shall not be enforced by attachment, but when the application is by the wife the court may, at the time of making such decree, or at any time afterwards, order that in the event of such decree not being complied with within any time in that behalf limited by the court, the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation. . . ."

By s. 4 it is provided that:

> "The court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment, or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same order wholly or in part, as the court may think just."

We have had the advantage of seeing a shorthand note of the judgment that was delivered by the learned judge. In deciding this case he has carefully considered the facts, and I am satisfied that he did not, as has been suggested on behalf of the wife, treat the case as one in which he had no discretion, or as one where, upon it being proved that the wife had committed adultery, all periodical payments must necessarily cease. The learned judge has not treated the case on that footing. In my opinion it would not be a proper way to treat it. Notwithstanding the admitted adultery of the wife, the discretion of the court to order such periodical payments as may be just under all the circumstances of the case remains. By s. 4 the court may subsequently review the position, and in doing so the court should have regard to the conduct of the parties, and more particularly the conduct of the wife. That is what the learned judge in the court below has done in the present case. After referring to the adultery of the wife and pointing out the position under s. 2 of the Act, he said:

> "Inasmuch as a decree under such Act does not dissolve the marriage relationship, it follows that it does not relieve the wife from the high duty of continued chastity. To hold otherwise would gravely and obviously impair the requirements of morality and the interests of social life."

He proceeded to consider the special circumstances of this case, and to consider whether it was just that the order for periodical payments should remain in force, and he said:

> "In the present case no palliation of the wife's conduct is suggested. She had secured an order for the periodical payment of a substantial sum and her husband punctually complied with the requirements of the order. Yet the wife committed adultery with A. E. Goode, not upon an isolated occasion, nor under any unusual stress of facts, but habitually and almost openly and without the slightest mitigating circumstances. I must, therefore, direct the suspension of payments under the order of June 13, 1916."

It was urged in opposition that it was not accurate to say that there was habitual adultery, as adultery had been established only on two separate occasions. But, even so, it must be borne in mind that on each of those occasions the wife went to an hotel and stayed there with the co-respondent as man and wife.

I am of opinion that the learned judge exercised his discretion correctly on all the facts of the case, and that having regard to the circumstances the order for periodical payments ought to be suspended. It is not a case where the attitude taken up by the wife was that some allowance should be made to her, and she did not adduce evidence to show that at all events at present she was living a chaste life. The attitude taken up by the wife is not that some provision should be allowed to her, but that the husband's petition for suspension of the periodical payments showed no ground for altering the order for payment of £4 per week. That was the issue, and in those circumstances I am of opinion that the order made by the learned judge was the right order. It was not, however, accurately drawn up. The learned judge said that the order for periodical payments should be suspended, and s. 4 of the Act provides that the court may temporarily suspend the order as to the whole or any part of the money ordered to be paid. The order should be so drawn up and should properly follow the words of the statute and temporarily suspend the periodical payments directed to be made by the order of June 13, 1916. In upholding the decision of the learned judge I wish to point out the resulting position is not that suggested by counsel for the wife. It is not a final order by reason of which the wife can never obtain an allowance for maintenance. That is not the position. The learned judge has dealt with the question on the existing facts, and his judgment will not, in my view, preclude the wife at a subsequent date, and upon a state of facts showing that she is deserving of an allowance, from making an application to the court for a renewal of the periodical payments and for such an order as may be just. The appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion. I agree that the order is wrong in form and that it was in fact drawn up contrary to the directions of the learned judge in the court below, for the last words of his judgment are: "I must, therefore, direct the suspension of payments under the order of June 13, 1916." The order, therefore, ought to be drawn up providing that the payments are to be suspended, and not that the husband is no longer liable to make the payments. Accordingly, I now treat the order as if it were drawn up in that form.

I agree with McCardie, J., that s. 4 of the Act of 1884 gives the court a discretion. The section ends with the words which govern the exercise of all powers given by the section, "as the court may think just." These are words commonly used in the Chancery Division to give the court an absolute discretion, but a discretion, of course, that must be exercised judicially and on an examination of all the material circumstances of the case. This wife obtained a decree for restitution of conjugal rights. But after her obtaining that decree and a subsequent order for periodical payments she committed adultery. The judge has taken that fact into consideration and exercised his discretion by suspending the periodical payments. Can it be said that the circumstances of the adultery of the wife is not a fact that the judge could take into account and act upon in exercising his discretion? It is impossible so to hold. I am clearly of opinion that the judge in the exercise of his discretion has not proceeded on any wrong or insufficient grounds; and, that being so, this court ought not to interfere with his exercise of his discretion.

I agree with the Master of the Rolls that there is nothing in the order which precludes the judge on a further application by the wife from exercising his discretion by again making an order for periodical payments if on consideration of all the circumstances of the case then proved it should seem to him to be just so to do. The order is in effect equivalent to a kind familiar in the Chancery Division when an order is made for omitting to continue until further order. For these reasons I agree that the appeal should be dismissed.

DUKE, L.J.—I agree. It seems to me that the wife was hopelessly wrong in the answer she made to the husband's application. She set up something of the nature of a demurrer, and in effect seemed to treat the decree for restitution of conjugal rights and the order for periodical payments as though they amounted to a licence to commit adultery. It is not necessary to add anything to what has been said by my brothers with regard to the effect of the Act of 1884. I should like, however, to say that the scheme of the Act of 1884 is to institute a humane arrangement under which, if either the husband or wife declines to perform his or her marital duties, instead of imposing heavy penalties upon the offending party, means are found of tempering the hardships resulting from the difficulties which have arisen. But if it could be said that the wife who obtained a decree for restitution of conjugal rights and an order for periodical payments could then enter on a course of gross misconduct, the intention of the legislature would have hopelessly failed. That is not the true position. The wife was able to obtain an order that she was to be maintained by the husband on the footing that she was an innocent wife. She is now a guilty wife, and then it is said the periodical payments ought to be continued on the same footing as though she were an innocent one. This is an intolerable proposition. The true view is that the court has an absolute discretion. It can suspend the payments and at the same time it says to the wife: "You are a guilty wife, but it is not too late even now for you to put yourself in a position to obtain some maintenance by resuming a chaste life." I agree entirely with what has been said by the Master of the Rolls and WARRINGTON, L.J., as to the aspect of the case. In these circumstances I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Barnes & Butler*; *W. R. Millar & Sons.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

LEVET *v.* GAS LIGHT AND COKE CO.

[CHANCERY DIVISION (Peterson, J.), October 16, 17, 18, 22, 29, 1918]

[Reported [1919] 1 Ch. 24; 88 L.J.Ch. 12; 119 L.T. 761; 35 T.L.R. 47; 63 Sol. Jo. 69]

Easement—Light—Doorway—Light coming through doorway, primarily constructed to be closed—Prescriptive right—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

The occupier of a house or workshop who, weather permitting, opens an ordinary doorway, primarily constructed for the purpose of being closed, in order to admit additional light to his house or workshop cannot claim a prescriptive right to such light through the doorway under s. 3 of the Prescription Act, 1832. The authorities all refer to rights to light in connection with windows or apertures constructed for the purpose of admitting light. If an ordinary door is left open from time to time as and when the owner thinks fit during the period of 20 years the doorway does not become an ancient light.

Dictum of LORD WESTBURY in *Tapling* v. *Jones* (1) (1865), 11 H.L.Cas. at pp. 305, 306, applied.

Notes. Further statutory provision as to prescriptive rights to light has now been made by the Rights of Light Act, 1959, [39 HALSBURY'S STATUTES (2nd Edn.) 285] but this does not affect the point decided in this case.

As to easements of light, see 12 HALSBURY'S LAWS (3rd Edn.) 582–594; and for cases see 19 DIGEST 123–145. For the Prescription Act, 1832, see 6 HALSBURY'S STATUTES (2nd Edn.) 669.

Case referred to:

(1) *Tapling* v. *Jones* (1865), 20 C.B.N.S. 166; 11 H.L.Cas. 290; 5 New Rep. 493; 34 L.J.C.P. 342; 12 L.T. 555; 29 J.P. 611; 11 Jur.N.S. 309; 13 W.R. 617; 144 E.R. 1067, H.L.; 19 Digest 125, *841*.

Also referred to in argument:

Garritt v. *Sharp* (1835), 3 Ad. & El. 325; 1 Har. & W. 220; 4 Nev. & M.K.B. 834; 111 E.R. 437; 19 Digest 88, *524*.

Scott v. *Pape* (1886), 31 Ch.D. 554; 55 L.J.Ch. 426; 54 L.T. 399; 50 J.P. 645; 34 W.R. 465; 2 T.L.R. 310, C.A.; 19 Digest 126, *847*.

Harris v. *De Pinna* (1886), 33 Ch.D. 238; 56 L.J.Ch. 344; 54 L.T. 770; 50 J.P. 486; 2 T.L.R. 529, C.A.; 19 Digest 127, *850*.

Harris v. *Kinloch & Co.*, [1895] W.N. 60; 19 Digest 128, *854*.

Colls v. *Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest 123, *830*.

Collis v. *Laugher*, [1894] 3 Ch. 659; 63 L.J.Ch. 851; 71 L.T. 226; 43 W.R. 202; 8 R. 760; 19 Digest 129, *874*.

Cooper v. *Straker* (1888), 40 Ch.D. 21; 58 L.J.Ch. 26; 59 L.T. 849; 37 W.R. 137; 5 T.L.R. 53; 19 Digest 130, *876*.

Courtauld v. *Legh* (1869), L.R. 4 Exch. 126; 38 L.J.Ex. 45; 19 L.T. 737; 17 W.R. 466; 19 Digest 129, *873*.

Kine v. *Jolly*, [1905] 1 Ch. 480; 74 L.J.Ch. 174; 92 L.T. 209; 53 W.R. 462; 21 T.L.R. 128; 49 Sol. Jo. 164, C.A.; affirmed sub nom. *Jolly* v. *Kine*, [1907] A.C. 1; 76 L.J.Ch. 1; 95 L.T. 656; 23 T.L.R. 1; 51 Sol. Jo. 11, H.L.; 19 Digest 137, *932*.

Action for (i) an injunction to restrain the defendants from erecting any bridge or other structure across or over the footway known as Laundry Yard, Horseferry Road, Westminster, so as illegally to darken, injure, or obstruct the access of light to the plaintiff's premises, or so as otherwise to occasion a nuisance thereto; (ii) a mandatory injunction to compel the defendants to remove the said bridge or other structure so far as the same occasioned a nuisance as aforesaid; (iii) damages. The plaintiff complained that the bridge interfered with the access of light to several parts of his premises, but the case is reported on the question whether he could claim a prescriptive right to light coming through two doorways, the doors of which were kept open when the weather permitted. The bridge or gangway in question was erected to facilitate the carrying on of work which the defendants alleged was work of national importance, and they had obtained a licence from the London County Council for the erection of the bridge or gangway and its retention for six months after the date of the declaration of peace. Only the claim for damages was persisted in at the trial.

Tomlin, *K.C.*, and *Manning* for the plaintiff.

Hughes, *K.C.*, and *Dighton Pollock* for the defendants.

Cur. adv. vult.

Oct. 29, 1918. **PETERSON, J.,** read the following judgment.—Leading out of Horseferry Road, Westminster, there is a narrow passage called Laundry Yard, which runs north and south, 5½ ft. wide. On the east side of this passage are the plaintiff's premises. They consist of a two-storied building which is used for the business of wood turnery. On the west side of the passage are the defendants' main premises. On the ground floor of the plaintiff's premises there are, first, a window to a water-closet; secondly, a doorway which the plaintiff claims to be an ancient light; thirdly, a window to the north of the doorway; and, fourthly, another window further to the north. On the first floor there is another doorway with a jib for the hauling up of timber. This doorway also the plaintiff claims to

be an ancient light, and on the first floor there is also a window which gives light to a small office. The defendants acquired the adjoining premises, No. 78, to the south of the plaintiff's premises, and constructed a bridge between those premises and their property on the west side of the passage. This bridge runs out in a westerly direction from No. 78, and then turns to the north, covering in its northerly extension a space above but opposite to the water-closet window, and this part is only 1 ft. 8 in. from the portion of the plaintiff's premises which is occupied by the water-closet. This bridge is the subject of complaint. I had a view of the premises at ten o'clock in the morning of a fair autumn day, and the conclusion at which I have arrived is the result both of the evidence and of my own inspection.

[His Lordship dealt with, and rejected, several complaints which do not call for report, and continued:] The upper shop—that is to say, the shop on the first floor—is lighted by six fair-sized skylights and four smaller skylights. On the whole it is a very well-lighted room. The complaint is that a bench by the door is not so well lighted as it was before the bridge was built. It was the habit of the workmen, when they used this bench for finishing work, to open the door, with the object of obtaining as much light as possible, except when the rain drove in or the weather was cold. I think the light of this bench has been affected by the bridge, though not to any very great extent, but sufficiently, I think, to be described as material. The question whether there is any right to this access of light through the doorway I will consider later.

The principal expert called by the plaintiff, Mr. Stevens, evidently thought that the great grievance in connection with the ground floor shop was the obstruction of light to the doorway. Rouse, a workman, said that the plaintiff used to derive a great deal of light from the doorway, and that it was from the doorway that the light was obtained. Shave, another workman, said that on an ordinary day he could see very well in the ground-floor shop with the door open, but not with the door shut. From my observation, I am satisfied that when the door was shut the ground-floor room was always a dark, gloomy room, and, in my judgment, the bridge has not materially affected the access of light to the window next to the doorway. Then as to the doorway, if the plaintiff is entitled to access of light through the open door, I am of opinion that the erection of the bridge has materially affected the light which formerly passed through when the door was open.

Then the last window in question is the window of the water-closet. This is a small aperture through which no direct light entered the room. The room was dark before the bridge was erected, but I am satisfied that, as Mr. Goulden, one of the witnesses, said, it has undoubtedly been darkened by the erection of the bridge. Having regard to the position of the bridge in relation to this window, the access of light must have been diminished. When I visited the premises it was almost impossible to distinguish anything in this room except the window and the cistern immediately under it. In this case I think that the diminution of light has been substantial.

The question remains whether the plaintiff has any right to complain that the access of light through the two doorways has been obstructed, or, in other words, whether an owner of a house who opens an ordinary door whenever he pleases, and by this means lights the space behind the door, can claim a prescriptive right to light through the doorway. The upper door has been opened as occasion required for the purpose of admitting planks of timber, and also, when the weather was favourable and it was desired to do finishing work at the bench, for the purpose of obtaining additional light for the bench, but for what period it has been used for the purpose of lighting the bench is at least doubtful; but Rouse, a workman who was in the plaintiff's employment until 1911, said that the bench was not there during the time that he was employed by the plaintiff. The lower door was opened to afford ingress and egress, and was also frequently kept open, when the weather was suitable, for the purpose of admitting light to the shop, and letting dust out.

So far as the reported decisions go, this appears to be the first case in which it has been contended that a prescriptive right to light can be obtained in such circumstances. Section 3 of the Prescription Act, 1832, provides:

> "When the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible. . . ."

The question is whether this section applies to a doorway having a door which is open or shut as occasion may require. It is difficult in such a case to see what is the measure of the light which has been enjoyed. If a door is at one time fully open and at another time only partially open, what is the aperture through which the light has been enjoyed, and what is the amount of light which has been enjoyed during the period of prescription? In my judgment, this is a serious objection to the right which has been claimed. I am also of opinion that the section only applies to windows or apertures in the nature of windows, and not to apertures with doors in them, which were primarily constructed for the purpose of being closed, and thus excluding light. In *Tapling* v. *Jones* (1) (11 H.L.Cas. at pp. 305, 306) LORD WESTBURY expressed the view that the section might be read as meaning "when any window of a dwelling-house, workshop, or other building shall have been actually enjoyed," showing that he considered that the access of light referred to in the section was access to a window or an aperture in the nature of a window. The cases all deal with rights, or alleged rights, of lights in connection with windows or apertures constructed for the purpose of admitting light, and no one before this case appears to have suggested that, if an ordinary door is left open from time to time as and when the owner thinks fit during the period of twenty years, the doorway becomes an ancient light. The result, according to the plaintiff's contention, would be surprising. For example, if the door of a scullery or kitchen were left open in fine weather in order to obtain fresh air, a prescriptive right to the access of light through the doorway would be obtained.

I am of opinion that the plaintiff's contention is erroneous, and that he has not acquired any rights to the access of light through the two doorways in question. The result is that the only good ground of complaint which the plaintiff has is in connection with the obstruction to the window of the water-closet. It is not contended by the plaintiff that there should in any case be a mandatory injunction, and I have been asked to assess the damages if I think damage has been incurred. It will probably be necessary now to install the electric light in the water-closet, and, as the electric light will only be used occasionally and for short periods, I think that the sum of £15 is adequate to satisfy the injury which the plaintiff has sustained.

Solicitors: *Bartlett & Gregory*; *Monier-Williams, Robinson & Milroy.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

ELLIS *v.* TORRINGTON

[COURT OF APPEAL (Bankes, Warrington and Scrutton, L.JJ.), November 3, 4, 1919]

[Reported [1920] 1 K.B. 399; 89 L.J.K.B. 369; 122 L.T. 361; 36 T.L.R. 82]

Maintenance—Champerty—Assignment of lease—Covenant to repair—Previous purchase of freehold by assignee—Action by freeholder, as assignee of covenant, against lessee.

By Lease No. 1, dated Feb. 12, 1868, premises were demised for a term of 50 years expiring Dec. 25, 1917. The premises subsequently became subject to two further leases, leases Nos. 2 and 3, expiring Dec. 18, 1917, and Dec. 15, 1917, respectively. All three leases contained similar covenants for repair. In 1909 lease No. 3 was assigned to the defendant, who by a further lease, lease No. 4, demised the premises to the plaintiff for a term expiring Dec. 5, 1917. The covenants for repair contained in lease No. 4 were less onerous than those contained in the three earlier leases. The plaintiff was in possession when lease No. 4 expired and the defendant commenced proceedings against him for breaches of the covenants contained in that lease. On May 1, 1918, the plaintiff purchased the freehold of the premises together with the benefit of the covenants contained in lease No. 1, and on Sept. 17, 1918, the benefits of the covenants contained in lease No. 3 were assigned to the plaintiff. The plaintiff thereupon commenced proceedings against the defendant as assignee of lease No. 3 for breaches of the lessee's covenants contained therein. The defendant contended that the assignment of Sept. 17, 1918, was bad as savouring of maintenance and champerty.

Held: the rights of action on the covenants of the lease were so connected with the enjoyment of the property that they were more than a bare right to litigate, and the assignment was not objectionable on the ground of maintenance or champerty.

Williams v. *Protheroe* (1) (1829), 2 Moo. & P. 779; *Dawson* v. *Great Northern and City Rail. Co.* (2), [1905] 1 K.B. 260; and *Ogdens, Ltd.* v. *Weinberg* (3), (1906), 95 L.T. 567, applied.

Prosser v. *Edmonds* (4) (1835), 1 Y. & C.Ex. 481, and *May* v. *Lane* (5) (1894), 64 L.J.Q.B. 236, discussed.

Notes. As to assignment of a right of action, see 1 HALSBURY'S LAWS (3rd Edn.) 14, 42, 43, and ibid., vol. 4, 519, 520; for cases see 8 DIGEST (Repl.) 557.

Cases referred to:

(1) *Williams* v. *Protheroe* (1829), 5 Bing. 309; 3 Y. & J. 129; 2 Moo. & P. 779; 130 E.R. 1080, Ex. Ch.; 1 Digest 77, *621*.

(2) *Dawson* v. *Great Northern and City Rail Co.*, [1905] 1 K.B. 260; 74 L.J.K.B. 190; 92 L.T. 137; 69 J.P. 29; 21 T.L.R. 114, C.A.; 8 Digest (Repl.) 558, *114*.

(3) *Ogdens, Ltd.* v. *Weinberg* (1906), 95 L.T. 567; 22 T.L.R. 729, H.L.; 8 Digest (Repl.) 588, *339*.

(4) *Prosser* v. *Edmonds* (1835), 1 Y. & C.Ex. 481; 160 E.R. 196; 8 Digest (Repl.) 552, *71*.

(5) *May* v. *Lane* (1894), 64 L.J.Q.B. 236; 71 L.T. 869; 43 W.R. 193; 39 Sol. Jo. 132; 14 R. 149, C.A.; 8 Digest (Repl.) 556, *97*.

(6) *Glegg* v. *Bromley*, [1912] 3 K.B. 474; 81 L.J.K.B. 1081; 106 L.T. 825, C.A.; 8 Digest (Repl.) 558, *112*.

(7) *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, *and Imperial Portland Cement Co.*, [1903] A.C. 414; 72 L.J.K.B. 834; 89 L.T. 196; 52 W.R. 143; 19 T.L.R. 677, H.L.; 12 Digest (Repl.) 660, *5123*.

(8) *Fitzroy* v. *Cave*, [1905] 2 K.B. 364; 74 L.J.K.B. 829; 93 L.T. 499; 54 W.R. 17; 21 T.L.R. 612, C.A.; 1 Digest 76, *617*.

(9) *Dickinson* (*Dickenson*) v. *Burrell*, *Stourton* v. *Burrell* (1866), L.R. 1 Eq. 337; 35 Beav. 257; 35 L.J.Ch. 371; 13 L.T. 660; 12 Jur.N.S. 199; 14 W.R. 412; 1 Digest 78, *634*.

(10) *Neville* v. *London Express Newspaper, Ltd.*, ante p. 61; [1919] A.C. 368; 88 L.J.K.B. 282; 120 L.T. 299; 35 T.L.R. 167; 63 Sol. Jo. 213; 1 Digest 68, *560*.

(11) *Torkington* v. *Magee*, [1902] 2 K.B. 427; 71 L.J.K.B. 712; 87 L.T. 304; 18 T.L.R. 703, D.C.; reversed, [1903] 1 K.B. 644; 88 L.T. 443; 19 T.L.R. 331, C.A.; 8 Digest (Repl.) 556, *98*.

Also referred to in argument:

Defries v. *Milne*, [1913] 1 Ch. 98; 82 L.J.Ch. 1; 107 L.T. 593; 57 Sol. Jo. 27, C.A.; 8 Digest (Repl.) 558, *111*.

Seear v. *Lawson*, *Chatterton* v. *Lawson* (1880), 15 Ch.D. 426; 49 L.J.Bcy. 69; 42 L.T. 893; 28 W.R. 929, C.A.; 1 Digest 74, *606*.

Re Perkins, *Poyser* v. *Beyfus*, [1898] 2 Ch. 182; 67 L.J.Ch. 454; 78 L.T. 666; 46 W.R. 595; 14 T.L.R. 464; 42 Sol. Jo. 591; 5 Mans. 193, C.A.; 12 Digest (Repl.) 568, *4327*.

British Union and National Insurance Co. v. *Rawson*, [1916] 2 Ch. 476; 85 L.J.Ch. 769; 115 L.T. 331; 32 T.L.R. 665; 60 Sol. Jo. 679, C.A.; 8 Digest (Repl.) 557, *101*.

Appeal by the defendant from a decision of SARGANT, J., sitting as an additional judge of the King's Bench Division.

The plaintiff sued for £334 damages for breach of a covenant to keep and leave certain premises in repair. He claimed as assignee of the benefit of the covenant.

The statement of claim alleged that, by a deed dated Oct. 24, 1898 [Lease No. 3], made between Earle Tudor Johnson of the one part and Franz Voelklein of the other part the house and premises in question, which were situate in the parish of Cookham in the county of Berks, and were then known as Felix Cottage, but now as Hazeldene, were let by E. T. Johnson to F. Voelklein from Sept. 29, 1898, for a term of nineteen years and a quarter of another year except the last ten days thereof. By the said deed F. Voelklein covenanted with E. T. Johnson that he would during the term well and substantially repair and keep in good and substantial repair in a workmanlike manner and with good materials the house and premises, damage by fire excepted, and also would save as aforesaid at his own cost in the second year and in every subsequent third year and in the last year of the term paint all the outside woodwork, ironwork, and other work belonging to the house and premises and all the inside woodwork in the fourth year, and once in every subsequent seven years and in the last year, and would colour, whitewash and paper as therein provided, and also would at the expiration of the term peaceably yield up the house and premises in good and substantial repair and condition in accordance with the covenants thereinbefore contained, damage by fire excepted. The term subsequently became vested in the defendant. E. T. Johnson died on Mar. 29, 1917, and the reversion upon the term became vested in his executors. While the defendant was assignee of the term the house and premises were out of such repair as was required by the covenants above mentioned, and at the end of the term they were yielded up by the defendant out of such repair. By a deed dated Sept. 17, 1918, the executors of E. T. Johnson, in consideration of the covenant hereinafter mentioned, assigned to the plaintiff the full benefit of the covenants on the part of the lessee contained in the deed of Oct. 24, 1898, together with the full right to recover, receive, and retain for his benefit all damages, costs, and other sums of money and all other relief for or in respect of any breach or breaches committed of the said covenants or any of them and also the right to bring, prosecute, compound, or release any action or proceeding in respect thereof

and all other rights and powers whatsoever in connection therewith. And the plaintiff covenanted with the executors that he would at all times keep the executors and the estate of E. T. Johnson effectually idemnified against all actions and proceedings, costs, damages, claims, and demands in respect of any liability whatsoever on the part of E. T. Johnson or his estate or effects under the indenture referred to in the schedule, namely, an indenture of lease dated Mar. 30, 1868, made between Albert Ricardo and E. T. Johnson, and referred to below. Express notice of this assignment was given in writing to the defendant on Sept. 18, 1918. The plaintiff claimed £334. The defendant objected that the statement of claim disclosed no cause of action.

The following statement of facts is taken from the judgment of SARGANT, J.: By an indenture of lease dated Feb. 12, 1868, hereinafter referred to as Lease No. 1, the house and premises were demised by Cooper and others to Albert Ricardo from Christmas, 1867, for fifty years, i.e., to Christmas, 1917, at a rent of £96, and there were covenants by the lessee to repair, to keep in repair, to do certain specified painting, and to yield up in good repair. On Mar. 30, 1868, a lease [Lease No. 2] was executed by which Albert Ricardo, as lessee under Lease No. 1, leased the premises to E. T. Johnson from Christmas, 1867, for fifty years less seven days, i.e., to Dec. 18, 1917, at a rent of £45 per annum. There were covenants by the lessee to repair and keep in repair, to do certain specified painting, and also to yield up in good repair. The language of those covenants was substantially identical with the language of the covenants in Lease No. 1. Some thirty years afterwards, on Oct. 24, 1898, E. T. Johnson by a Lease No. 3, demised the same property to F. Volklein from Michaelmas, 1898, for nineteen and a quarter years less ten days for a term expiring on Dec. 15, 1917. This is the lease referred to in para. 1 of the statement of claim. It contained the covenant set out therein which was more or less, but not quite the same, as the covenants contained in Leases Nos. 1 and 2. There was an exception of damage by fire in the covenant to yield up. By Sept. 29, 1909, Lease No. 3 had got into the hands of one Leon as assignee, who in the same year assigned Lease No. 3 to the defendant, Lady Torrington, by a deed of assignment containing the ordinary covenant by the assignee to indemnify the assignor against subsequent breaches of covenant in the lease. On May 30, 1914, by a Lease No. 4, the defendant leased the premises to the plaintiff from June 24, 1914, for a term of three and a half years less twenty days, i.e., to Dec. 5, 1917. The covenants to repair in this lease were different from those in the other leases. They were covenants by which the lessee's liability for fair wear and tear were excepted. The plaintiff was in actual possession when Lease No. 4 came to an end. During the twenty days or so from Dec. 5 to Dec. 25, 1917, all the four leases expired.

On Dec. 18, 1917, the plaintiff contracted with the successors in title of Cooper and others, the lessors under Lease No. 1, to purchase the freehold of the premises, and it was part of the terms of the purchase that the plaintiff should have assigned to him the benefit of the covenants by the lessee contained in Lease No. 1. The purchase was actually completed on May 1, 1918. On that day two indentures were executed; by one of which the freeholders conveyed the fee simple of the premises to the plaintiff, and by the other of which the freeholders conveyed to the plaintiff the full benefit of the lessee's covenants in Lease No. 1, together with the right to sue in respect thereof. Thus the plaintiff was entitled to sue Ricardo or his representatives for breaches by the lessee of the covenants in Lease No. 1. Ricardo or his representatives if sued by the plaintiff could, and probably would, sue the executors of E. T. Johnson, who had died on Mar. 29, 1917, for breaches of the almost identical covenants in Lease No. 2, and Johnson's executors in their turn could sue the defendant on the covenants in Lease No. 3. The defendant was already seeking to recover from the plaintiff under his covenants in Lease No. 4. In these circumstances the representatives of E. T. Johnson executed the assignment mentioned in para. 5 of the statement of claim as set out above. The question at issue was whether that assignment was valid. SARGANT, J., held that

the rights under the assignment were sufficiently connected with the enjoyment of the property to escape being bare rights of action and were not within the mischief aimed at by the rules against maintenance and champerty. The defendant appealed.

Gover, K.C., and *Foà* for the defendant.

Schiller, K.C., and *Willoughby Williams*, for the plaintiff, were not called on to argue.

BANKES, L.J.—It is clear that the plaintiff could have been made responsible for breaches of covenant in the under-lease of which she was assignee, if the freeholder had sued his lessee Ricardo or his representatives, and Ricardo or his representatives had sued E. T. Johnson, and E. T. Johnson had sued the defendant. It is therefore in the public interest that the short cut which the plaintiff is taking in this action should be permissible, in order to avoid circuity of action, provided the law will permit it. It is said that there is a valid objection in that the assignment of Sept. 17, 1918, from E. T. Johnson's executors to the plaintiff, was an assignment of a bare right of action for damages for breach of contract and, as such, unenforceable.

In considering this argument it is necessary first to ascertain the principle on which is based the rule that a bare right of action for damages is not assignable either in law or in equity. We have been referred to a number of cases, but I think the principle is best stated in the judgment of PARKER, J., sitting as a member of the Court of Appeal in *Glegg* v. *Bromley* (6). He says ([1912] 3 K.B. at pp. 489, 490):

> "Ordinary choses in action were not assignable at law, but were, generally speaking, assignable in equity whether themselves legal or equitable choses. In the former case equity compelled the assignor to allow his name to be used for their recovery in legal proceedings; in the latter case the assignee could sue in equity in his own name. There was one exception to this rule. Equity on the ground of public policy did not give validity to the assignment of what is in the cases referred to as a bare right of action, and this was so whether the bare right were legal or equitable. I have looked at a good many authorities on that point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to maintenance. There is no doubt in the cases about the rule, and there is no doubt in the cases with regard to the exception, but difficulties often arose in deciding whether a particular right was within the exception or was within the rule."

The rule then that a bare right of action for damages is not assignable, which PARKER, J., treats as an exception to a broader rule, rests on the principle that the law will not recognise any transaction savouring of maintenance or champerty.

The next question is what is the exception to this rule? It is where the assignee can establish that he has an interest in the suit. Of the instances to which we have been referred the first is *Williams* v. *Protheroe* (1). Counsel for the defendant has pointed to several distinctions in point of fact between that case and the present, but the importance of the case is its recognition of the interest of the assignee as being sufficient to sustain his claim. BEST, C.J., there said (2 Moo. & P. at p. 787):

> "Here the agreement was to enable a bona fide purchaser of an estate to recover rents due and in arrear; and, also, to recover for injuries or dilapidations previously to the purchase. The agreement applies to bygone rents, for which suits have been instituted and commenced by the vendor; and to say that the agreement as to the sum to be recovered for past dilapidations is champerty, would be carrying the law further than was ever done in ancient times, when it was necessary for the then existing state of society."

It was held then that the purchase of an estate conferred on the purchaser an interest sufficient to validate an assignment of a right of action for damages for breach of a covenant to repair the premises, and that the law of champerty could not be invoked to defeat his rights under the assignment. *Dawson* v. *Great Northern and City Rail. Co.* (2) differed from this in its facts, but the language of STIRLING, L.J., in giving his reasons for holding the action maintainable is very applicable to the present case. He said ([1905] 1 K.B. at p. 271):

> "Even if the assignment be regarded apart from the conveyance of the lands and buildings comprised in the deed of Aug. 17, 1901, it appears to us that it is good; but we think that great weight must be given to the circumstance that this assignment is incidental and subsidiary to that conveyance, and is part of a bona fide transaction, the object of which was to transfer to the plaintiff the property of Blake with all the incidents which attached to it in his hands. Such a transaction seems to be very far removed from being a transfer of a mere right of litigation."

In my view the assignment in the present case was, in the words of STIRLING, L.J., "incidental and subsidiary" to the conveyance of the property. It is true that here the conveyance of the property and the assignment of the right of action were made by different persons, but I do not see what difference in principle that makes when the test is whether the transaction incurs or avoids the charge of maintenance and champerty. In *Ogdens, Ltd.* v. *Weinberg* (3) the House of Lords, and particularly LORD DAVEY, dealt with the question whether a particular assignment was an assignment of a bare right of action for damages and held that it was not, because, as LORD DAVEY expressed it, the contract was clearly one which appertained to the business. Guided by those three cases, I approach the question, Is there anything in the facts of this case to justify the court in holding that, notwithstanding the plaintiff's interest, this action was champertous and the assignment of Sept. 17, 1918, unenforceable? I think not.

In my view, SARGANT, J., was quite right when he said that rights of action for breaches of covenant by the defendant were sufficiently connected with the enjoyment of the property to escape being bare rights of action within the meaning of that phrase as used by PARKER, J., in *Glegg* v. *Bromley* (6). The plaintiff is seeking to enforce a right incidental to property, a right to a sum of money which theoretically is part of the property he has bought. I see nothing relevant in the fact that, owing to the various dealings with the property, he was obliged to take the assignment from an underlessee. His position is in the eye of the law the same as if he had been able to bring this action under the assignment which he took from the original freeholder. On these grounds I think the judgment of SARGANT, J., was right and this appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion. The question is whether in the particular circumstances of this case the assignment to the plaintiff of the benefit of certain covenants to repair, for the performance of which the defendant is liable, is valid and confers on the plaintiff a right to sue for damages. The defendant contends that the assignment was of a bare right of action, that is, an assignment of a right to recover damages for a past breach of contract; that it is therefore obnoxious to the law against champerty and maintenance, and consequently, according to settled principles of law, void.

[HIS LORDSHIP stated the facts, and continued:] The question is, Is that assignment valid, as SARGANT, J., has held it to be, or is it void under the rules which prevent an assignment of a bare chose in action? The principle to be applied in solving this question is stated very neatly and completely by PARKER, J., then sitting in the Court of Appeal, in *Glegg* v. *Bromley* (6). The passage has been cited by BANKES, L.J., and I do not propose to read the whole of it again. The effect of it is that as a general rule all choses in action are assignable in equity, though they were not assignable at law. To that rule there is an exception, namely, that a bare right of action is not assignable. Then follows a passage in

which PARKER, J., states the reason why both in law and equity such assignments were held to be invalid. He says ([1912] 3 K.B. at p. 490):

> "I have looked at a good many authorities on that point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to maintenance."

Then after saying that there was no doubt about the rule or about the exception, but that difficulties often arose in deciding whether a particular right was within the exception or was within the rule, he proceeded:

> "The question was whether the subject-matter of the assignment was, in view of the court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity."

In *Dawson* v. *Great Northern and City Rail. Co.* (2) STIRLING, L.J., said ([1905] 1 K.B. at p. 270):

> "Although as is laid down by LORD MACNAGHTEN in advising the House of Lords in *Tolhurst* v. *Associated Portland Cement Manufacturers* (7), 'It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee,' yet a Court of Equity is as much bound as a Court of Common Law by the law relating to champerty and maintenance, and if an assignment of a chose in action is obnoxious to that law it is bad in equity no less than at law. An assignment of a mere right of litigation is bad: *Prosser* v. *Edmonds* (4); but an assignment of property is valid even although that property may be incapable of being recovered without litigation."

I have referred to those passages because they lead back to the source of the objection, both in law and in equity to the assignment of a right of action. Does that apply to the present case? To eliminate the immaterial, suppose the transaction had been this: A purchase by the plaintiff from the then freeholders, with the benefit of Ricardo's covenants, Ricardo himself being a party to that conveyance in order to assign the benefit of the covenants contained in E. T. Johnson's underlease, and so joining in pursuance of an agreement between him and the purchaser that the purchaser, instead of suing Ricardo, and leaving Ricardo to bring a separate action against E. T. Johnson, should have direct recourse to Ricardo's right of action against E. T. Johnson. If Johnson were the person ultimately liable, what possible objection on the ground of champerty or maintenance could there be to that? Interest, sometimes of a most shadowy nature, in the subject-matter was sufficient to save a transaction from the imputation of maintenance. In the case I have put, the plaintiff would have had ample interest in the subject-matter to justify an assignment to him of the benefit of E. T. Johnson's covenants to repair; considerations which would validate an assignment by Ricardo of his rights against E. T. Johnson would equally validate an assignment by E. T. Johnson's executors against Voelklein or the assignee of his sub-underlease. It follows that in the circumstances of this particular case the interest of the assignee is sufficient to relieve the assignment from any objection based on the ground that it was an assignment of a bare right of action and as such void in law and in equity. The judgment of SARGANT, J., was right and ought to be affirmed.

SCRUTTON, L.J.—On a careful consideration of the authorities cited, I find no principle of law to countenance the objection taken to this assignment. The objection is this. The defendant's lessor has assigned to the present owner of the property the right to sue on the defendant's covenant to keep the premises in repair or pay damages; it is said that this assignment is void, because it contravenes the law of champerty and maintenance. It is elementary knowledge that for a long time courts of common law, and courts of equity, differed as to how far choses in action, and particularly causes of action, could be assigned. The

common law treated debts as personal obligations and assignments of debts merely as assignments of the right to bring an action at law against the debtor and, except in a strictly limited number of cases, did not recognise any such assignments. Courts of equity always took a different view. They treated debts as property, and they regarded the necessity of an action at law to reduce the property into possession merely as an incident which followed on the assignment of the property.

I am stating the effect of the judgment of COZENS-HARDY, L.J., in *Fitzroy* v. *Cave* (8). But there came a point on which both courts would have agreed; to assign a bare right of action, a bare power to bring an action, was not permitted in either court, and the reason was, as pointed out by WARRINGTON, L.J., that both courts treated such an assignment as offending against the law or maintenance or champerty or both. But early in the development of the law the courts of equity, and perhaps the courts of common law also, took the view that where the right of action was not a bare right, but was incident or subsidiary to a right in property, an assignment of the right of action was permissible, and did not savour of champerty or maintenance. In *Glegg* v. *Bromley* (6) PARKER, J., defined the exception in this way ([1912] 3 K.B. at p. 490):

> "The question was whether the subject-matter of the assignment was in the view of the court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity."

STIRLING, L.J., in *Dawson* v. *Great Northern and City Rail. Co.* (2), defined it in these words ([1905] 1 K.B. at p. 271):

> "We think that great weight must be given to the circumstance that this assignment is incidental and subsidiary to that conveyance, and is part of a bona fide transaction, the object of which was, to transfer to the plaintiff the property of Blake, with all the incidents which attached to it in his hands."

In *Dickinson* v. *Burrell* (9), which has been approved in later cases, Dickinson, having conveyed property by a deed which was voidable in equity, made a second conveyance of the same property by a valid deed. It was held that the second deed carried with it the right to set aside the voidable deed. LORD ROMILLY, M.R., said (L.R. 1 Eq. at p. 342):

> "The distinction is this: if James Dickinson sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A.B., to maintain this bill; but if A.B. had bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed."

Those three cases state in various ways the exception which the courts have recognised to the rule, that a bare right of action cannot be conveyed because it savours of champerty and maintenance. The exception and the limits defining it are easily apprehended when the nature of champerty and maintenance is considered. Many acts used to be regarded as acts of maintenance which are not so regarded now. HAWKINS, in his PLEAS OF THE CROWN, gives many instances which no one now would think of calling maintenance. LORD HALDANE in *Neville* v. *London Express Newspaper, Ltd.* (10), said (ante p. 71):

> "It is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence."

Champerty is only a particular form of maintenance, namely, where the person who maintains takes as a reward a share in the property recovered. When the person who assists is himself interested in the subject-matter of the suit before its commencement, there is neither champerty nor maintenance. Three owners of property may assist one of them in suing to protect the property, and may share in what is recovered. This is neither maintenance nor champerty, because none

of the three have a bare right of action. Each has a right of action relating to his interest in the property. So in this case, when the plaintiff, who had bought the freehold, took also an assignment of the right to recover damages for dilapidations against the first lessee, he was not buying in order merely to get a cause of action, he was buying property and a cause of action as incidental thereto. That assignment seems clearly to be protected by the principle of *Williams* v. *Protheroe* (1). The next step is this, if, starting with a valid assignment of the lease, he had sued the first lessee, who had sued the second lessee, who had sued the third lessee, there would have been three actions, the last of which would have established the liability of the defendant. Instead of that the plaintiff, by taking an assignment of the action against the third lessee, reaches the same result by one action instead of the complicated formalities of three. For these reasons I think the objection taken to this assignment is baseless.

I wish to add this. There are two much-quoted cases, which must in future be accepted with caution. The dictum in *Prosser* v. *Edmonds* (4) would be much modified if that case were decided now for the first time. Secondly, it is not of much use to cite *May* v. *Lane* (5) at the present day, without citing the cases in which it has been explained. The judgment of RIGBY, L.J., is generally cited without reference to the facts of the case. It ought to be taken with the qualification placed upon it in *Torkington* v. *Magee* (11). I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *C. E. W. Ogilvie*; *Cutler & Allingham.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

Re GARSIDE. WRAGG *v.* GARSIDE]

[CHANCERY DIVISION (Astbury, J.), December 3, 1918]

[Reported [1919] 1 Ch. 132; 88 L.J.Ch. 116; 120 L.T. 339; 35 T.L.R. 129; 63 Sol. Jo. 156]

Accumulation—Accumulation beyond permitted period—Income or capital—Valid accumulations for 21 years capital of residuary estate—Accumulations thereafter residuary income.

A testator by his will devised freehold property to his trustees on trust to sell the same, with power to postpone the sale, and until sale on trust to apply the income, or a competent part thereof, for the benefit of his son as they in their discretion should think fit. In the exercise of the trust, the unexpended income from the property was accumulated over a period of more than twenty-one years.

Held: the valid accumulations between the date of the testator's death and twenty-one years thereafter formed part of the capital of the testator's residuary estate, while the accumulations after that date were distributable as income of the residuary estate.

Re Hawkins, White v. *White* (1), [1916] 2 Ch. 570, followed.

Re Pope, Sharp v. *Marshall* (2), [1901] 1 Ch. 64, not followed.

Notes. The Accumulations Act, 1800, has been repealed by the Law of Property Act, 1925. See now s. 164 of the Act of 1925.

As to restriction of accumulation, see 29 HALSBURY'S LAWS (3rd Edn.) 335 et seq.; and for cases see 37 DIGEST 130 et seq. For the Law of Property Act, 1925, s. 164, see 20 HALSBURY'S STATUTES (2nd Edn.) 771.

Cases referred to:

(1) *Re Hawkins, White* v. *White*, [1916] 2 Ch. 570; 86 L.J.Ch. 25; 115 L.T. 543; 61 Sol. Jo. 29; 37 Digest 149, *750*.

(2) *Re Pope, Sharp* v. *Marshall*, [1901] 1 Ch. 64; 70 L.J.Ch. 26; 49 W.R. 122; 45 Sol. Jo. 45; 37 Digest 148, *749*.

(3) *Re Phillips, Phillips* v. *Levy* (1880), 49 L.J.Ch. 198; 28 W.R. 340; 37 Digest 148, *748*.

(4) *Re Cababé, Cababé* v. *Cababé* (1914), 59 Sol. Jo. 129; 37 Digest 148, *740*.

(5) *Crawley* v. *Crawley* (1835), 7 Sim. 427; 4 L.J.Ch. 265; 58 E.R. 901; 37 Digest 145, *710*.

(6) *O'Neill* v. *Lucas* (1838), 2 Keen, 313; 48 E.R. 649; 37 Digest 148, *745*.

Also referred to in argument:

Tench v. *Cheese* (1855), 6 De G.M. & G. 453; 3 Eq. Rep. 971; 24 L.J.Ch. 716; 25 L.T.O.S. 189; 1 Jur.N.S. 689; 3 W.R. 500; 43 E.R. 1309, L.C. & L.JJ.; 37 Digest 132, *617*.

M'Donald v. *Bryce* (1838), 2 Keen, 276; 7 L.J.Ch. 173; 2 Jur. 295; 48 E.R. 634; 37 Digest 147, *728*.

Originating Summons.

The testator by his will, dated May 15, 1893, devised certain freehold property, which he specified, to his wife for life with a request that during her lifetime she would maintain his eldest son, Abraham, in a manner suitable to his station in life, and after her death he devised certain property which he described as situate in the parish of Worksop in the county of Nottingham to his trustees on trust to sell the same with power to postpone the sale and until the sale on trust to manage or superintend the management of the same and grant leases thereof and to apply the income thereof first in payment of the expenses incurred in the management or in the exercise of any of the powers thereby conferred or otherwise in relation to the premises and of the outgoings and subject thereto to apply such income or a competent part thereof in and for the maintenance, support and benefit of the testator's son, Abraham, in such manner as the trustees, in their uncontrolled discretion should think fit. On the death of Abraham, the testator directed that the Worksop property, including the proceeds of sale of such part as might have been sold, should be held for the benefit of the widow and children of Abraham, and if there should be no child of Abraham who should attain the age of twenty-one years, then the Worksop property, including the proceeds of such portion thereof as might have been sold, or might be sold, should be held to the uses declared of and concerning his residuary real estate. The testator then devised and bequeathed all his residuary real and leasehold estate, and all the residue of his personal estate, to trustees on trust in the first place to pay out of his personal estate his funeral and testamentary expenses and debts and the legacies bequeathed by his will, and on trust in the next place until his youngest child should attain the age of twenty-one years out of the income of his residuary real and personal estate to pay the annual sums therein mentioned, and on trust to accumulate the surplus income of his residuary real and personal estate in the way of compound interest by investing the same and all the resulting income thereof, and to stand possessed of such accumulations to be dealt with as part of his residuary personal estate. When and so soon as his youngest child should attain the age of twenty-one years, the testator devised all his real and leasehold estate to the use of his son Frederick for life, and on the death of Frederick to the testator's trustees to the use of all the children of Frederick who should attain the age of twenty-one years. The testator then bequeathed all his residuary personal estate, including all accumulations thereof, to his trustees on trust to sell the same and stand possessed of the residuary trust moneys on trust to set apart and invest certain capital on trust for his daughters and their children, and subject thereto on trust to invest the residue of his personal estate and pay the annual income thereof to his son Frederick during his life, and after his death in trust to

hold the capital and the future income of the residuary trust fund for the children of Frederick who should attain twenty-one or marry. There was ample estate to provide for these sums, and, in the result, Abraham having died without issue, Frederick became tenant for life of the residuary, real, and personal estate. Frederick married and had one child only. The will also provided that, if Abraham should assign, or attempt to assign, the income of any estate applicable under the trusts of the will for his benefit, or should do, commit or permit any act or default, whether voluntarily or involuntarily, which should be inconsistent with his personal enjoyment of the whole of the income thereof, the trustees were to hold the income on the further discretionary trusts therein set out. Lastly, the testator authorised his trustees to postpone the sale and conversion of his real and leasehold estate while subject to any trust for sale, and of his personal estate for so long as they should think fit, and directed that, in the meantime, the income of the unconverted property should be applied in the same way as the income of the proceeds of sale would have been applicable if the sale and conversion had actually taken place. The testator died in 1893, his widow in 1899, and his son Abraham died intestate in 1918. The testator's youngest child attained twenty-one in 1896. Since the death of the widow, the trustees had managed the real estate in Worksop, and had out of the income paid such amounts as were from time to time required for the maintenance, support and benefit of the testator's son Abraham. The income was more than sufficient for the purpose, and the trustees had now in their hands money, or the investments thereof, of over £12,000, representing the accumulations of income not applied for Abraham's benefit during the interval between the death of his mother and his own death.

This summons was taken out by the trustees to determine (i) whether the £12,000 passed under the residuary devise or bequest contained in the will, or belonged to the estate of Abraham, either under the terms of the will or as heir-at-law of the testator, and (ii) if it passed under the residuary devise or bequest, whether it was to be treated as capital and invested as forming part of the testator's residuary estate, or belonged to his son, Frederick, as tenant for life.

Percy Wheeler for the trustees.
E. E. H. Brydges for the next-of-kin of testator's heir-at-law.
Owen Thompson for the tenant for life of the residue.
Dighton Pollock for the daughter of the tenant for life of the residue.

ASTBURY, J.—I think it is clear that there is no direct gift of the income of this specified real estate to Abraham. There is a trust under which the trustees of the will are entitled to apply the income, or a competent part thereof, for his benefit, as they in their uncontrolled discretion shall think fit. They exercised that trust, and a sum of £12,000, income derived from this property, has accumulated in their hands. That money, subject to what I shall say in a moment, passes under the residuary bequest.

A much more difficult question is as to the character in which it must be so held. The period during which the money was accumulated exceeded twenty-one years from the date of the testator's death. Under the trusts of this will, if the trustees exercised their discretion as they did, it is obvious that there is an accruing, accumulating sum of income which they do not apply from time to time for the benefit of Abraham. On the authorities, it seems to me that, under the Thellusson Act, the accumulations so growing up can only be held and invested as such for a period of twenty-one years. Therefore, this sum of £12,000 must be divided into two portions—one that grew up between the testator's death and the expiration of the twenty-one years, and the other that has since accrued. With regard to the first sum—namely, the valid accumulations which the trustees made —I think that they form part of the capital of the testator's residuary estate. They consisted of sums which were properly accumulated by the trustees during Abraham's life, and they were, during his life, liable to be drawn on for his benefit under the trusts in his favour, but such as existed at the end of the twenty-one

years and after Abraham's death, formed, in my opinion, part of the testator's general personal residuary estate. There is a trust for sale of this property which, I think, never ceased to be operative, and, therefore, there is a validly accumulated sum of personal estate which passed on the death of Abraham as part of the testator's residue, and I so hold.

With regard to the part of the income of this property which has accrued between the expiration of the twenty-one years and the death of Abraham, the case is different. This matter has been the subject of many conflicting decisions, but I propose on this point to follow the view of SARGANT, J., in *Re Hawkins, White* v. *White* (1). He there held, following *Re Phillips* (3) and *Re Cababé* (4), in preference to *Crawley* v. *Crawley* (5), *O'Neill* v. *Lucas* (6), and *Re Pope, Sharp* v. *Marshall* (2), that surplus income of this character could not, by reason of the Thellusson Act, be added from time to time to the capital of residue and dealt with accordingly, and that, therefore, it was distributable as income of the residuary estate. There must be a declaration to that effect.

Solicitors: *King, Wigg & Brightman*, for *Broomhead, Wightman & Moore*, Sheffield.

[*Reported by* J. B. MACMAHON, ESQ., *Barrister-at-Law*.]

MITCHELL-HENRY *v.* NORWICH UNION LIFE INSURANCE SOCIETY

[COURT OF APPEAL (Pickford, Warrington and Scrutton, L.JJ.), April 18, 1918]

[Reported [1918] 2 K.B. 67; 87 L.J.K.B. 695; 119 L.T. 111; 34 T.L.R. 359; 62 Sol. Jo. 487]

Mortgage—Interest—Payment—Payment by registered post—Treasury notes amounting to £48—Theft of notes—Right of mortgagees to recover from mortgagor.

The plaintiff borrowed on mortgage a sum of money from the defendants repayable with interest by instalments on certain dates. The defendants wrote to the plaintiff pointing out that an instalment of £48 5s. 8d. was due on a certain date, and asking that the amount should be paid at their office. The letter added: "Please return this notice when remitting." The plaintiff posted a registered letter containing £48 in Treasury notes and the balance in a postal order and stamps. The letter was delivered by the postman to a liftboy not in the employment of the defendants, and was stolen. In an action by the plaintiff for a declaration that the money had been paid,

Held: the use of the word "remitting" in the letter indicated that the defendants were willing to receive their payments through the post in the usual way, but it was not the usual or a reasonable practice to send so large a sum as £48 in Treasury notes, and so the plaintiff was not entitled to the declaration he claimed.

Notes. As to payments by post, see 8 HALSBURY'S LAWS (3rd Edn.) 212; and for cases see 12 DIGEST (Repl.) 533.

Case referred to:

(1) *Warwicke* v. *Noakes* (1791), Peake, 98, N.P.; 12 Digest (Repl.) 533, *4036*.

Also referred to in argument:

Pennington v. *Crossley & Son* (1897), 77 L.T. 43; 13 T.L.R. 513; 41 Sol. Jo. 661, C.A.; 12 Digest (Repl.) 533, *4039*.

Norman v. *Ricketts* (1886), 3 T.L.R. 182, C.A.; 12 Digest (Repl.) 533, *4041*.

Robb v. *Gow* (1905), 8 F. (Ct. of Sess.) 90; 42 Digest 825, *k*.

Appeal from a decision of BAILHACHE, J.

By an indenture dated May 15, 1915, the plaintiff covenanted to pay to the defendants a sum of £400 by ten half-yearly instalments, together with interest at 6 per cent., to be reduced to 5 per cent. on punctual payment. Payment was to be made on May 15 and Nov. 15 in each year. On May 9, 1916, the defendants' secretary wrote to the plaintiff as follows:

> "I beg to remind you that a half-year's interest on the above-mentioned mortgage for £400 becomes due on the 15th day of May next, and I shall be obliged by your paying the amount as stated below on that day to our office at 13, Southampton Street, Holborn, London, W.C."

The amount was set out at £48 5s. 8d., and at the bottom there was this intimation:

> "Please return this notice when remitting."

On June 13, 1916, the plaintiff remitted by registered post to the London office the sum of £48 5s. 8d., as to the £48 in Treasury notes and as to the additional 5s. 8d. in postal orders and stamps. The letter was posted early on June 13, 1916, and it reached the London office of the defendants on June 14, 1916, at about 10.30 a.m. When it got there the postman delivered the packet, as is the practice there, to the liftboy, who was not employed by the defendants. The liftboy signed for it, and, instead of taking it to the defendants, appropriated the packet and the contents to his own use.

The defendants sought to appropriate a payment made three months later to the first payment. In these circumstances the plaintiff claimed a declaration that the first payment had been duly made, and that the defendants were not entitled to make the appropriation. BAILHACHE, J., refused to make the declaration asked for.

Barrington-Ward for the plaintiff.

Maddocks for the defendants.

PICKFORD, L.J., stated the facts and continued: The question is whether under these circumstances there was a payment to the defendants. I should say that after this there appeared on the defendants' circulars with regard to payments this note:

> "All cheques, money orders, and postal orders should be crossed, and made payable to the Norwich Union Life Insurance Society, or order. Cash, bank-notes, and Treasury notes should be sent per prepaid registered post."

It is not suggested that any such notice as that was known to the plaintiff when he sent the money, but we certainly may look at it to see that the defendants considered that, and told their customers or clients that that was the way to send Treasury notes. With regard to that, I agree with BAILHACHE, J., that that is not an invitation or direction to send any amount that they like in Treasury notes by registered post, but that it is an intimation that if a person is sending an amount which it is ordinarily and reasonably proper to send by Treasury notes he may send it by registered post; and this is, to my mind, purely a question of fact. I am not prepared to say that no sum may be sent in this way, that it is not an ordinary way to send some sums in Treasury notes by registered post, but I do not think it is necessary to lay down any general rule that in other cases where any sum is paid in Treasury notes by registered post that is not payment if it be in compliance with a direction of the creditors to remit by post. On the other hand, I am not prepared to lay down a rule that, even looking at this note

to which I have referred, it is an ordinary and proper thing to send any amount, no matter how large, by Treasury notes by registered post, and that if it be done the debtor has discharged his obligation. It is a question of fact in each particular case.

There are one or two matters one must consider. This has been compared to the sending of bank-notes. Bank-notes, if they are of large denomination, say £20 notes, would be obviously things very much more difficult for a liftboy to get rid of and deal with than ordinary £1 Treasury notes. If they are of larger denomination still the difficulty is greater, even £5 notes are not so easy to handle as these ordinary £1 Treasury notes. With regard to registration, I think it is common knowledge that, certainly in London, and in fact in most parts of this country, the precaution is not taken, as in foreign countries, of seeing that when the registered letter is delivered the signature of the person to whom it is addressed is obtained. It is well known, at any rate to a business man, that anybody who answers the door and receives a letter from the postman signs a receipt for the registered letter. Taking all these matters into consideration, it does not seem to me that it is the ordinary way of payment to send so large a sum as £48 in Treasury notes, which are so much more easily handled by a dishonest person than bank-notes, even of the smallest denomination. There was no difficulty, of course, in getting a money order, nor in walking to Southampton Row and delivering the notes there. I do not know that there is any reason why a cheque should not have been sent, which would have been received, although it is not legal tender. I do not therefore feel at all inclined to differ from BAILHACHE, J., in his finding on the facts that this money was not sent in the ordinary business and proper way of sending a sum of this amount, even according to the direction to send it by post, and that therefore the sending of it by post in this way is not payment. I think, therefore, that this appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion. The defendants requested the plaintiff to send this sum of £48 by post, but in my judgment that did not amount to a request to send that sum in any form that the plaintiff might choose to send it by post, but it amounted to a request to send that sum by post in such an ordinary way as is appropriate to a sum of that amount. The question is, therefore, one purely of fact: Did the plaintiff send that sum in such an ordinary way as is appropriate to a sum of that amount? The onus of course lies upon the plaintiff. He it was who was liable to pay the sum to the defendants, and it is for him to show that he has paid it when it is an undeniable fact that the money did not actually reach the hands of the defendants. Like PICKFORD, L.J., I am not prepared to say that no sum may properly be sent by post in Treasury notes under such a request as this, but I am of opinion that the plaintiff has failed to make out that the ordinary way of sending so large a sum as £48 is to send it by £1 Treasury notes; and for that reason I also am not prepared to differ from the judgment of BAILHACHE, J. With regard to the note which was afterwards, in July, appended to the requests for payment, in my judgment all that that means is that if you adopt the post for sending cash of such an amount as is usually sent in cash, then you should send it by registered letter. I do not think it means anything more than that.

SCRUTTON, L.J.—I agree. There is a clear request in this case to make a remittance by post. The question seems to me to be, in the language of LORD KENYON in *Warwicke* v. *Noakes* (1), whether what was done was the usual way of transacting business of this nature. The plaintiff lived near the Haymarket, and he had to pay the money at High Holborn. What he did was to put forty-eight Treasury notes in an envelope and register it in the Haymarket to go to High Holborn. Is that the usual way to transact a business of this nature? BAILHACHE, J., has found that it is not usual to send so large a sum as £48 in Treasury notes. I am not prepared to say that I am satisfied with these reasons, but, using my own

judgment and knowledge of business men, I agree that it is not a usual way to send so large a sum in Treasury notes. That being so, I think the judgment must stand.

Appeal dismissed.

Solicitors: *Mount, Sterry & Wheeler*; *Collisson, Prichard & Barnes.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. *v.* BRAITHWAITE. Ex parte DOWLING

[COURT OF APPEAL (Pickford, Warrington and Scrutton, L.JJ.), May 2, 1918]

[Reported [1918] 2 K.B. 319; 87 L.J.K.B. 864; 119 L.T. 170; 82 J.P. 242; 34 T.L.R. 406; 16 L.G.R. 580; 2 B.R.A. 626]

Rates—Non-payment—Summons—Service—Service at ratepayer's place of business—"Document"—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *ss.* 256, 267.

A summons for the non-payment of a general district rate is a "document" within the meaning of s. 267 of the Public Health Act, 1875, and service under that provision may properly be effected by leaving the document at the place of business of the person on whom it is to be served.

Notes. The Public Health Act, 1875, s. 267, was repealed by the Public Health Act, 1936. Section 285 of the 1936 Act replaces s. 267 of the Act of 1875. The Summary Jurisdiction Act, 1848, s. 1, was repealed by the Magistrates' Courts Act, 1952. The Magistrates' Courts Rules, 1952, S.I. 1952, No. 2190, r. 76, made under the Act of 1952, replaces s. 1 of the Act of 1848. The Public Health Act, 1875, s. 256, was repealed for most purposes by the Public Health Act, 1936, and was finally repealed by the Highways Act, 1959. By virtue of s. 2 (1) of the Rating and Valuation Act, 1925, the general rate takes the place of the poor rate and any other rate which the county borough council, borough council, or urban district council had power to make. Proceedings for non-payment of rates are now brought under the Distress for Rates Act, 1960.

Followed: *R.* v. *Hastings Justices, Ex parte Mitchell* (1925), 89 J.P.Jo. 86. Considered: *R.* v. *Rose, Ex parte L.C.C.* (1948), 92 Sol. Jo. 557. Referred to: *Morecambe and Heysham Corpn.* v. *Warwick*, [1958] 56 L.G.R. 283.

As to the service of documents under the Public Health Acts, see 31 HALSBURY'S LAWS (3rd Edn.) 58, 59; and for cases see 38 DIGEST (Repl.) 193, 194. As to the service of summons under the Magistrates' Courts Rules, 1952, see 25 HALSBURY'S LAWS (3rd Edn.) 191, 192; and for cases see 33 DIGEST 330. As to the Public Health Act, 1936, s. 285, see 19 HALSBURY'S STATUTES (2nd Edn.) 464, 465. For the Magistrates' Courts Rules, 1952, r. 76, see 13 HALSBURY'S STATUTORY INSTRUMENTS.

Cases referred to:

(1) *R.* v. *Lilley, Ex parte Taylor* (1910), 104 L.T. 77; 75 J.P. 95; 25 Digest 105, *290.*

(2) *R.* v. *Rhodes, Ex parte McVittee, R.* v. *Mullin, Ex parte McVittee* (1915), 85 L.J.K.B. 830; 113 L.T. 1007; 79 J.P. 527; 25 Cox, C.C. 212, D.C.; 33 Digest 330, *431.*

(3) *Mason* v. *Bibby* (1864), 2 H. & C. 881; 3 New Rep. 482; 33 L.J.M.C. 105; 9 L.T. 692; 28 J.P. 121; 12 W.R. 382, D.C.; 38 Digest (Repl.) 194, *205.*

(4) *Newport Corpn.* v. *Lang* (1892), 57 J.P. 199, D.C.; 38 Digest (Repl.) 194, *206.*

(5) *Blackwell* v. *England* (1857), 8 E. & B. 541; 27 L.J.Q.B. 124; 3 Jur.N.S. 1302; 120 E.R. 202; sub nom. *England* v. *Blackwell*, 30 L.T.O.S. 148; 6 W.R. 59; 7 Digest 92, *532.*

(6) *R.* v. *Mead*, [1894] 2 Q.B. 124; 58 J.P. 448; 42 W.R. 442; 10 T.L.R. 413; 38 Sol. Jo. 400; 10 R. 217; sub nom. *R.* v. *Mead, Ex parte Anthony*, 63 L.J.M.C. 128; 70 L.T. 766, D.C.; 38 Digest (Repl.) 193, *202.*

(7) *Attenborough* v. *Thompson* (1857), 2 H. & N. 559; 27 L.J.Ex. 23; 30 L.T.O.S. 154; 3 Jur.N.S. 1307; 6 W.R. 135; 157 E.R. 230; 7 Digest 92, *533.*

(8) *Ablett* v. *Basham* (1856), 5 E. & B. 1019; 25 L.J.Q.B. 239; sub nom. *Ablett* v. *Barham*, 2 Jur.N.S. 285.

(9) *Haslope* v. *Thorne* (1813), 1 M. & S. 103.

(10) *Stoy* v. *Rees* (1890), 24 Q.B.D. 748; 59 L.J.Q.B. 310; 63 L.T. 49; 38 W.R. 683; 6 T.L.R. 345, C.A.; Digest (Practice) 301, *304.*

(11) *R.* v. *Hammond* (1852), 17 Q.B. 772; 21 L.J.Q.B. 153; 19 L.T.O.S. 21; 16 J.P. 312; 16 Jur. 194; 117 E.R. 1477; 20 Digest 131, *1046.*

Also referred to in argument:
Roberts v. *Williams* (1835), 2 Cr.M. & R. 561; 5 L.J.M.C. 23.

Appeal from a decision of the Divisional Court (Darling, Avory and Sankey, JJ.) (reported [1918] 1 K.B. 1), on a rule nisi addressed to T. W. Braithwaite and W. Hudson, justices for the county of Durham, to show cause why a writ of certiorari should not issue to quash an order made by them and dated Apr. 2, 1917, whereby Thomas Dowling, the applicant for the rule, was ordered to pay to the Bishop Auckland Urban District Council £2 14s. 8d. for general district rate.

The applicant, Major Thomas Dowling, was a major in the army, and before the war he practised as a solicitor at Bishop Auckland, Durham. He was the owner of two adjoining houses at Bishop Auckland, one of which he used as a dwelling-house and the other as an office. There was no internal communication between the two houses, and they were rated separately. In April, 1915, the applicant, who had then joined His Majesty's forces, was compelled by the nature of his military duties to close his dwelling-house, and it was wholly unoccupied, although his furniture remained there. His business as a solicitor was carried on in the adjoining house by his managing clerk, a man named Graham. In October, 1916, a general district rate was made by the Bishop Auckland Urban District Council for the half-year ending Mar. 31, 1917, and the applicant was assessed to this rate in respect of his dwelling-house in the sum of £2 14s. 8d. The applicant declined to pay the rate, as he considered that he should not be called upon to do so while he was serving with His Majesty's forces abroad. A summons was thereupon issued and served by a constable leaving it at the office with Mr. Graham, and Mr. Graham was requested to communicate with the applicant. This was done, but the letter did not reach the applicant until after the return day of the summons. Mr. Graham had no authority to accept service of the summons on behalf of the applicant. The justices made an order for the payment of the rate in the absence of the applicant. The applicant then applied for a certiorari to bring up that order on the ground that there had been no valid service of the summons, his contention being that service should have been made under the provisions of the Summary Jurisdiction Act, 1848, and that service under that Act must be either personal or at his place of abode, and not at his place of business. The justices contended that service of the summons was made under the Public Health Act, 1875, s. 267, and that under that Act service at a place of business was good, such place of business being a place of residence within the meaning of that section.

The Divisional Court held that the service of the summons was good under s. 267. The applicant appealed.

By s. 1 of the Summary Jurisdiction Act, 1848:

"Every . . . summons shall be served . . . upon the person to whom it is so directed, by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode. . . ."

By the Public Health Act, 1875:

"S. 256. If any person assessed to any rate made under this Act by any urban authority fails to pay the same when due and for the space of fourteen days after the same has been lawfully demanded in writing . . . any justice may summon the defaulter to appear before a court of summary jurisdiction to show cause why the rate in arrear should not be paid; . . ."

"S. 267. Notices, orders, and any other documents required or authorised to be served by delivering the same to or at the residence of the person to whom they are respectively addressed . . ."

Simey for the applicant.

Barrett-Lennard (*Mortimer* with him) for the justices.

Cur. adv. vult.

May 2, 1918. The following judgments were read.

PICKFORD, L.J., stated the facts, and continued: Speaking for myself, in the absence of authority, I should have thought that the same meaning attached to place of "abode" and place of "residence," but there are authorities to the contrary; *R.* v. *Lilley* (1) and *R.* v. *Rhodes* (2) on the one side, and *Mason* v. *Bibby* (3) and *Newport Corpn.* v. *Lang* (4) on the other. If it should become necessary to decide whether there is any difference in the meanings of the two expressions, I wish to reserve my opinion. Speaking again for myself, I should have thought in the absence of authority that the meaning of both expressions was the place where a man lived, using that word in its ordinary sense as distinguished from the place where he carried on his business. But there is authority of long standing that such a meaning is not always to be attached to the expression "place of residence," but that the object of the provision in which it is used must be regarded: see *Blackwell* v. *England* (5), where it was held that to describe an attorney's clerk as residing at his place of business was sufficient, because the object of the description was to enable persons to make inquiries about him, and that object was better attained by giving his place of business than his lodgings. There are other authorities to the same effect, that the words are to be interpreted according to the intention of the provision containing them, and the cases of *Mason* v. *Bibby* (3) and *Newport Corpn.* v. *Lang* (4) decided that, for the purpose of service under the Public Health Act, 1875, "place of residence" includes "place of business." The object of prescribing the place at which service is to be made is that the person summoned should have notice of the summons, and this is as well or better attained by service at his place of business than at his house. These authorities are of old standing, and have, no doubt, regulated the practice in many instances, and in such a case, unless there is a clear violation of principle or a great injustice resulting, I do not think we should overrule them. If, therefore, the service of the summons was under the Public Health Act, 1875, the cases cited show that it was good.

Whether it was under that Act or not depends upon whether the summons is a document within s. 267. Here again there is a decision of nearly twenty-five years' standing, in *R.* v. *Mead* (6), which has probably regulated the practice ever since. That case decides that such a summons is a document within the corresponding section of the Public Health (London) Act, 1891, in which the provisions are for this purpose identical with the provisions of the Public Health Act, 1875, and therefore to be served under its provisions. It is true that in that case the summons was one to an unknown and unnamed owner of premises, and could not have been served at all unless it were served in that way, but both CHARLES and COLLINS, JJ., state broadly that a summons is within the section and to be served in accordance with its provisions. I do not think we should overrule this decision

unless it is clearly wrong, and I do not think it is. The order of the justices, as it seems to me, would fall within s. 267 so far as service is concerned, and I see no reason why "document" should not include the summons upon which the order is made. It seems to me to fall within the words "document required or authorised to be served under this Act" and s. 256 authorises a justice to summon a defaulter in payment of rates, and this summons, therefore, is authorised by the Public Health Act, 1875, s. 256, to be served. The result is that I think the service was good, and the appeal should be dismissed with costs.

WARRINGTON, L.J., stated the facts and continued: I agree with the Divisional Court that the mode of service is regulated by s. 267 of the Public Health Act, 1875. The words are "any documents required or authorised to be served under this Act," not "any document which by the Act is so required or authorised." It is, therefore, unnecessary to find in the Act any express direction that this summons is to be served. All we do find is in s. 256 that any justice may summon the defaulter to appear before a court of summary jurisdiction. This necessarily involves service of a summons so to appear, and, in my judgment, such summons is required or authorised to be served under the Act, and is therefore within s. 267. The point was decided in this way in *R.* v. *Mead* (6) by CHARLES and COLLINS, JJ., and the correctness of that decision appears never to have been questioned.

Can it be served at the place of business? Independently of authority, I should say yes. Such an expression as "residence," which has no technical meaning, may properly be construed, having regard to the objects of the Act in which it is found, see *Blackwell* v. *England* (5), a case under the Bills of Sale Act. The only possible object in the case of the statute in question is that the documents mentioned may be brought to the knowledge of the defaulter. For this purpose I can see no reason why a man's private house or lodgings should be selected as the place of service exclusively of his place of business. In fact, seeing that the section authorises service by post, I should say there was much more chance of their getting by accident into the fire or the waste-paper basket at the private house or lodging than at his business premises, where part of the routine of the day is to open and read all letters; but this point also is covered by the authority of *Mason* v. *Bibby* (3) and *Newport Corpn.* v. *Lang* (4). Both on principle and on authority, therefore, I am of opinion that this appeal fails and should be dismissed.

SCRUTTON, L.J.—The question raised in this appeal is whether a summons for payment of water rate and general district rate in respect of his dwelling-house was properly served on the applicant. It was served by being left with a clerk at his place of business.

If service is to be regulated by the Summary Jurisdiction Act, 1848, the summons may be served by leaving it with some person for him at his last or most usual place of abode, and there are decisions under this Act that his place of business is not his "place of abode." If service is to be regulated by the Public Health Act, 1875, s. 267, the summons may be served by delivering the same to some person at his "residence," and there are authorities under this section, which the Divisional Court has followed, that his place of business may be his "residence." Whether service of the summons, which by s. 256 of the Public Health Act, 1875, is to be issued by a justice for appearance before a court of summary jurisdiction, may be effected under s. 267 of that Act depends on whether the summons is under that section a "document required or authorised to be served under that Act." The Divisional Court have followed *R.* v. *Mead* (6), a decision of COLLINS and CHARLES, JJ., that under s. 128 of the Public Health (London) Act, 1891, the words of which are practically identical with those of s. 267 of the Public Health Act, 1875, a summons to appear before a court of summary jurisdiction to answer a complaint under the Public Health (London) Act, was "a document required or authorised to be served under this Act," so that the method of service under s. 128 applied. This decision is based partly on the fact that the summons was on an

unknown owner of premises and that, if this mode of service was not available, there must be no mode of service provided under the Summary Jurisdiction Act, 1848, so that there was no means of dealing with a nuisance on premises whose owner was unknown. But CHARLES, J., said ([1894] 2 Q.B. at p. 132):

> "I cannot see that there is any reason for not construing s. 128 as including a summons as well as a notice or order"

and COLLINS, J., said (ibid at p. 133):

> "I am clearly of opinion that those words do embrace a summons."

It was argued that the words "or other documents" must be construed as ejusdem generis with the words "notices, orders" and it was said that this consideration would exclude legal proceedings. But the section authorises the service of "orders . . . required or authorised to be served under this Act." This would cover orders of courts, such as the "orders of abatement or prohibition" mentioned in s. 102 of the Public Health Act, 1875, and the preceding sections, and, if so, there is no difference of kind effected in including the summonses on which such orders are made. The demand to pay rates which precedes the issue of the summons in question in this case may clearly be served according to the provisions of s. 267, and it would be curious if a different mode of service were necessary for the consequent summons. The case of *R.* v. *Mead* (6) has stood unchallenged for twenty-five years, and in these matters of procedure, if no obvious injustice is done by a rule, it is of great importance that the rule should be certain, and not varied according to the court's view from time to time on the construction of words which are somewhat ambiguous. I am not satisfied that the decision in *R.* v. *Mead* (6) was wrong; I am inclined to think it was right; and, anyhow, I do not see any reason for changing the present practice by overruling it. In my opinion, therefore, the validity of the service of this summons should be regulated by s. 267 of the Public Health Act.

Under that section was it validly served? It was served on a clerk in charge at the appellant's place of business, and the section requires it to be served "at the residence of the person" summoned. This sort of question has had to be considered on a number of statutes passed for varying purposes, some using the words "place of abode," some "place of residence"; and on them there have been a bewildering variety of decisions as to whether a place of business is or is not a place of abode or residence. A picturesque dictum of MARTIN, B., in one of the authorities describes the process of going through these authorities as "wallowing in the mire"; and I do not propose to undertake that task. In ordinary language, I do not think we would speak of a place of business as a man's place of abode or residence, phrases which I think ordinarily mean the same thing; but when the words are used in a statute, one must consider the purpose of the statute, and the object to be effected by requiring the place of abode or residence to be described or visited. Thus in the Bills of Sale Act the place of business may be inserted in the bill of sale as the "residence" of the grantor or attesting witness. For, as POLLOCK, C.B., said in *Attenborough* v. *Thompson* (7) (27 L.J.Ex. at p. 24):

> "The object of the Act was that information should be given where the person might be found, met with, seen, and inquired of. . . . Our decision is that the place of business, being a place where the party 'abides' for a considerable portion of his time, is quite sufficient as a description of the place of residence, not that the other description [namely, where he sleeps] might not also be sufficient."

See also the decisions of *Blackwell* v. *England* (5), especially the judgments of ERLE, J., and *Ablett* v. *Basham* (8), the latter on the description of the plaintiff's residence on a writ of summons. So in *Haslope* v. *Thorne* (9) the "place of abode" of a deponent to an affidavit was held to cover his place of business. LORD ELLENBOROUGH said (1 M. & S. at p. 104):

"The words 'place of abode' did not necessarily mean the place where the deponent sleeps; the object of the rule of court was to ascertain the place where the deponent was most usually to be found, which in the present case was the office at which he was employed during the greater part of the day, and not the place where he retired merely for the purpose of rest."

The decision of *Stoy* v. *Rees* (10), as to writs, is the other way. On the other hand, where for a municipal election the place of abode of a candidate had to be stated, the court held in *R.* v. *Hammond* (11) that the word was to be used in its ordinary sense, if residence was contrasted with business, and there are similar decisions as to service under the Summary Jurisdiction Act: *R.* v. *Lilley* (1) and *R.* v. *Rhodes* (2).

What, then, is the purpose of the provision by which a summons need not be personally served, but may be left at the "place of residence"? Obviously that it shall get to the person summoned by being left at a place where it is likely to reach him. His place of business will usually be at least as suitable a place for that purpose as the place where he sleeps; frequently more so, as more care is usually taken of business than of private documents. On principle, therefore, I see no reason why the place of business should not be the place of residence for the purposes of serving this summons; and there are two decisions under these Acts to this effect, which the Divisional Court has followed, *Mason* v. *Bibby* (3) and *Newport Corpn.* v. *Lang* (4). As on principle I am of opinion that the purpose of this legislation is furthered by such a construction, and, as already stated, I think it is undesirable to disturb an existing rule of procedure unless it really causes injustice, I am not disposed to overrule these authorities, or reverse the decision of the Divisional Court which is based on them. I may add that, while the true construction of the provision of the Summary Jurisdiction Act, 1848, as to service is not before us, I think it is unfortunate that in Acts with a similar purpose and similar words there should be different decisions as to their meaning, and I desire to reserve liberty to consider whether the principles I have endeavoured to state should not also be extended to the Summary Jurisdiction Act, 1848, so as to allow service by leaving the summons at a place of business. In this particular case I am clear no injustice is done. The applicant's English dwelling-house was closed, but he had clerks at his place of business. He had conceived the idea that while he was serving in the army he should not pay rates, and for some time had paid no attention to any claims for rates of any sort. If he was personally served, he did not appear, and distress had to be levied on his property. He would not have appeared if personally served in this case. It is a pity he has not spent the money expended on these proceedings in paying his rates. The appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *J. & C. Dodd*, for *T. Dowling*, Bishop Auckland; *Corbin, Greener & Cook*, for *J. T. Proud & Son*, Bishop Auckland.

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

Re ELLIOTT. PUBLIC TRUSTEE *v.* PINDER

[CHANCERY DIVISION (Sargant, J.), February 7, 1918]

[Reported [1918] 2 Ch. 150; 87 L.J.Ch. 449; 118 L.T. 675; 62 Sol. Jo. 383]

Accumulation—Provision for raising a portion—Annuity after death of life tenant—Accumulation of interest not applied—Fund and accumulations to annuitant's child after annuitant's death—After child's death fund to fall into testator's residuary estate—Accumulations Act, 1800 (39 & 40 *Geo.* 3, *c.* 98), *s.* 2.

A testator directed his trustees to pay the income of his estate to his wife for life, after her death to set apart £8,000, out of the interest from the £8,000 to pay an annuity to his daughter for her life, to add the remainder of the interest to the principal, and after the daughter's death to hold the £8,000 and the accumulations to the daughter's only child, M.P. After the death of M.P. the fund was to fall into the testator's residuary estate.

Held: the trust for accumulation after the widow's death was not a "provision for raising a portion" within s. 2 of the Accumulations Act, 1800, and was invalid.

Watt v. *Wood* (1) (1862), 2 Drew. & Sm. 56, applied.

Middleton v. *Losh* (2) (1852), 1 Sm. & G. 61, not followed.

Notes. The Accumulations Act, 1800, was repealed by the Law of Property Act, 1925. Section 164 (2) of the 1925 Act replaces the proviso to s. 2 of the Act of 1800.

Considered: *Re Bourne's Settlement*, *Bourne* v. *Mackay* (1945), 200 L.T.Jo. 110.

As to funds which may or may not be portions, see 29 HALSBURY'S LAWS (3rd Edn.) 344, 345; and for cases see 37 DIGEST 139 et seq. For the Law of Property Act, 1925, s. 164 (2), see 20 HALSBURY'S STATUTES (2nd Edn.) 774.

Cases referred to:

(1) *Watt* v. *Wood* (1862), 2 Drew. & Sm. 56; 31 L.J.Ch. 338; 10 W.R. 335; 62 E.R. 542; 37 Digest 140, *677*.

(2) *Middleton* v. *Losh* (1852), 1 Sm. & G. 61; 22 L.J.Ch. 422; 20 L.T.O.S. 138; 17 Jur. 175; 1 W.R. 78; 65 E.R. 27; 37 Digest 140, *674*.

(3) *Eyre* v. *Marsden* (1838), 2 Keen, 564; 7 L.J.Ch. 220; 2 Jur. 583; 48 E.R. 744; affirmed (1839), 4 My. & Cr. 231, L.C.; 37 Digest 141, *681*.

(4) *Barrington* v. *Liddell* (1852), 2 De G.M. & G. 480; 22 L.J.Ch. 1; 20 L.T.O.S. 133; 17 Jur. 241; 1 W.R. 41; 42 E.R. 958, L.C.; 37 Digest 138, *660*.

(5) *Burt* v. *Sturt* (1853), 10 Hare, 415; 22 L.J.Ch. 1071; 22 L.T.O.S. 54; 17 Jur. 728; 1 W.R. 145; 68 E.R. 989; 37 Digest 142, *685*.

(6) *Morgan* v. *Morgan* (1851), 4 De G. & Sm. 164; 20 L.J.Ch. 109, 441; 17 L.T.O.S. 114, 302; 15 Jur. 319; 64 E.R. 781; 37 Digest 131, *616*.

Also referred to in argument:

Wildes v. *Davies* (1853), 1 Sm. & G. 475; 22 L.J.Ch. 495; 21 L.T.O.S. 206; 1 W.R. 253; 65 E.R. 208; 37 Digest 142, *687*.

Jones v. *Maggs* (1852), 9 Hare, 605; 22 L.J.Ch. 90; 19 L.T.O.S. 213; 16 Jur. 325; 68 E.R. 654; 37 Digest 140, *673*.

Originating Summons.

By his will, dated Oct. 30, 1890, the testator bequeathed his property to his trustees upon trust for sale and, after payment of the funeral and testamentary expenses and debts and certain legacies, to stand possessed of the residue in trust to pay the income thereof to his wife during her life, and from and after her death to set apart out of the investments £8,000 and out of the interest thereon to pay to E. M. Pinder an annuity of £60 per annum and to add the remainder of the interest to the principal, and after the decease of E. M. Pinder to hold the £8,000

and the accumulations for the benefit of the testator's granddaughter Marian Pinder upon trust to pay the annual proceeds thereof to her for life, to be paid over in the event of her marriage to the trustees of her marriage settlement provided such settlement provided for her having a life interest therein. If such settlement was not executed, there was a proviso that from and after her decease without having married or had a marriage settlement the fund should fall into and form part of the testator's residuary estate, which, in the events which happened, passed under the trusts of the will to his grandson H. P. Bell. The testator died in 1891. In 1914, his widow appointed the Public Trustee to act as trustee with her. She died in 1917, leaving her daughter, E. M. Pinder, and granddaughter, Marian Pinder, her surviving.

This summons was taken out by the Public Trustee to determine whether the direction in the will after the death of the testator's widow to set apart £8,000 and after payment of an annuity of £60 to E. M. Pinder to add the remainder of the interest to the principal and after the decease of the said E. M. Pinder to hold the sum of £8,000 and the accumulations thereon for the benefit of Marian Pinder was valid as to accumulating the income, having regard to the exemption as to portions in s. 2 of the Accumulations Act, 1800, and notwithstanding that the testator's widow survived him for more than twenty-one years.

By the proviso to s. 2 of the Accumulations Act, 1800:

> ". . . nothing in this Act contained shall extend . . . to any provision for raising portions for any child or children of any grantor, settlor, or devisor or any child or children of any person taking any interest under any such conveyance, settlement, or devise . . . but that all such provisions . . . shall and may be made . . . as if this Act had not passed."

Leonard Mossop for the plaintiff.
Edward Beaumont for the granddaughter, Marian Pinder.
Owen Thompson for the residuary legatee.

SARGANT, J.—The summons in this case raises the question whether the direction in the will to accumulate the balance of the income of a sum of £8,000 remaining after payment of an annuity is bad under the Accumulations Act, 1800. [His Lordship read the material parts of the will, and continued:] The testator died in 1891 and his widow in 1917, and, as she survived the testator for twenty-six years, the period for accumulation allowed by s. 1 of the Act came to an end before the £8,000 was payable, and, unless the case comes within the proviso contained in s. 2 of the Act, the direction to accumulate the balance of income is void. [His Lordship read the proviso to s. 2 of the Accumulations Act, 1800, and continued:]

The question which I have to determine is whether this direction for accumulation after the widow's death and during the lifetime of the daughter is a provision for "raising" a portion for the grandchild within the meaning of the proviso in s. 2. In the first place there can be no question that the grandchild Marian Pinder was a child of a person taking an interest under the settlement or devise within the meaning of s. 2; for her mother, Eliza Martha Pinder, was given an annuity of £60 out of the interest on the settled sum of £8,000. Then, is the direction to accumulate the surplus income, after providing the annuity, of this specific sum of £8,000 for the benefit of the testator's granddaughter Marian Pinder a provision for raising a portion? It is reasonably clear, on s. 2 of the Act, from the collocation of debts and portions, that the section is first a provision for clearing off incumbrances, and that the provision for "raising portions" points to the creation of a subsidiary fund out of and less than a larger one composed of an original fund and the accumulated interest thereon. "Raising portions" in itself refers to raising a fund out of a larger fund. What counsel for the residuary legatee says against the contention that this provision for Marian Pinder is a provision for raising a portion is that the direction in the will is one for augmenting the whole settled fund by the addition of accumulations and then for handing over to her the whole of the

settled fund as so augmented, and that if that is the true effect of the provision in the will, the case falls precisely within the mischief aimed at by the Act, namely, that it is increasing the capital for a legatee by accumulating the interest during a longer period than that allowed by the Act. I entirely agree. No doubt the term "portions" referred to in s. 2 was originally used for sums out of the income of real estate for the younger brothers and sisters of the eldest son who took the real estate, but the term is not confined to real estate.

There is a considerable amount of authority on this subject, but apart from one case it is all in one direction. The first case I will refer to is *Eyre* v. *Marsden* (3). There the direction to accumulate was with regard to residue and was held to be void, and the reasons given by LORD LANGDALE for so holding were, first, because two of the legatees were not the children of any person taking an interest under the will; and, secondly, because the direction was not a provision for raising portions, but a provision for making additions to the capital for the purpose of making one gift of an aggregate fund. That second reason is conclusive in the present case unless it has been qualified by the decision of some court of competent authority. *Middleton* v. *Losh* (2), upon which counsel for the granddaughter Marian Pinder mainly relied, does undoubtedly appear in favour of the validity of the direction to accumulate for the benefit of Marian Pinder. In that case there was a direction to accumulate the income of £50,000 during the life of William Beaumont, for whose maintenance the income was, in the first place, applicable, and on his death to divide the fund with the accumulations amongst his children at twenty-one or marriage, the interests of those children being referred to as "portions," and the direction was held to be a trust for raising portions and valid on the authority of *Barrington* v. *Liddell* (4). But when the reasons given by STUART, V.-C., are looked at, it seems to me that he was confused by *Barrington* v. *Liddell* (4), which was really decided on a different point, and that he failed to appreciate the particular facts of that case or sufficiently to notice the second reason given for the decision in *Eyre* v. *Marsden* (3). True it is that the subject-matter in *Barrington* v. *Liddell* (4) was, as it was in *Middleton* v. *Losh* (2), a specific sum of money, but in *Barrington* v. *Liddell* (4) there was at the date of the will an existing charge for portions on family estates under a settlement, and by the will a sum of £15,000 was directed to be set apart and accumulated during a period which exceeded that allowed by the Act, and at the expiration of that period to be applied in redeeming the charge for portions; it was there held that that was a provision for raising portions within the saving section of the Act. *Middleton* v. *Losh* (2) has been much commented on. In *Burt* v. *Sturt* (5) PAGE WOOD, V.-C., said (10 Hare at p. 426):

> "The case before STUART, V.-C., *Middleton* v. *Losh* (2), is not at all similar to this. The case before STUART, V.-C., does, I think, seem in opposition to *Eyre* v. *Marsden* (3). In that case there was no fund raised out of the accumulations of another fund for the purpose of making provisions for parties, and then the fund passed over, subject to the direction for accumulation; but it is the fund itself that is accumulated. So far, that case is in opposition to *Eyre* v. *Marsden* (3); because in *Eyre* v. *Marsden* (3) LORD LANGDALE seems to have been of opinion that, where the fund itself was the thing to be accumulated, that was not within the provision for raising portions out of and by means of the accumulation of a fund."

And in *Morgan* v. *Morgan* (6) KNIGHT BRUCE, V.-C., decided against the case being within the exception in s. 2 of the Act.

The decision in *Watt* v. *Wood* (1) seems to me directly opposed to that in *Middleton* v. *Losh* (2). In *Watt* v. *Wood* (1) a testator gave a sum of money to trustees upon trust to receive the dividends during the life of his niece's husband, and to invest and accumulate such dividends for the benefit of his niece for her life; and after the death of his niece and her husband for the benefit of all his niece's children except an eldest or only son. The money had been invested, and

the dividends had been invested and accumulated for a period exceeding twenty-one years, and it was held that it was not a gift to raise portions within s. 2 of the Act, and therefore that the persons entitled under it were only entitled to the accumulations for twenty-one years from the testator's death. And KINDERSLEY, V.-C., in giving judgment in that case, said (2 Drew. & Sm. at p. 59):

> "The accumulation of the income during Mr. Lockwood's life was directed for the purpose of forming a fund for the benefit of a parent and her younger children. How can that be said to be a provision for 'raising portions' for children? It does not come within the proper meaning of the words."

Then he says (ibid. at p. 60):

> "In *Middleton* v. *Losh* (2), STUART, V.-C., was, I think, under the impression that *Barrington* v. *Liddell* (4) laid down a principle inconsistent with the other cases on the question what sort of provision for children came within the meaning of 'portions'; but upon examination it appears to me that the point upon which LORD ST. LEONARDS overruled TURNER, V.-C., in *Barrington* v. *Liddell* (4) was this, that inasmuch as the language of the exception in the second section required that the children for whom the provision is made should be children of a person taking some interest under 'such conveyance, settlement, or devise,' TURNER, V.-C., was of opinion that the parent must take an interest under the very clause which gives the portions, and further, that there was no gift to the parent of any money, or other direct benefit . . . whereas LORD ST. LEONARDS considered that the parent took under the will such an interest as was sufficient to bring the case within the requisitions of the second section."

And as to *Barrington* v. *Liddell* (4), KINDERSLEY, V.-C., said that the question upon which the decision in that case turned was altogether different from that which arose in the case before him, and that it did not appear to him that *Barrington* v. *Liddell* (4) overruled the other cases with reference to the question which he then had to decide.

In this state of the authorities, quite independently of my own view of the matter, I should feel bound to follow the decision in *Watt* v. *Wood* (1). And I notice that both in JARMAN ON WILLS (6th Edn.), p. 386, and THEOBALD ON WILLS (7th Edn.), p. 617, the decision in *Middleton* v. *Losh* (2) is considered to be irreconcilable with the other decisions. Then, is there any distinction between cases where the fund to be accumulated is residue and where it is a specified sum to be set aside? I can see no distinction. The Act deals with the settlement of property, whether real or personal. Where a particular legacy, pecuniary or specific, is settled by a will, it is as amenable to the Act as a settlement of a testator's residue. Here I can see no more reason for treating the settlement of this sum of £8,000 as not a settlement than I could if it were a settlement of the whole estate. The fund was intended to be a marriage portion for the granddaughter, but that is a different thing from a provision for "raising" a portion out of a settled fund. I therefore hold that the direction to accumulate was wholly invalid and did not come within the exception as to raising portions mentioned in s. 2 of the Act.

Solicitors: *Lowless & Co.*; *Blundell, Baker & Co.*, for *J. M. Moore & Armstrong*, South Shields.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

LONDON AND NORTH WESTERN RAIL. CO. *v.* J. P. ASHTON & CO.

[HOUSE OF LORDS (Viscount Finlay, Lord Atkinson, Lord Shaw and Lord Sumner), July 29, 1919]

[Reported [1920] A.C. 84; 88 L.J.K.B. 1157; 122 L.T. 75; 35 T.L.R. 708; 63 Sol. Jo. 736; 25 Com. Cas. 9]

Carriage of Goods—Limitation of liability—Transit partly by land and partly by sea—Loss of goods—Need for carrier to prove loss during land transit—Carriers Act, 1830 (11 *Geo.* 4 *&* 1 *Will* 4, *c.* 68), *s.* 1.

In order that a common carrier may limit his liability for the loss of goods entrusted to him for transit partly by land and partly by sea, he must prove that the goods were lost during the land portion of the transit, as otherwise the protection afforded by s. 1 of the Carriers Act, 1830, does not apply.

Decision of Court of Appeal ([1918] 2 K.B. 488) affirmed.

Le Conteur v. *London and South Western Rail. Co.* (1) (1865), L.R. 1 Q.B. 54, explained.

Notes. Referred to: *Rosenthal* v. *L.C.C.* (1924), 131 L.T. 563.

As to a carrier's liability under the Carriers Act, 1830, see 4 HALSBURY'S LAWS (3rd Edn.) 158 et seq.; and for cases see 8 DIGEST (Repl.) 50 et seq. For the Carriers Act, 1830, s. 1, see 2 HALSBURY'S STATUTES (2nd Edn.) 804.

Case referred to:

(1) *Le Conteur* v. *London and South Western Rail. Co.* (1865), L.R. 1 Q.B. 54; 6 B. & S. 961; 35 L.J.Q.B. 40; 13 L.T. 325; 30 J.P. 148; 12 Jur.N.S. 266; 14 W.R. 80; 122 E.R. 1448; 8 Digest (Repl.) 50, *312*.

Also referred to in argument:

Hart v. *Baxendale*, *Baxendale* v. *Hart* (1852), 6 Exch. 769; 21 L.J.Ex. 123; 18 L.T.O.S. 305; 16 Jur. 126; 155 E.R. 755, Ex. Ch.; 8 Digest (Repl.) 54, *355*.

Lennard's Carrying Co., Ltd. v. *Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 31 T.L.R. 294; 59 Sol. Jo. 411; 13 Asp.M.L.C. 81; 20 Com. Cas. 283, H.L.; 41 Digest 418, *2616*.

The Glendarroch, [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344; 10 T.L.R. 269; 38 Sol. Jo. 362; 7 Asp.M.L.C. 420; 6 R. 686, C.A.; 41 Digest 414, *2580*.

Taylor v. *Liverpool and Great Western Steam Co.* (1874), L.R. 9 Q.B. 546; 43 L.J.Q.B. 205; 30 L.T. 714; 22 W.R. 752; 2 Asp.M.L.C. 275; 41 Digest 420, *2638*.

R. v. *Turner* (1816), 5 M. & S. 206; 105 E.R. 1026; 14 Digest (Repl.) 494, *4781*.

Millen v. *Brasch* (1882), 10 Q.B.D. 142; 52 L.J.Q.B. 127; 47 L.T. 685; 47 J.P. 180; 31 W.R. 190, C.A.; 8 Digest (Repl.) 51, *316*.

Piancini v. *London and South Western Rail. Co.* (1856), 18 C.B. 226; 139 E.R. 1354; 8 Digest (Repl.) 50, *311*.

Appeal by the London and North Western Rail. Co. from an order of the Court of Appeal (PICKFORD, SCRUTTON and BANKES, L.JJ.), which affirmed a judgment of the Divisional Court (A. T. LAWRENCE and SHEARMAN, JJ.), affirming a decision of His Honour Judge BRAY at the Bloomsbury County Court.

The question was whether s. 1 of the Carriers Act, 1830, was a good defence to an action for damages for non-delivery of goods contracted by the railway company to be carried from London to Belfast and to be delivered at Belfast, such contract being a contract to carry the goods partly by land and partly by sea, and no proof being given that the loss of the goods occurred during the land portion of the transit.

The respondents, J. P. Ashton & Co., delivered certain parcels of furs to the receiving office of the appellants, the London and North Western Rail. Co., in Knightrider Street for delivery at Belfast. The parcels were not delivered. The

parcels, which contained fur coats, were worth £65—i.e., were above the value of £10—and no declaration as required by s. 1 of the Carriers Act, 1830, was made by the respondents. It was known that, after the goods had been delivered at Knightrider Street to the appellants they reached the departure platform at Euston Station, but thereafter they could not be traced. The respondents brought an action against the appellants claiming £65, and the appellants gave notice that they intended to rely as a special defence on s. 1 of the Carriers Act, 1830. The learned county court judge held that s. 1 of that Act only protected a carrier where the goods were lost during a land transit, and, the appellants not having proved that the goods were lost during the land portion of the transit, were liable for the loss. The Divisional Court and the Court of Appeal dismissed appeals from that judgment.

Disturnal, *K.C.*, and *Schiller*, *K.C.* (*Russell Davies* with them), for the appellants. *MacKinnon*, *K.C.*, and *S. A. Kyffin*, for the respondents, were not called on to argue.

VISCOUNT FINLAY.—In this case, there were parcels of furs delivered on three occasions by the respondents to the appellants, who carry goods between London and Belfast. The carriage of these goods is, of course, effected partly by land, as far as Holyhead, and from Holyhead it is effected by sea as far, apparently in this case, as Greenore, and thence the goods, I suppose, go to Belfast by land. When the furs were delivered to the appellants they would become liable on a contract to carry from London to Belfast, partly by land, and partly by sea. The Carriers Act, 1830, exempts a carrier from liability in certain cases, and s. 1, omitting the immaterial words, provides:

> "No . . . common carrier by . . . land for hire shall be liable for the loss of . . . any . . . furs . . . contained in any parcel or package which shall have been delivered . . . to be carried for hire . . . when the value of such . . . articles . . . contained in each parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office . . . of such . . . common carrier . . . the value and nature of such . . . articles . . . shall have been declared by the person . . . sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Then s. 2 makes provision for an increase of payment in respect of such articles.

The carriers, the London and North Western Rail. Co., the appellants, claim the benefit of this section, and it is for those who plead the section to aver and prove that the section applies, and it does not apply unless the loss took place by land; it does not apply if the loss took place by sea. It is for the carriers who, having entered into a general contract of carriage from London to Belfast, desire to get the benefit of the Act, to show that the facts bring them within that protection, and the facts do not bring them within that protection unless the loss took place by land. It was said that there were two contracts. I cannot accept that view. *Le Conteur* v. *London and South Western Rail. Co.* (1), which was relied on, seems to me to show nothing of the kind. On the contrary, the court there treated the contract as one contract, but said that, being a contract for carriage, partly by land and partly by sea, the contract might be divisible as regards the extent of the liability by land as compared with the extent of the liability by sea.

This case has been before six judges already, and each of them has arrived at the same opinion. I desire to express my entire concurrence in the opinion which has been formed by every judge before whom this case has come, and I think the appeal must be dismissed.

LORD ATKINSON.—I concur. I think this case is perfectly plain. Section 1 of the Carriers Act, 1830, is directed to the protection of carriers by land against being liable for the loss of goods of a certain value, no declaration being made. That obviously means that it protects them while they are acting in that character,

and when a loss is sustained while they are acting in that character. This necessitates its being proved by them that the loss occurred on the land portion of the journey, for it is only on the land portion of the journey that they were acting in the position of common carriers. Therefore, it appears to me that, when they want to excuse themselves from liability, they must prove that the loss occurred while they were acting in that character—namely, during the course of the land journey.

LORD SHAW.—I concur.

LORD SUMNER.—I concur.

Appeal dismissed.

Solicitors: *M. C. Tait*; *Ballantyne, Clifford & Hett.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

R. *v.* WAKELEY

[COURT OF CRIMINAL APPEAL (Earl of Reading, C.J., Sankey and Salter, JJ.), December 1, 1919]

[Reported [1920] 1 K.B. 688; 89 L.J.K.B. 97; 122 L.T. 623; 84 J.P. 31; 64 Sol. Jo. 360; 26 Cox, C.C. 569; 14 Cr. App. Rep. 121]

Criminal Law—Carnal knowledge—Girl under sixteen—Limitation of time for prosecution—Amendment of information—Date of commencement of prosecution—Criminal Law Amendment Act, 1885 (48 *&* 49 *Vict.*, *c.* 69), *s.* 5, *as amended by Prevention of Cruelty Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 27.

By s. 5 of the Criminal Law Amendment Act, 1885: "Any person who (1) unlawfully and carnally knows . . . any girl being of or above the age of thirteen years and under the age of sixteen years . . . shall be guilty of a misdemeanour. . . . Provided also that no prosecution shall be commenced for an offence under sub-s. (1) of this section more than three months after the commission of the offence." By s. 27 of the Prevention of Cruelty to Children Act, 1904, the time limit was increased to six months after the commission of the offence.

The appellant was indicted for having had carnal knowledge of a girl between thirteen and sixteen years of age. The information against him was sworn on May 3, 1919, and he was charged with having committed the alleged offence between Nov. 6 and 7, 1918. On May 13, 1919, the information was amended by altering the date on which the offence was alleged to have been committed to between Nov. 3 and 8, 1918. At the trial the girl gave evidence that the appellant had connection with her on Nov. 4, 1918. The appellant was convicted, but appealed against his conviction on the ground that the proceedings commenced on May 13, 1919, when the information was amended, and that, as that date was more than six months after Nov. 4, 1918, the proceedings were out of time.

Held: as the amendment did not charge a different offence from that charged in the original information, the prosecution was commenced on May 3, 1919, when the information was first laid, and, as the dates inserted in the amended information were all within six months of May 3, 1919, the prosecution was not out of time.

Notes. As to limitation of time in criminal proceedings, see 10 HALSBURY'S LAWS (3rd Edn.) 340 et seq.; and for cases see 14 DIGEST (Repl.) 168 et seq.

For the offence of unlawful intercourse with a girl under the age of sixteen, see now the Sexual Offences Act, 1956, s. 6; by ibid., Sched. 2, Pt. II, para. 10, the time limit has been increased to twelve months. For the Sexual Offences Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 215.

Case referred to:

(1) *Weldon* v. *Neal* (1887), 19 Q.B.D. 394; 56 L.J.Q.B. 621; 35 W.R. 820, C.A.; 32 Digest 536, *1892*.

Appeal on a point of law against a conviction at the Exeter Assizes for having had carnal knowledge of a girl between thirteen and sixteen years of age.

The information against the appellant was sworn on May 3, 1919, and alleged the commission of an offence between Nov. 6 and 7, 1918. On May 13, 1919, the information was amended by alleging that the offence was committed between Nov. 3 and 8, 1918, instead of between Nov. 6 and 7, 1918. At the trial the girl deposed that the appellant had connection with her on Nov. 4, 1918. The appellant denied this. The judge, in summing up the case to the jury, remarked on the absence of any corroboration of the story told by the girl and expressed the opinion that a man should not be convicted on evidence of that kind without corroboration. The jury, however, convicted the appellant, and he was sentenced to twelve months' imprisonment with hard labour.

H. Geen for the appellant.

W. T. Lawrance, for the Crown, was not called on to argue.

The judgment of the court was delivered by

EARL OF READING, C.J.—The offence of which the appellant was convicted was committed on Nov. 4, 1918. An information against him was laid on May 3, 1919, one day less than six months after the commission of the offence. The information, as first sworn to, alleged that the offence was committed between Nov. 6 and 7, 1918, but it having been discovered that the evidence would not support this allegation, the information was amended and charged the commission of the offence between Nov. 3 and 8, 1918. The objection taken on behalf of the appellant is that the prosecution was out of time, not having been commenced within six months of the commission of the offence. If, in the original information, the offence had been charged as having been committed between Nov. 3 and 8, 1918, this objection could not have been taken. But counsel for the appellant contends that we must look upon the prosecution as having been started on the date when the information was amended, that is to say, May 13, 1919, and that as more than six months had elapsed from Nov. 4, 1918, when the offence was committed, the prosecution was commenced too late and that the information should be quashed. The court is of opinion that this contention is unsound and cannot prevail. The offence is charged in the original information as having been committed within six months from the commencement of the prosecution on May 3, 1919. The alteration in the information was only the same as if the offence was originally laid as having been committed on Nov. 6 or 7, 1918, and then subsequently had been laid as having been committed between Nov. 4 and 8, 1918, in order to fix the limits of time within which the offence was committed. No new offence was charged in the information as amended, and the amendment was simply made for the purpose of extending the dates between which the offence was alleged to have been committed. These dates all fell within the period of six months from May 3, 1919. It has been argued that the amendment of the information on May 13, 1919, was really the commencement of the proceedings. This cannot be so, for, to take the case suggested during the argument by SANKEY, J.: Suppose the court had exercised its power to amend during the course of the trial and had altered the dates when the offence was alleged to have been committed in the same way as the original information was altered, no one could say that

A the alteration was the commencement of the proceedings; it would only be a step taken during the proceedings. We have been referred to *Weldon* v. *Neal* (1) in support of the appellant's case. That decision, however, does not help us in the present case. It is really an instance of what would have happened if the information as amended had placed the commission of the offence on a date beyond the six months from May 3, 1919, but that is not the present case. There is no B substance in this objection taken on behalf of the appellant, and it fails.

It is also said on behalf of the appellant that the summing up of the judge at the trial showed that the case was unsatisfactory and one in which it was not safe to convict. There is no doubt that if the decision had rested solely with the judge he would have acquitted the appellant; but the verdict is that of the jury, and they are solely responsible for it. They convicted the appellant notwithstanding C the opinion of the judge that he ought to be acquitted. A disregard by the jury of the warning given to them by the judge is not sufficient to enable this court to set the verdict aside; that can only be done if the verdict is unreasonable, and the court cannot, under the circumstances, say that in the present case the verdict is so unreasonable that it cannot stand. The jury heard all the witnesses and were, therefore, able to arrive at a proper conclusion. The appeal must be D dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

E

F

HAYES *v.* BROWN

[King's Bench Division (Lush and Sankey, JJ.), October 29, 1919]

[Reported [1920] 1 K.B. 250; 89 L.J.K.B. 63; 122 L.T. 313]

G *County Court—Practice—Notice to admit document—Plan prepared in accident case—Need of notice to admit—Costs—County Court Rules*, 1903–1918, *Ord.* 18, *r.* 6, *Ord.* 53, *r.* 44.

A plan prepared for the purpose of illustration, e.g., of the place where an accident took place, **held** not to be a "document" within the meaning of Ord. 18, r. 6, of the County Court Rules, 1903–1918, and, therefore, need not H be included in a notice to admit documents. The matter came within Ord. 53, r. 44, dealing with allowances for the preparation of plans, &c., and for witnesses called to prove them.

Notes. The County Court Rules, 1903–1918, have been replaced by the County Court Rules, 1936. For Ord. 18, r. 6, of the old rules, see now Ord. 20, r. 10, of the 1936 Rules, and for Ord. 53, r. 44, see now Ord. 47, r. 30 (1).

I As to notices to admit or produce in the county court, see 9 Halsbury's Laws (3rd Edn.) 217, 218; as to the allowance of costs for the preparation of plans, etc., see ibid., 308; and for cases see 13 Digest (Repl.) 432, 461, 462.

Appeal from the Marylebone County Court.

The plaintiff, Edward Hayes, a farmer, sued the defendant, John Norwood Brown, for damages for the loss of a horse which was being led by a labourer through Finchley Road at dusk, and without any light being exhibited. It was run into by the defendant's car while passing a tram on the offside. The learned county court judge gave judgment for the plaintiff for £25 and costs. At the

trial, a plan of the road, prepared by a surveyor on behalf of the plaintiff, was produced. The surveyor had been subpœnaed to prove the plan, but was not called, as the plan was admitted. The learned judge allowed the costs of the plan. On taxation, the registrar allowed the plaintiff £1 1s. as remuneration to the surveyor for his attendance on the scale allowed under Ord. 53, r. 44, of the County Court Rules to an ordinary witness, and 3s. for the issue and service of the subpœna. The defendant lodged objections to the registrar's decision on this point on the ground that no notice to inspect and admit the plan had been given in accordance with Ord. 18, r. 6, and applied to the learned county court judge to review the taxation. The judge upheld the decision of the registrar. The defendant appealed.

By Ord. 18, r. 6, of the County Court Rules, 1903–1918:

"Where a party desires to give in evidence any document he may, not less than five clear days before the trial, give notice to any other party in the action or matter who is competent to make admissions requiring him to inspect and admit such document; and if such other party does not within three days after receiving such notice make such admission, any expense of proving the same at the trial shall be paid by him, whatever may be the result, unless the court otherwise orders; and no costs of proving any document shall be allowed unless such notice has been given, except in cases where, in the opinion of the judge at the trial, or of the registrar on taxation, the omission to give such notice has been a saving of expenses."

By Ord. 53, r. 44:

"Persons who prepare plans, drawings, models, &c., for the purpose of illustration, and who, if called at the trial, prove the correctness of such plans, drawings, models, &c., only, shall not be entitled to allowances as expert and scientific witnesses, but shall be allowed for their attendance upon the scale applicable to ordinary witnesses; and there may be also allowed for the preparation of such plans, drawings, models, &c., and of all tracings and copies thereof, the sum reasonably paid for the same, so long as it does not exceed the sums mentioned in item 95 of the scale of costs."

J. B. Matthews, K.C., and *David White* for the defendant.
Martin O'Connor and *M. O'Sullivan* for the plaintiff.

LUSH, J.—In this case, which was an ordinary running-down action, the plaintiff's solicitor instructed a surveyor to prepare a plan of the locus in quo. The plan was not included in the list of documents of which notice to inspect and admit had been given. The plan, however, was admitted at the trial by the defendant, and the surveyor was not called to prove the plan, though he had been subpœnaed and was in attendance at the trial. The learned county court judge gave judgment for the plaintiff, and he allowed the plaintiff the costs of preparing the plan. On taxation before the registrar, the defendant's solicitor objected to the costs of serving the subpœna on the surveyor and of his attendance at the trial. The registrar overruled these objections, and the learned county court judge upheld his decision. Against that decision the defendant is appealing.

It is contended for the defendant that this plan is a "document" within the meaning of Ord. 18, r. 6, and that, as no notice to inspect and admit was given, these costs ought not to be allowed on taxation. In my opinion, that argument is not sound. When we consider Ord. 18, r. 6, in the light of Ord. 53, r. 44, we find the latter rule says this: [His Lordship read the rule and proceeded:] Reading that rule side by side with Ord. 18, r. 6, it seems to me reasonably clear that a plan like this plan which is prepared merely for the purpose of illustration ought not to be treated as a "document" under Ord. 18, r. 6, but as a plan with respect to the proof of which it was reasonable to call the surveyor who had prepared it. The learned county court judge was, therefore, right in holding that this was not a document but a plan prepared for the purpose of illustration within the meaning of Ord. 53, r. 44. There may, however, be many plans which are documents to

which Ord. 18, r. 6, would apply. There may be plans, drawings, models, &c., of that kind, which, to use counsel for the defendant's phrase, are in the nature of "evidentiary documents"; to these Ord. 18, r. 6, is distinctly applicable.

The question for our decision here is: Was this particular plan, which was prepared for the purpose of illustrating the actual spot where the accident took place, a document to which Ord. 18, r. 6, applies? In my opinion, it is not. It is not a document which the party wishes to give in evidence, nor one to which, according to the ordinary practice, a party would be entitled to a notice to admit. It is, like a photograph, a document prepared merely to throw light upon the question which has to be decided. It is not a document which can be called a document to be used in evidence at all. As was pointed out by the learned county court judge, it is often very desirable to call the surveyor to explain as well as prove his plan. It was never contemplated by the framers of this rule that a plan prepared for this purpose should be included in a notice to inspect and admit. In my opinion, this appeal fails and must be dismissed.

SANKEY, J.—I agree. The question which falls to be decided is a very narrow one. It is not whether a plan is a document within the meaning of Ord. 18, r. 6, but whether this particular plan was a document within the meaning of that rule. I am of opinion that it was not a document which it was desired to give in evidence within the meaning of Ord. 18, r. 6, but that it comes within the meaning of Ord. 53, r. 44. In my view, it was not an evidentiary but an illustrative document, and, therefore, comes within the meaning of the words "plans . . . for the purpose of illustration" in Ord. 53, r. 44. The decision allowing these costs was, therefore, right, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *White & Co.*; *Appleton & Co.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

Re JEWELL'S SETTLEMENT. WATTS *v.* PUBLIC TRUSTEE

[CHANCERY DIVISION (Younger, J.), October 17, 24, 25, 1918, April 16, 1919]

[Reported [1919] 2 Ch. 161; 88 L.J.Ch. 357; 121 L.T. 207]

Settlement—Policy—Life assurance by husband—Subject of marriage settlement—Power to trustees to apply income of wife's fund in payment of premiums necessary to keep on foot or "restore" policy—Lapse of policy—Right of trustees to require husband to effect new policy and apply income of wife's fund in paying premiums.

By a marriage settlement made in 1895, the husband settled a policy upon his life for £1,000 with all bonuses thereon upon trust to pay the income of the policy moneys to the wife during her life, and after the death of the survivor of the husband and wife such moneys and the investments thereof (called the husband's fund) were to be held in trust for the issue of the marriage as the husband and wife or the survivor should appoint and subject to such appointment in trust for the children of the marriage who should attain twenty-one, or being daughters married, in equal shares, and subject thereto in trust for the husband absolutely. The wife settled certain reversionary interests to be held upon the same trusts as the husband's fund except in the case of default of issue, when, if the wife predeceased the husband, the wife's fund was to be held as she should by will appoint. The husband

covenanted that he would not do or suffer anything whereby the policy might become void or voidable, but would pay the annual premiums to keep on foot the policy or any substituted policy, or for restoring the same if the same should have become voidable, and, in case the policy should become void, would effect a new policy or policies on his life in such sum or sums of money as should amount to the sum which would have become payable under the void policy if he had then died, any new policy to be held on the same trusts as the settled policy. It was, further, declared that the trustees might in their discretion apply any part of the income of the wife's fund in or towards payment of the annual premiums or other the sum or sums of money necessary for keeping on foot or restoring the said policies or any of them. The husband was unable to keep up the premiums on the policy, as the wife's fund had not fallen into possession the trustees could not do so, and the policy lapsed in 1897. The wife died in 1904. The husband married again in 1905 and assigned his life interest under the settlement to his second wife, who on Apr. 18, 1905, settled it upon trust whereby she was to receive the income during her life. The first wife's fund fell into possession in 1917 and the trustees of the 1895 settlement required the husband to take out a new policy on his life for the amount which would at that date have been payable under the lapsed policy, they paying the premiums out of the income of the wife's fund. The trustees of the 1905 settlement having contended that, if such a policy was effected, the income of the wife's fund could not be applied in payment of the premiums, and the husband having declined to take any steps to effect a new policy,

Held: the power contained in the 1895 settlement enabling the trustees to apply any part of the income of the wife's fund in or towards the payment of the premiums necessary for keeping on foot or restoring the policy or policies of assurance mentioned in the settlement or any of them did not authorise them to effect a new policy in the place of that which had lapsed and thereafter to apply the necessary part of the income of the wife's fund in payment of the premiums on it, for "restoring" in the settlement connoted only the resuscitation of a subsisting policy which had become voidable and did not include the effecting of a new policy in place of one that had become void; but the trustees were in a position successfully to maintain an action against the husband for specific performance of his covenant to effect and deliver to them, in place of the policy which had become void, a new policy on his life in the names of the trustees for the amount prescribed by the covenant and in the office directed by the trustees, and on the refusal or neglect of the husband to effect such a policy themselves to take out that policy: *Hamlin* v. *Great Northern Rail. Co.* (1) (1856), 1 H. & N. 408, and *Le Blanche* v. *London and North Western Rail. Co.* (2) (1876), 1 C.P.D. 266, applied; and when that policy had been effected the trustees were entitled to apply the income of the wife's fund so far as was necessary in paying the premiums on the policy, for that policy would be one to which the power in the 1895 settlement directly referred, and the husband's assignees of the income (the trustees of the 1905 settlement) would be entitled to receive only the surplus not required by the premiums.

Notes. As to policies of insurance as subjects of settlements, see 34 HALSBURY'S LAWS (3rd Edn.) 602, 603, and cases there cited.

Cases referred to:

(1) *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408; 26 L.J.Ex. 20; 28 L.T.O.S. 104; 5 W.R. 76; 156 E.R. 1261; sub nom. *Hamblin* v. *Great Northern Rail. Co.*, 2 Jur.N.S. 1122; 8 Digest (Repl.) 157, *999*.

(2) *Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C.P.D. 286; 45 L.J.Q.B. 521; 34 L.T. 667; 40 J.P. 580; 24 W.R. 808, C.A.; 8 Digest (Repl.) 109, *709*.

(3) *Darcy* v. *Croft* (1858), 9 I.Ch.R. 19.

(4) *Re Rhodesia Goldfields, Ltd., Partridge* v. *Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239; 79 L.J.Ch. 133; 102 L.T. 126; 54 Sol. Jo. 135; 17 Mans. 23; 43 Digest 922, *3617*.

(5) *Hawkins* v. *Coulthurst* (1864), 5 B. & S. 343; 33 L.J.Q.B. 192; 10 Jur.N.S. 876; 12 W.R. 825.

(6) *Priddy* v. *Rose* (1817), 3 Mer. 86; 36 E.R. 33; 43 Digest 921, *3612*.

(7) *Smith* v. *Smith* (1835), 1 Y. & C.Ex. 338; 160 E.R. 137; 43 Digest 922, *3615*.

(8) *Burridge* v. *Row* (1842), 1 Y. & C.Ch. 183; 11 L.J.Ch. 369; 6 Jur. 121; 62 E.R. 846; affirmed (1844), 13 L.J.Ch. 173; 3 L.T.O.S. 1; 8 Jur. 299, L.C.; 43 Digest 922, *3614*.

(9) *Cherry* v. *Boultbee* (1839), 2 Keen, 319; 4 My. & Cr. 442; 9 L.J.Ch. 118; 3 Jur. 1116; 41 E.R. 171, L.C.; 4 Digest (Repl.) 452, *3967*.

(10) *Re Smelting Corpn., Seaver* v. *Smelting Corpn.*, [1915] 1 Ch. 472; 84 L.J.Ch. 571; 113 L.T. 44; [1915] H.B.R. 126; 10 Digest (Repl.) 767, *4989*.

(11) *National Assurance and Investment Association* v. *Best* (1857), 2 H. & N. 605; 27 L.J.Ex. 19; 30 L.T.O.S. 169; 6 W.R. 78; 157 E.R. 249.

(12) *Re Weston, Davies* v. *Tagart*, [1900] 2 Ch. 164; 69 L.J.Ch. 555; 82 L.T. 591; 48 W.R. 467; 43 Digest 922, *3616*.

(13) *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch.D. 587; 53 L.J.Ch. 1008; 50 L.T. 545; 32 W.R. 601, C.A.; 10 Digest (Repl.) 989, *6807*.

(14) *Re Abrahams, Abrahams* v. *Abrahams*, [1908] 2 Ch. 69; 77 L.J.Ch. 578; 99 L.T. 240; 23 Digest (Repl.) 448, *5161*.

(15) *Re Towndrow, Gratton* v. *Machen*, [1911] 1 Ch. 662; 80 L.J.Ch. 378; 104 L.T. 534; 43 Digest 990, *4321*.

(16) *Re Pain, Gustavson* v. *Haviland*, [1919] 1 Ch. 38; 87 L.J.Ch. 550; 119 L.T. 647; 63 Sol. Jo. 178; 43 Digest 818, *2616*.

(17) *Re Dacre, Whitaker* v. *Dacre*, [1916] 1 Ch. 344; 85 L.J.Ch. 274; 114 L.T. 387; 60 Sol. Jo. 306, C.A.; 43 Digest 923, *3622*.

(18) *Morris* v. *Livie* (1842), 1 Y. & C.Ch. Cas. 380; 11 L.J.Ch. 172; 62 E.R. 934; 23 Digest (Repl.) 455, *5244*.

Also referred to in argument:

Re Melton, Milk v. *Towers*, [1918] 1 Ch. 37; 87 L.J.Ch. 18; 117 L.T. 679; 34 T.L.R. 20; [1917] H.B.R. 246, C.A.; 43 Digest 924, *3626*.

Willes v. *Greenhill* (1860), 29 Beav. 376; 30 L.J.Ch. 808; 9 W.R. 217; 54 E.R. 673; 23 Digest (Repl.) 447, *5152*.

Ex parte Mitford (1784), 1 Bro.C.C. 398; 3 Mer. at p. 105; 28 E.R. 1202; 4 Digest (Repl.) 308, *2786*.

Courtnay v. *Williams* (1844), 3 Hare 539; 13 L.J.Ch. 461; affirmed (1846), 15 L.J.Ch. 204; 6 L.T.O.S. 517; 23 Digest (Repl.) 449, *5179*.

Stephens v. *Venables* (*No. 1*) (1862), 30 Beav. 625; 54 E.R. 1032; 33 Digest (Repl.) 410, *4802*.

Re Langham, Otway v. *Langham* (1896), 74 L.T. 611; 40 Digest (Repl.) 736, *2244*.

Re Wheeler, Hankinson v. *Hayter*, [1904] 2 Ch. 66; 73 L.J.Ch. 576; 91 L.T. 227; 52 W.R. 586; 48 Sol. Jo. 493; 23 Digest (Repl.) 450, *5186*.

Re Bruce, Lawford v. *Bruce*, [1908] 2 Ch. 682; 78 L.J.Ch. 56; 99 L.T. 704, C.A.; 23 Digest (Repl.) 450, *5184*.

Browne v. *Price* (1858), 4 C.B.N.S. 598; 27 L.J.C.P. 290; 31 L.T.O.S. 248; 4 Jur.N.S. 882; 6 W.R. 721; 140 E.R. 1225; 29 Digest 361, *2918*.

Adjourned Summons for determination of questions arising under a marriage settlement.

By a settlement, dated Nov. 6, 1895, and made between Louis Charles Richard Duncombe-Jewell, of the first part, Mary Amy Slaughter, of the second part, and Francis Watts and Cecil Trevenen Prance, of the third part, in contemplation of the marriage of the said Louis Charles Richard Duncombe-Jewell (hereinafter called the husband) and Mary Amy Slaughter (hereinafter called the wife), the husband assigned to the trustees a policy of £1,000 upon his life in the National

Assurance Co., subject to a half-yearly premium of £12 17s. 6d. and all sums of money which by way of bonus or otherwise might become payable under or by virtue of the same, to hold the said policy moneys and premises after the solemnisation of the intended marriage upon trust upon the death of the husband to receive the moneys to become payable under the said policy, and to invest the same as therein mentioned, and to stand possessed of the said monies and the investments thereof (hereinafter called the husband's fund) in trust to pay the income thereof to the wife, if then living, during her life, for her separate use, and after the death of the survivor of the husband and wife in trust for all or any such one or more of the issue of the said intended marriage born during the lives of the husband and wife, or the survivor of them, as the husband and wife should jointly appoint, and in default of and subject to any such appointment in trust for all the children or any the child of the said intended marriage who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, and if more than one in equal shares with a provision for bringing shares into hotchpot, and it was declared that if there should be no child of the said intended marriage who should attain a vested interest, then after the death of the survivor of the husband and wife and such default or failure of children as aforesaid the trustees should hold the husband's fund in trust for the husband, his executors, administrators, and assigns; and the wife conveyed and assigned to the trustees all the wife's share and interest in certain real and personal estate specified in the schedule thereto (hereinafter called the wife's fund) subject to the life interest therein of the wife's father and mother, Amy Slaughter and Charles Slaughter, in trust after the solemnisation of the intended marriage, when the same should respectively fall into possession, to obtain the conveyance, assignment, or transfer thereof to them, and to deal with or invest the same as therein mentioned, and to pay the income of the wife's settlement funds to the wife during her life, and after her death to pay such income to the husband during his life, and after his death to hold the wife's settlement fund upon such trusts and subject to such powers in favour of the issue of the intended marriage as were in the event of the wife surviving the husband after her death expressed and declared of and concerning the husband's settlement fund, except that in default of a child of the said intended marriage attaining a vested interest therein the trustees should, after the death of the husband and such default or failure of children hold the wife's settlement funds, if the wife should survive the husband, in trust for the wife, her heirs, executors, administrators and assigns absolutely, but if the wife should predecease the husband in trust as she should by will appoint, and in default of and subject to any such appointment in trust for her next-of-kin, as if she had died intestate and without having been married with a provision for advancement of any child of the intended marriage to an extent not exceeding one-half of his or her expectant or presumptive share. The settlement contained covenants by the husband as follows:

"That if the said intended marriage shall take place he will not do or suffer anything whereby the said policy of assurance may become void or voidable, and will duly and punctually pay the annual premiums and other sums necessary for keeping on foot the said policy of assurance or any policy or policies effected as hereinafter provided, or for restoring the same respectively if the same respectively shall have become voidable, and in case the said policy shall not be granted, or in case the said policy or any policy or policies effected as hereinafter provided shall become void will effect a new policy or policies of assurance with such office or offices as the said trustees or trustee for the time being shall direct, and in their or his names or name on the life of the husband in such sum or sums of money as shall be or amount to the sum which would have been payable under the policy or policies not so effected as aforesaid or so become void if the husband had then died and will deliver every such future policy and the receipt for every such payment as

aforesaid to the said trustees or trustee for the time being, and will not do or suffer anything whereby the said trustees or trustee may be prevented from receiving any of the moneys intended to be assured by the said policy or policies respectively; and it is hereby agreed and declared that every such new policy or policies, and the moneys to become payable under the same shall be held and applied upon the trusts and with and subject to the powers, provisos, agreements, and declarations by these presents declared concerning the subsisting policy and the moneys to become payable under the same. Provided nevertheless and it is hereby agreed and declared that it shall not be obligatory on the said trustees or trustee to enforce any of the covenants hereinbefore contained in relation to the said policies or any of them or in relation to the payment of the annual premiums or sums of money necessary for keeping on foot or restoring the same or any of them or to see to the said policies or any of them being kept on foot and that no omission or neglect in that behalf by the said trustees or trustee shall be chargeable as a breach of trust. Provided always and it is hereby agreed and declared that the said trustees or trustee may if they or he shall in their or his absolute discretion think fit from time to time apply any part of the income of the wife's trust funds in or towards payment of the annual premiums or other the sum or sums of money necessary for keeping on foot or restoring the said policies of assurance or any of them."

The marriage duly took place. Subsequently, Louis Duncombe-Jewell was unable to provide the money for payment of the half-yearly premiums on the settled policy, and Mrs. Slaughter, the mother of Mrs. Duncombe-Jewell, paid three of such premiums, after which the policy lapsed, the wife's fund not having fallen into possession and the trustees in consequence having no funds out of which to pay the premiums. The policy carried with it profits which were added to the policy as a bonus on a quinquennial valuation. There was issue of the marriage one son only, Antony Michael Jewell, who was born in April, 1903. Mrs. Duncombe-Jewell died on May 3, 1904, having by her will, dated Jan. 5, 1903, given and devised all her property if there should be issue of her marriage one child only in trust for such child on attaining the age of twenty-one years. Shortly after her death Louis Charles Richard Duncombe-Jewell changed his name to Ludovick Charles Richard Cameron, and in 1905 married Janet Sarah Bruce. On Apr. 18, 1905, he assigned his life interest under the settlement to his wife, and by a settlement dated the same day, made between Janet Sarah Cameron, of the first part, Ludovick C. R. Cameron, of the second part, and Alfred Robinson and Henry Jenner, of the third part, such life interest was settled upon trusts, under which Janet Sarah Cameron was now entitled to the income representing such life interest. The present trustees of such settlement were the Public Trustee and Henry Jenner. Charles Slaughter, the father of Mrs. Duncombe-Jewell, died on June 6, 1905, and Mrs. Amy Slaughter died on Aug. 25, 1917. Upon her death the reversionary interest forming the wife's fund under the settlement of Nov. 6, 1895, fell into possession. The income of such reversionary interest amounted to about £134. Up to the time of such reversionary interest falling in the trustees of the settlement of 1895 had no funds in hand, and Mr. Cameron's financial position was such that the trustees had not thought it advisable to attempt to enforce the covenants in relation to the policy of assurance contained in the settlement of 1895. After the death of Mrs. Slaughter the trustees made inquiry of the National Assurance Co. as to what would have been the present value of the policy if it had not lapsed. It appeared that on Dec. 31, 1917, the value of such policy with the bonuses declared would have been £1,437 10s., but that if Mr. Cameron survived Dec. 31, 1918, a further bonus would probably be declared. The trustees thereupon required Mr. Cameron to effect a policy upon his life for £1,437 10s., the premiums of which they intended to pay out of the income of the wife's fund before paying such income to Mrs. Cameron. Mr. Cameron was willing to effect a policy on his life for £1,000 in lieu of the lapsed policy as a matter of grace, but

he and the trustees of the settlement of 1905 disputed the right of the trustees of the settlement of 1895 in the circumstances to require a fresh policy to be taken out or to apply any part of the income of the wife's fund in payment of the premiums upon any such policy. The trustees of the 1895 settlement issued this summons, to which the trustees of the 1905 settlement and the infant son of Mrs. Duncombe-Jewell, Antony Michael Jewell, were defendants, to have these points decided.

G. M. Hillyard for the trustees of the 1895 settlement.
W. R. Sheldon for the infant.
B. A. Hall for the trustees of the 1905 settlement.

Cur. adv. vult.

Apr. 16, 1919. **YOUNGER, J.,** read a judgment in which he set out the material clauses of the settlement and continued: In the event the infant defendant on the death of the husband, his father, and on attaining twenty-one, will become absolutely entitled in possession both to the husband's fund and to the wife's fund, unless, should he have issue during the husband's lifetime, his interest is defeated in whole or in part by an appointment by the husband in their favour. It will be found not unimportant to remember that, subject to the possible exercise of this power by the husband, the infant defendant's interest in the funds both of the husband and the wife is identical. At the hearing it very soon emerged that without the co-operation of the husband, the questions raised by this summons were by no means free from difficulty. To the summons he was no party, and, divided in duty as he deemed himself to be, he would not say whether or not he would submit himself voluntarily for medical examination, or otherwise assist to any extent at all. Yet the case seemed one for adjustment, in view especially of Mrs. Cameron's delicate health and slender means, and an opportunity was accordingly given at the close of the arguments to see whether by negotiation some proper adjustment could be reached. This, however, has been found impossible, and it is necessary at length to determine the questions between the parties strictly.

The first contention on behalf of the infant, had it been well founded, would have resolved all further difficulty. That contention was that the power contained in the settlement enabling the trustees to apply any part of the income of the wife's fund in or towards payment of the premiums necessary for keeping on foot or restoring the policies of assurance or any of them expressly authorises them, as they seek by the summons to do, themselves to effect a new policy in the place of that which has lapsed, and thereafter to apply the necessary part of the income of the wife's fund in payment of the premiums upon it. In answer to that view it was urged strongly on behalf of the trustees of the 1905 settlement that the only policy to which this express power extends is either an actually subsisting policy or one which at the moment is no more than voidable and capable of restoration; a lapsed or void policy is not included, for the word "restoring" in this settlement connotes only the resuscitation of a policy which has become voidable, and does not extend to include the effecting of a new policy in place of one that has become void. A critical perusal of this settlement, coupled with an extensive examination of the books of conveyancing precedents on this subject, has convinced me that the answer on this point is complete. In this settlement the distinction between the restoration of a voidable policy and the effecting of a new policy in place of one that has irrevocably lapsed is, I think, clearly maintained, and the draftsman has not thought fit to extend this express power over the wife's income to the "effecting" a substituted policy in place of one which has become void. The well-understood form of words operative for this purpose has been omitted from the power, and, when the object of the power is remembered, not, I think, without reason. For its object and purpose is clear. It is to enable the trustees, while the income of the wife's fund is still payable to her or on her account, to apply a competent part of it, even without her consent, in discharge of settlement obligations, not of

herself, but of somebody else, viz., the husband. As is stated in VAIZEY ON SETTLEMENTS (Vol. I at p. 315):

> "There does not appear to be any justification for payment by the trustees of such premiums out of income which under the trusts of the settlement is payable to some other person than the covenator."

If such power is to be given it must be expressed, and, I think, clearly expressed, and I agree with MR. VAIZEY in doubting the correctness of some observations in *Darcy* v. *Croft* (3), which might appear to indicate a contrary view.

On the construction, therefore, of this express power it seems to me that the contention of counsel for the trustees of the 1905 settlement is right, and that the plaintiffs and the infant defendant cannot support this summons by reference only to it. The further contention, however, that the presence of this inadequate express power excludes the possibility of implying in the trustees any further or other power in this matter over the income of the wife's fund, even after it has ceased to be payable to her, is, I think, destroyed by the success of the first contention and by the reasoning by which that success was achieved, because the presence of the power, directed as it is to a totally different purpose, can, I think, in no way be held to qualify the right or power of the trustees apart from express provision to impound any part of the trust fund payable under the settlement to or on account of the husband in or towards the discharge of settlement obligations of his own. Not that I doubt that this express power, even now that the wife's interest in the fund has ceased, may be invoked if necessary or convenient to cover a case expressly within it, and that is the reason for my opinion already indicated that the original objection by the Public Trustee to the husband's first proposal was not fell founded—yet, even so, I am satisfied that the existence of this power cannot in this settlement limit or affect the general powers of the trustees, whatever they may be, to impound any fund of the husband's, from whatever source originally proceeding, in or towards discharge of his own obligations under the settlement.

What, then, under this settlement are the powers of the trustees in this matter? Upon this question there is, strangely enough, a remarkable absence of direct authority. First of all, however, the trustees are, I think, in a position to maintain, and, so far as I can see, successfully to maintain, an action against the husband for specific performance of his covenant to effect and deliver to the trustees in place of the original policy, which has become void, a new policy on his life in the names of the trustees for the amount prescribed by the covenant, and in the office directed by the trustees. Secondly, in my opinion, on the principle of *Hamlin* v. *Great Northern Rail. Co.* (1), followed in *Le Blanche* v. *London and North Western Rail. Co.* (2), the trustees, on application to the husband, and refusal or neglect by him to effect such a policy, will themselves be entitled to take out that policy, on the principle that where one party to a contract does not perform it the other may do so for him as near as may be and charge him for the expense incurred in so doing. It is manifest that in either of these cases the premiums ultimately payable on the policy effected, either as a result of the order for specific performance or by the trustees, will largely depend upon the possibility of compelling or inducing the husband to submit to medical examination. But, in my opinion, if and so soon as a policy is actually effected, under whichever alternative it comes to be effected, the trustees, under the express provisions of the clause to which reference has already so copiously been made, will thereafter be entitled to apply the income of the wife's fund as far as necessary in paying the premiums upon it, for the reason that the policy, so soon as it exists, will, like that already mentioned, be one to which the power directly refers, and the husband's assignees of the income will be entitled only to the surplus not required for these premiums. In the meantime, moreover, the trustees will, for the reasons given in *Re Rhodesia Goldfields, Ltd.* (4), prior to the issue of the policy be entitled

to withhold from the assignees of the husband's interest the income in their hands until the amount necessary to meet these premiums has been ascertained.

These observations would suffice for the decision of the case, and, if well founded, would justify the greater part of the order I propose to make. But counsel for the infant did not ultimately rest his case on any such particular considerations. He based it on the general principle that neither the husband nor anyone claiming under him can take anything out of the settled funds here until there has been made good to them that which under the settlement is due from him. It is, of course, clear by reason of the husband's default the settled funds at this moment stand denuded of a property which, at the least, is represented by the present value of the lapsed policy: see *Hawkins* v. *Coulthurst* (5). To that extent, therefore, at the least, says counsel, the trustees are entitled to impound the income of the wife's fund as against the husband and his assignees until, by way of compensation to the husband's fund, his default in respect thereof has out of that income been made good. To this contention the first answer of counsel for the trustees of the 1905 settlement was that the principle invoked is only applicable where there is owing to the fund by the covenantor—something in the nature of a debt properly so called, that the principle of impounding such an interest has never been extended to the satisfaction of a mere claim by the trustees sounding only in damages. The husband has not in this case, as counsel pointed out, covenanted to pay any premiums to the trustees. He has not covenanted to pay the trustees anything. If he had, the principle put forward on behalf of the infant would, it was admitted, so far as this point was concerned, have applied to the extent of the money unpaid. It has, however, no application to a claim in respect of moneys unpaid to some third person or to any other default sounding only in damages. I confess that this distinction does not commend itself to my judgment. It is, however, the fact that in such leading cases on the subject as *Priddy* v. *Rose* (6), *Smith* v. *Smith* (7), and *Burridge* v. *Row* (8) there was always a debt due to the trustees; it is also true that the statement of the general principle—as e.g., in *Cherry* v. *Boultbee* (9)—is expressed in terms of debt; that in *Re Rhodesia Goldfields, Ltd.* (4), SWINFEN EADY, J., was at pains to point out that the liability there was in the nature of debt and not of damages; and that in *Re Smelting Corpn.* (10) the decision was inter alia that, as the unpaid instalments there in question—they were instalments of debenture stock—did not constitute a debt to the company or the trustees, the principle of *Cherry* v. *Boultbee* (9) had no application. On the other hand, it has again and again been said that the equity in question does not depend on any refined or technical considerations, but is of general application, and I feel satisfied that this argument on behalf of the trustees of the 1905 settlement would, if accepted, most injuriously curtail the operation of the rule, by discovering a difference when in substance there is none. It is true, as counsel pointed out, that the measure of damages for the husband's failure to pay the premiums was not the amount of the premiums: see *National Assurance Co.* v. *Best* (11). But, if it had been, could it be said that the equity of the trustees to impound the husband's interest in satisfaction of his liability was to depend upon the accident whether the husband's covenant was to pay the premiums to them or was to pay them direct to the insurance company. The converse distinction taken before STIRLING, J., in *Re Weston* (12) was brushed aside by him. But really the substance and result of the husband's default in this matter is, as I have said, that a valuable property which he covenanted to bring into settlement has been lost to the trust. It was a policy of assurance; it might have been a house; it might have been a sum of money. If the property which is lost to the settlement by reason of the breach of covenant can be measured in money, why should not the equity to impound extend to the value so lost as much as it would to money covenanted to be paid and unpaid? I can see no reason on principle why it should not, and, although for other reasons the decision in itself does not assist, *Re Milan Tramways Co., Ex parte Theys* (13), I think, settles the matter in this sense.

In that case six creditors of a company in liquidation assigned their debts for value to H. After assignment the liquidator took out a misfeasance summons that H. should pay £2,000 to the liquidator in respect of his misfeasance. That sum was not paid. In the meantime, and before any order was made, H. assigned for value all the above debts to T. T. applied after order made for payment to him of the dividend on the debts assigned, and the liquidator claimed to retain that dividend by way of set-off against H.'s £2,000. In that case, as was pointed out by SWINFEN EADY, J., in *Re Rhodesia Goldfields, Ltd.* (4), the claim was for damages for misfeasance, so there was no debt until judgment. That circumstance, however, did not in the view of the Court of Appeal affect the operation of the rule. The rule did not apply there because, but only because, there was no debt established against H. until after his transfer to T. Had it been so established, or had the company's claim been against the original assignors, then, although that claim sounded in damages only, the set-off claimed would have been allowed. COTTON, L.J., says (25 Ch.D. at p. 593):

> "The appellant also relied on this, that the company could say to Hütter, 'You shall not receive anything from the assets till you have paid what you owe us.' Probably the company could effectually say so. But Hütter is not coming here to obtain anything from the company. Theys is coming to have the benefit of proofs made not by Hütter, but by persons who, though they have transferred the benefit of their proofs, are the persons to whom the debts have been found due. The appellant says that an equity attached to these debts in respect of Hütter's liability to the company, because the debts were assigned to him. The answer to that is that Theys is not coming here to enforce any right of Hütter, but the rights of the creditors who proved. It is said that the Judicature Act, 1873, s. 25 (6) makes a difference. No doubt that enactment makes the assignment of a chose in action carry the right for the assignee to sue in his own name subject to equities. But there is nothing to prevent the ultimate assignee from suing in the name of the original creditors, free from any equities which only attach on the intermediate assignee. If there were any equity against the original creditors the case would be different."

That judgment, as well as those of LORD SELBORNE and FRY, L.J., make it clear, I think, that there is in the application of the equity now in question no magic in the fact that the claim against the covenantor was not from the commencement one in debt: a claim for the value of property lost is just as good for the purpose, and the circumstance that its amount may have to be established, just as the amount of a disputed tailor's bill may have to be established, is no reason, in the one case any more than in the other, why the trustees should be called upon to pay over any income in their hands before the amount of their claim against it has been ascertained: see *Re Rhodesia Goldfields, Ltd.* (4). Nor do I think that I am precluded from reaching this conclusion by *Re Smelting Corpn.* (10). In that case there was no debt, neither was there any damage proved. There was no remedy for specific performance open to the company, and the statement in the judgment ([1915] 1 Ch. at p. 477) that in *Re Abrahams* (14) WARRINGTON, J., held that the rule in *Cherry* v. *Boultbee* (9) only applied to a legal debt presently payable cannot, I think, be pressed. For, while that statement sufficed in that case, it does not suffice here. In *Re Abrahams* (14) WARRINGTON, J., did not decide that the rule only applied to a legal debt presently payable. What he did decide was that it did not apply even to a legal debt, which was only payable in futuro—for present purposes a very different thing.

In the result, therefore, while the dicta and general statements so much relied on by counsel for the trustees of the 1905 settlement cannot be gainsaid, I do not find that this distinction of his has ever been taken or upheld in a case like the present, where the substance of the default was as I have described it, and, fortified as I am by *Re Milan Tramways Co., Ex parte Theys* (13), I am not prepared

to weaken a principle of wide utility and broad equity by upholding for the first time the distinction here.

Counsel's second answer to the contention put forward on behalf of the infant was different. It was based on PARKER, J.'s decision in *Re Towndrow* (15) to which I have been referred since the argument. I cannot see, however, that that decision has any bearing on this case. One may perhaps be permitted to regret, for a reason I ventured to indicate in *Re Pain* (16), that neither in *Re Towndrow* (15) nor in *Re Dacre, Whitaker* v. *Dacre* (17) was *Morris* v. *Livie* (18) cited to the court. If it had been *Re Towndrow* (15) might well have been decided differently, and the principle there enunciated based on broader grounds. But the decision as it stands does not, in my judgment, affect the present case. As I have already pointed out, the interest of the infant defendant here both in the husband's fund and in the wife's fund is the same, and in his interest the trustees, if they can, are bound to see that nothing is taken out of either fund by the husband until his obligations to the other fund are fully satisfied. *Burridge* v. *Row* (8) may also be referred to in answer to this contention.

For all these reasons I am prepared to declare, and do declare, that the plaintiffs are entitled, as against the Public Trustee and the defendant Jenner, or other the trustees of the settlement of April 18, 1905, to retain the income of the wife's fund during the lifetime of the husband until a policy upon his life for the amount covered by his covenant has been effected in their names, or until thereout there has been retained a sum equal to the surrender value for the time being of the original policy which has lapsed. Declare further that the plaintiffs are also entitled to apply all accruing income of the said fund so far as necessary in payment of the premiums upon such new policy if and when effected. Declare that the defendants as such trustees as aforesaid are not entitled to claim the said income or any part thereof except subject to the exercise by the plaintiffs of their rights therein hereby declared.

Solicitors: *Rawle, Johnstone & Co.*, for *Prance & Prance*, Plymouth; *Wansey, Stammers & Co.*

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

Re WHITEHEAD. WHITEHEAD *v.* HEMSLEY

[CHANCERY DIVISION (Sargant, J.), October 16, November 4, 1919]

[Reported [1920] 1 Ch. 298; 89 L.J.Ch. 155; 122 L.T. 767; 36 T.L.R. 129]

Will—Construction—Gift of residuary personality and realty to named persons "or their heirs" in equal shares—Conversion of realty into personalty—Words of purchase or limitation—Wills Act, 1837 (1 *Vict.*, *c.* 26), *s.* 28.

By her will, dated Oct. 2, 1890, the testatrix gave her residuary personalty and realty, after the death of an annuitant, to her four brothers and a sister by name "or their heirs" in equal shares and proportions. The testatrix died on Mar. 27, 1895, and the annuitant died on Jan. 17, 1917. Two of the brothers and the sister died before the testatrix, all leaving children who survived (except for one) the testatrix and also (except for two) the annuitant. A third brother died after the testatrix, but before the annuitant, leaving children. The fourth brother died shortly after the annuitant, leaving children.

Held: the will did not operate to convert the real estate into personalty; as regards the realty, the words "or their heirs" were words of substitution and not limitation; as regards the personalty, it being admitted that there the words were substitutionary, the persons to take were the statutory next-of-kin; in the case of both realty and personalty, the class to take must be ascertained, in the cases of the two brothers and the sister who died before the testatrix, at the death of the testatrix, and in the cases of the two brothers who died after the testatrix, at the death of each brother.

Notes. Distinguished: *Re Hayden, Pask* v. *Perry*, [1931] 2 Ch. 333. Considered: *Re Kilvert, Midland Bank Executor and Trustee Co.* v. *Kilvert*, [1957] 2 All E.R. 196.

As to the construction of a gift by will to a person "or his heirs" see 34 HALSBURY'S LAWS (2nd Edn.) 312; and for cases see 44 DIGEST 868 et seq. For s. 22 of the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1349.

Cases referred to:

(1) *Read* v. *Snell* (1743), 2 Akt. 642; 26 E.R. 784, L.C.; 44 Digest 869, *7250*.

(2) *Wingfield* v. *Wingfield* (1878), 9 Ch.D. 658; 47 L.J.Ch. 768; 39 L.T. 227; 26 W.R. 711; 44 Digest 804, *6585*.

(3) *Harris* v. *Davis* (1844), 1 Coll. 416; 9 Jur. 269; 63 E.R. 480; 44 Digest 424, *2541*.

(4) *Greenway* v. *Greenway* (1860), 2 De G. F. & J. 128; 29 L.J.Ch. 601; 45 E.R. 570, L.JJ.; 44 Digest 979, *8344*.

(5) *Re Clerke, Clowes* v. *Clerke*, [1915] 2 Ch. 301; 84 L.J.Ch. 807; 113 L.T. 1105; 59 Sol. Jo. 667; 44 Digest 1025, *8840*.

(6) *Re Philips' Will* (1868), L.R. 7 Eq. 151; 19 L.T. 713; 44 Digest 804, *6583*.

Also referred to in argument:

Parsons v. *Parsons* (1869), L.R. 8 Eq. 260; 17 W.R. 1005; 39 Digest 114, *77*.

Eve v. *King* (1852), 16 Beav. 46; 21 L.J.Ch. 560; 20 L.T.O.S. 5; 16 Jur. 489; 51 E.R. 693; 44 Digest 497, *3175*.

Re Ibbetson, Ibbetson v. *Ibbetson* (1903), 88 L.T. 461; 44 Digest 803, *6573*.

Adshead v. *Willetts* (1861), 29 Beav. 358; 9 W.R. 405; 54 E.R. 666; 44 Digest 666, *5055*.

Adjourned Summons was taken out by the legal personal representatives of the testatrix against J. W. Hemsley and T. A. Hemsley (respectively heir-at-law and one of the next-of-kin of Ellen Hemsley) and John William Whitehead (son and heir-at-law of John Whitehead, James Whitehead, and Adelaide Taylor, claiming respectively as heir-at-law and nominal legatee under his will) and Thomas Whitehead (claiming as heir-at-law of Francis Whitehead), and sundry other children of Francis Whitehead (claiming as his next-of-kin). The summons raised, among others, the question as to what persons were entitled to participate in the division of the testatrix's residuary real and personal estate.

By her will, dated Oct. 2, 1890, Sarah Anne Whitehead appointed her brother, Joseph Whitehead, her executor. The will directed that all her just debts and funeral and testamentary expenses were to be paid as soon as conveniently might be after her death, and gave £10 to her sister Ellen Hemsley, to be deducted from her share referred to thereinafter, and directed her business as a milliner, stock-in-trade, money, book debts, household furniture, and other effects to be sold and converted into money, and directed that her real estate in Knaresborough be let or sold as her executor might consider most advisable and the money realised by the rents or the sale to be invested after paying all necessary expenses. The testatrix further directed that her executors should appropriate such portion as was necessary towards the maintenance of her sister Dorothy Whitehead so long as she should live, such amount not to exceed £20 per year, and at her death she gave all the remainder of her money or estate unto her brothers and sisters, viz., Francis, William, John, Ellen, and Joseph, "or their heirs, in equal shares and proportions." The testatrix died on Mar. 27, 1895, and her will was duly proved on

June 21, 1895, by the executor therein named. Her sister Dorothy died on Jan. 17, 1917. On her death the residuary estate consisted of the property at Knaresborough mentioned in her will and personalty consisting of a sum of £129 odd on deposit in the bank. Of the brothers and sister, John died before the date of the will, leaving one child him surviving, namely, the defendant John William Whitehead. Francis died after the will, but before the death of the testatrix, having had ten children. Of these, one died in 1868, two died after the death of the testatrix, but before the death of Dorothy, and seven were still living at the date of the summons. Ellen died after the date of the will, but before the death of the testatrix, leaving two children, both defendants in these proceedings. William survived the testatrix and died in 1900, leaving two children him surviving. He left a will, which had not been proved, under which his widow was appointed his executrix, and his real and personal property was left to her for life and after her death to his daughter. Joseph survived Dorothy by a few months, and died in August, 1917, leaving five children him surviving. He left a will, of which the plaintiff and another son were the executors. The net income of the testatrix's estate appears to have been not more than sufficient to keep down the annuity to Dorothy.

R. L. Ramsbotham for the legal personal representatives of the testatrix.

C. D. Myles for the children of brothers or sisters who died in the lifetime of the testatrix.

Percy Wheeler for a legatee under the will.

J. F. Carr for some of the next-of-kin.

Cur. adv. vult.

Nov. 4, 1919. **SARGANT, J.,** after reading the will and stating the facts, read the following judgment. I am asked only to decide who are now entitled to participate in the division of the residuary real and personal estate of the testatrix, and for that purpose to determine certain points of construction arising on the will. It is clear in the first place that the will does not operate to convert the real estate into personalty, and also that any interest in residue given to the testatrix's brothers and sister was given to them as tenants in common and not as joint tenants. The only really debatable question arising on the will is whether the words "or their heirs" are, as regards the real estate, to be construed as words of limitation or as words of substitution. As regards the personal estate so far as any may in the result be left, it is admitted that the words are substitutionary.

Apart from authority, there could, I think, be no doubt as to the proper answer to give to this question. The words "or their heirs" are on their plain primary meaning substitutionary. They can be treated as words of limitation only by doing violence to the language by altering the word "or" into "and." Further, the result of this alteration would be to render the three words in question superfluous and ineffective, since without them the words of gift are, under s. 28 of the Wills Act, 1837, amply sufficient to give the brothers and sister the fee simple or other the whole estate or interest which the testatrix had power to dispose of.

But it is said that the course of decision, both before and since the Wills Act, obliges me to decide that a gift to "A. or his heirs" takes effect by way of limitation and not by way of substitution. As regards the decisions prior to the Wills Act, it is clear that any rule to this effect laid down or recognised in such cases as *Read* v. *Snell* (1) was merely one instance of the various forced constructions adopted by the courts to avoid the frustration of intention resulting from a rigid application of the technical rule requiring the employment of words of limitation to pass an estate of inheritance: see *Wingfield* v. *Wingfield* (2). When once that blot had been removed by the Wills Act, and such a primâ facie interpretation had been given to devises as would undoubtedly correspond with the intentions of testators in the great majority of cases, it would naturally follow that there should also be an end of an obviously unnatural construction which had been adopted merely to avoid a difficulty which no longer existed. And accordingly the best-

known text-writers—VAUGHAN, HAWKINS, JARMAN and THEOBALD—have been unanimous in suggesting that, in devises to "A. or his heirs" or to "A. or the heirs of his body" since the operation of the Wills Act, the courts should now recognise the natural substitutionary character of the phrase cessante ratione legis cessat ipsa lex. It has, however, been strongly pressed upon me that the question is concluded to the contrary by three cases decided on devises since the Wills Act —namely, *Harris* v. *Davis* (3), *Greenway* v. *Greenway* (4), and *Re Clerke*, *Clowes* v. *Clerke* (5). In each of the first two of these cases there was a gift over to aid the construction of the initial gift, and in the second of these cases the language of the initial gift dealt in terms with income only; so that neither of these cases is a clear and distinct authority for the meaning to be placed even on such a devise as one to "A. or the heirs of his body." But no comment of this kind can be made on *Re Clerke*, *Clowes* v. *Clerke* (5), which is a clear and direct decision that the construction of a devise to "A. or his issue" is precisely the same to-day as it was before the Wills Act; and also contains a distinct expression of opinion that a devise to A. or his heirs would be construed on the same principle. It is to be observed that this construction of a devise to "A. or the heirs of his body," or to "A. or his issue," is not open to one of the objections to a corresponding construction of a devise to "A. or his heirs," since in the former case the words of limitation or quasi-limitation would not be ineffective or superfluous as in the case of the words "or his heirs," but this objection is a comparatively slight one. The real objection is the same in both cases—namely, the change of the plain meaning of the word "or" into "and" without any adequate cause as the law now stands. To my mind this last objection is the determining one, and, with much deference to the view of EVE, J., I cannot help declaring my own preference for the view of the text-writers I have mentioned, at any rate so far as regards a devise to "A. or his heirs."

Had I to decide a case precisely similar to that before EVE, J., I might perhaps be constrained to follow his decision for the sake of uniformity, leaving the matter to be considered now or at some future period by a higher tribunal. But as the matter stands, it is open to me to follow my own opinion, and this is particularly so in the present case because of two special circumstances which are present here. In the first place, the gift here is a conjoint gift of realty and personalty. Undoubtedly the gift of personalty must be construed as being substitutionary, and this is a strong reason for construing the gift of realty in the same way. Further, one of the devisees mentioned in the gift was known to the testatrix to be dead at the date of the will, so that it is hardly possible that in this case at least the testatrix meant the gift to be other than substitutionary.

The other points raised by the summons are covered by authority and have not been seriously contested. It is clear that, as regards the personalty, the persons to take under the gift to heirs are the statutory next-of-kin, and as regards both the real and personal estate the persons to take must be ascertained, in the case of each of the brothers and sister dying before the testatrix, at the death of the testatrix, and, in the case of each of the brothers dying after the testatrix, at the death of the brother: see *Re Philips' Will* (6).

Order accordingly.

Solicitors: *Halligey & Co.*; *Edgar Robins & Grimsdall*; *T. D. Jones & Co.*; *Hewitt, Woollacott & Chown.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re HUTCHINSON. CRISPIN *v.* HADDEN

[Chancery Division (P. O. Lawrence, J.), May 1, 8, 1919]

[Reported 88 L.J.Ch. 352; 121 L.T. 239]

Will—Construction—Gift of "my securities for money"—Primary meaning—Absence of context denoting use in wider meaning—Money secured on property.

By his will, dated Oct, 7, 1880, the testator gave a life interest in his personal estate to his wife and thereafter a bequest of "my money and securities for money" among brothers and sisters equally. The testator died on Oct. 21, 1903, and his widow died on Dec. 22, 1917. The testator's personal estate comprised stocks, shares, debentures, preference shares, annuities, Consols, colonial inscribed stock, and some Great Western Railway rentcharge stock, and there was no dispute as to which would be included if the word "securities" was confined to its strict and primary meaning of money secured on property.

Held: as there was no sufficient context to show that the word "securities" was intended to be used in the wider meaning as including investments generally, a court of first instance was bound to give it its primary meaning of money secured on property, especially in a will dated 1880, and, therefore, stocks and shares did not pass under the bequest.

Notes. Since *Perrin* v. *Morgan*, [1943] 1 All E.R. 187, there is no presumption that "money" bears one meaning rather than another, and regard must be had to the context and other relevant circumstances.

Considered: *Re Smithers*, *Watts* v. *Smithers*, [1939] 3 All E.R. 689.

As to the meaning, in gifts under will, of "money" and "securities for money," see 34 Halsbury's Laws (2nd Edn.) 254, 259 and Supplement; and for cases see 44 Digest 707 and Supplement.

Cases referred to:

(1) *Ogle* v. *Knipe* (1869), L.R. 8 Eq. 434; 38 L.J.Ch. 692; 20 L.T. 867; 17 W.R. 1090; 44 Digest 707, *5506*.

(2) *Re Beavan*, *Beavan* v. *Beavan* (1885), 53 L.T. 245; 44 Digest 707, *5502*.

(3) *Re Maitland*, *Chitty* v. *Maitland* (1896), 74 L.T. 274; 44 Digest 705, *5483*.

(4) *Re Johnson*, *Greenwood* v. *Greenwood and Robinson* (1903), 89 L.T. 84; affirmed (1903), 89 L.T. 520, C.A.; 44 Digest 707, *5508*.

(5) *Re Rayner*, *Rayner* v. *Rayner* (1903), 89 L.T. 85n; reversed, [1904] 1 Ch. 176; 73 L.J.Ch. 111; 89 L.T. 681; 52 W.R. 273; 48 Sol. Jo. 178, C.A.; 44 Digest 705, *5484*.

(6) *Re Gent and Eason's Contract*, [1905] 1 Ch. 386; 74 L.J.Ch. 333; 92 L.T. 356; 53 W.R. 330; 44 Digest 706, *5485*.

Adjourned Summons taken out by the plaintiff, Charles Johnston Crispin, who, with the defendant, St. John Hutchinson, were the present trustees of the will of Alexander Hadden Hutchinson, to determine whether under a bequest of "my money and securities for money" all investments such as stocks and shares passed or only those which could strictly be described as money secured on property.

The testator, Alexander Hadden Hutchinson, by his will dated Oct. 7, 1880, gave, devised, and bequeathed all his property real and personal (except mortgage and trust estates) to his trustees and executors upon trust to pay his debts, funeral, and testamentary expenses, and then to pay the income of his personal estate and the rents and profits of his real estate unto his wife, Mary Elizabeth Hutchinson, for her life so long as she should continue his widow, and upon trust to allow her to have the use and enjoyment of his furniture, plate, china, books, pictures, engravings, and other articles of a like nature for her life so long as she should continue to be his widow, and after the death or second marriage of his wife, whichever should first happen, he gave and bequeathed the furniture, plate, china,

and other articles to his brother, Charles Frederick Hutchinson, absolutely. And after the death or second marriage of his wife, "I give and bequeath my money and securities for money unto and equally between and amongst my brothers and sisters living at the decease or second marriage of my wife in equal shares and proportions." The testator then directed that in case of the death of any of his brothers or sisters in the lifetime or previous to the second marriage of his wife leaving issue the share of such brother or sister so dying should go to his or her issue respectively in equal shares and proportions. And after the death or second marriage of his wife he gave and devised all his real estate and all the residue and remainder of his personal estate not otherwise disposed of to Charles Frederick Hutchinson, his heirs, executors, and administrators absolutely. The testator then appointed Charles Frederick Hutchinson and his brother-in-law, the Rev. Charles Smyth Johnston, executors. The testator died on Oct. 21, 1903, Sir Charles Frederick Hutchinson died on Nov. 15, 1907, and Charles Smyth Johnston died on Nov. 4, 1910. The testator's widow did not marry again and died on Dec. 22, 1917. Two sisters of the testator survived his widow, namely, the defendants Fanny Hutchinson and Annie Innes Hutchinson. Benjamin Clay Hutchinson died in the testator's lifetime, leaving the defendants Richard Charles Hutchinson and Benjamin Innes Hutchinson issue him surviving, who are now living in Australia. St. John Hutchinson, another brother of the testator, died in the lifetime of the widow unmarried and without issue. Sir Charles Frederick Hutchinson left issue one child only—namely, the defendant St. John Hutchinson, who in the events which have happened and under the will of his father was entitled to the residuary estate devised and bequeathed by the testator to Charles Frederick Hutchinson, father of St. John Hutchinson, and as such residuary legatee claimed to be entitled to stocks and shares as not being included within the meaning of the bequest of "my money and securities for money." The testator's personal estate comprised at his death and on the death of his widow a number of stocks, shares, debenture stock, preference stock, annuities, Consols, and ordinary shares in companies, colonial inscribed stock, and some Great Western Railway rentcharge stock. On the hearing of the summons it was agreed that "my money and securities for money" referred to those investments which should be held to be included within the meaning of those words which belonged to the testator at the time of his death, and did not refer to those existing at the death of his widow in 1917.

G. R. Northcote for the plaintiff, one of the trustees of the will of the testator.

F. K. Archer for the defendants, trustees of Sir Charles Frederick Hutchinson's will.

J. W. Manning for the defendant, St. John Hutchinson, entitled to residue.

G. T. Simonds for the surviving sisters of the testator.

P. O. LAWRENCE, J.—The question raised by this summons is what is the true meaning of "securities for money" in the will of the testator. The primary meaning of securities for money is money secured on property, but at the present day the words are widely used in a more general sense as meaning stocks and shares dealt with on the Stock Exchange. It is contended on behalf of the defendant, St. John Hutchinson, claiming under his father, the residuary legatee of the testator, that I ought to hold that the wider meaning of the words is the true meaning. The will was made in October, 1880.

The testator died on Oct. 21, 1903, and his widow died on Dec. 22, 1917. It is conceded that the bequest of "my money and securities for money" refers to the time of the death of the testator and includes only money and securities for money which belonged to the testator at the time of his death. This is a peculiar will, in that it contains a specific bequest of money and securities for money after a life interest was given in his estate and his furniture, plate, and other articles to his wife, with the result that money which would have been the primary fund for the payment of debts had to be reserved and invested and was not available for those outgoings.

In my judgment, the words "securities for money" are indistinguishable in their meaning from the word "securities" only. In this will there is no context to afford a clue as to the meaning in which the testator has used the words "securities for money." The question, therefore, is whether in a will made in the year 1880 in the absence of any context which might give some special meaning to the words, the expression "securities for money" means in the strict sense money secured on property or bears the wider meaning of stocks and shares dealt with on the Stock Exchange or investments generally. I have been referred to several authorities and I will consider them in the order of their dates. In *Ogle* v. *Knipe* (1), decided in 1869, the expression used was in substance indistinguishable from the words in the will before me, and JAMES, V.-C., said that he could not give the wider meaning I have spoken of to the words "money and securities for money of every description." That decision would cover the present case but for the argument put forward by the legatee that the word "securities" is a flexible word and that it has, since the decision in *Ogle* v. *Knipe* (1), where the will in which the words occurred was made in the year 1857, acquired a wider meaning. The next case in order of date is *Re Beavan*, *Beavan* v. *Beavan* (2), decided in 1885 by KAYE, J., and in the expression used in the will, which was made in the year 1854, were the words "securities for money," the exact words we have in this case, and amongst other items were certain railway debenture stocks, and the learned judge decided that those debenture stocks were "securities for money," and said in the course of his judgment that "the difference between debenture stock and preference shares is manifest"; and it was clear that in his opinion shares would not have passed as securities for money. In *Re Maitland*, *Chitty* v. *Maitland* (3), decided by NORTH, J., in the year 1896, in which the words in question were, "the securities in my name now held, or which may hereafter be held for me by Lloyds Bank, of 54 St. James's Street, London, S.W.," the decsion in *Ogle* v. *Knipe* (1) was followed, and the learned judge said that the word "securities" without any guidance for its interpretation being able to be found in the context of the will or from extrinsic circumstances must be held to have its strict and primary meaning.

In *Re Johnson*, *Greenwood* v. *Greenwood and Robinson* (4), decided by KEKEWICH, J., in 1903, and affirmed by the Court of Appeal, the words were, "all securities for money standing invested in my name." The date of the will was 1901. The list of items of the property in dispute included shares in Church Schools Co., Ltd., £2,000 River Weir Navigation and Sunderland Docks Co. mortgage bond at three per cent., a £300 mortgage bond of the Tyne Improvement Commission, and some preference stock of railway companies. The judgment is a long one, and the learned judge came to the conclusion on the construction of the will and on certain extrinsic evidence which he admitted, that the word "securities" included the shares in the Church Schools Co. and the preference stock. After the testatrix's death a list in her handwriting containing the items of property in dispute and headed "securities" was found. After dealing with the items of the River Weir Navigation and Tyne Improvement Commission bonds which, he says, are necessarily securities, KEKEWICH, J., said (89 L.T. at p. 87):

> "All the others are not in the proper sense securities, and I venture to say that fifty years ago none of them could have been held to be securities, because none of them provide for the repayment of the money."

He then stated that he had considerable doubt about the shares in the Church Schools Co., but that he was bound to bear in mind the documents which included the government stock and the Church Schools shares, with all the other things which she had in one of them described as "securities" and that therefore he must hold that all, without exception, passed under the gift; I conclude that the only reason the learned judge included the shares in that case was the fact that the testatrix had described these shares as securities in the document in her handwriting.

Whether that decision of Kekewich, J., is right or not, and whether the evidence as to the change of the meaning of the word "securities" admitted in that case was the reason for so deciding, I do not desire to express any opinion. In the Court of Appeal the decision was given on the ground that the context in the will was sufficient to indicate the testatrix's intention that the word should bear the wider meaning. But it is obvious that the facts and words used in that case are different from those here. *Re Rayner*, *Rayner* v. *Rayner* (5), which was decided in 1903 by the Court of Appeal, is the only other case of importance. In the court of first instance it was before Farwell, J., on Mar. 30, 1903, which was some months prior to Kekewich, J.'s decision in *Re Johnson*, *Greenwood* v. *Greenwood and Robinson* (4). In *Re Rayner*, *Rayner* v. *Rayner* (5) Farwell, J., had to decide whether the words "such securities as my trustees in their absolute discretion shall think fit," followed by the words "and I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities" used in a will made in the year 1895 could be construed so as to include stock and shares in railways or other companies, and the learned judge held that the word "securities" had a well-defined primary meaning and did not extend to a share in property and that extrinsic evidence that the testator, who was a very wealthy man, had the greater part of his estate invested in shares and other property which would not come within the meaning of the word "security" was not admissible, because there was nothing in the context of the will from which it was apparent that the testator had used the words in which he had expressed himself in any other than their strict and primary sense, and that where his words so interpreted were sensible without reference to extrinsic circumstances it was an inflexible rule that the words of the will should be interpreted in their strict and primary sense. In the Court of Appeal the lords justices were chiefly influenced in their decision by the last sentence, "and I authorise my trustees to continue or leave any moneys invested at my death in and upon the same securities," and by reason of that clause decided that in the particular context in which the words were used the construction of the meaning of the word "securities" was the wider one, and Vaughan Williams, L.J., in his judgment showed that he was inclined to differ from Farwell, J., as to extrinsic evidence being inadmissible. The learned lord justice adds an opinion that he did not concur in the opinion expressed by Farwell, J., but Romer, L.J., agreed with Farwell, J., that in the absence of any context or admissible evidence the meaning of the word must be the primary one of money secured on property, but in so concurring with Farwell, J., he must have meant to concur with his view of what evidence would be admissible in that case. Stirling, L.J., said that he was prepared to say that the meaning of the word "securities" since the decision in *Ogle* v. *Knipe* (1) was confined to its strict and primary meaning, and that the contention that the meaning of the word had changed since 1869, and that as understood at the date of the will and at that time, that was in 1904, it included stocks and shares he was not prepared to say was well founded, but he thought that it was unnecessary to decide the question on that occasion.

Those are all the authorities which are of assistance except one more case, which, however, is not so material—namely, *Re Gent and Eason's Contract* (6), where trustees of a will were authorised to invest trust moneys in the purchase or upon mortgage of freehold or leasehold properties, or in or upon Government stocks or funds, or debentures or preferential stocks of certain railway companies, or in or upon trustee investments authorised by law, with power to vary and transpose such securities for other securities of any of the descriptions thereinbefore authorised. The question there was whether that word "securities" had been used as synonymous with the word "investments." Farwell, J., said that in that particular will the testator had treated the words "investment" and "security" as interchangeable.

That case really affords no assistance here. Counsel for the legatee has referred to the definitions given of the word "securities" in the Conveyancing Act, 1881,

s. 2 (xiv), in the Settled Land Act, 1882, s. 2 (10) (viii), and in the Trustee Act, 1893, s. 50, in each of which the word "securities" is made to include stocks and shares, also to MURRAY'S NEW DICTIONARY in which one of the meanings given to that word under the tenth heading is "a document held by a creditor as guarantee of his right to payment. Hence any particular kind of stocks, shares or other form of investment guaranteed by such documents." In that dictionary a work was also cited, ROGERS ON CAPITAL AND LABOUR, written in 1872, which showed that the word "securities" connected with a stockbroker included stocks and shares. There was also cited the "Daily News" of 1879: "Liquid securities, or, in other words, those easily converted into cash when the necessity arises." It was argued on the authority of the definitions in these statutes and the dictionary and citations therein that I am at liberty and even bound to give the wider meaning to these words "securities for money" used in this will. In my view, I am not at liberty to do this. In the absence of any context showing that the word was intended to be used in the wider sense I am bound to give to it its primary meaning as meaning money secured on property, especially in a will dated 1880, on the authority of *Ogle* v. *Knipe* (1), *Re Maitland*, *Chitty* v. *Maitland* (3), and *Re Rayner*, *Rayner* v. *Rayner* (5), where the canon of construction was not dissented from by STIRLING, J., and not dealt with adversely by VAUGHAN WILLIAMS, L.J. Therefore, as a judge of first instance, I am not at liberty to give to this word the wider meaning, however much personally I may think that in the present times the word is used in that wider meaning as including stocks and shares dealt with on the Stock Exchange or investments generally. Then, in the list of items in dispute in this case, it being admitted that Great Western Railway rentcharge stock, the terms on which it was issued having been considered, is money secured on property, and there being no question as to which of the remaining items are securities in the primary sense, those which are stocks and shares I hold do not pass under the bequest in question in this will. The costs of all parties will come out of the estate.

Order accordingly.

Solicitors: *Trower, Still, Parkin & Keeling*; *Field, Roscoe & Co.*; *Drake, Son & Parton.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re STOKES. Ex Parte MELLISH

[King's Bench Division (Horridge, J.), March 24, 1919]

[Reported [1919] 2 K.B. 256; 88 L.J.K.B. 794; 121 L.T. 391; 35 T.L.R. 345; [1918–19] B. & C.R. 208]

Bankruptcy—Liquidation by arrangement—Debtor's business carried on by trustee—Policy of life assurance effected by debtor—Premiums paid by debtor—Trustee ignorant of existence of policy—Death of debtor—Right to proceeds of policy.

The trustee of a debtor whose affairs were being liquidated by arrangement under the Bankruptcy Act, 1869, carried on the debtor's business during practically the whole period of the liquidation, and engaged the debtor to act as his clerk at a salary. The debtor, during the liquidation and without the trustee being aware of it, effected a policy on his life and paid the premiums during the liquidation and, after his discharge, until his death. By his will made after his discharge, the debtor appointed his niece executrix. The insurance company refused to pay the policy moneys to her until it had been determined whether they passed to her under the debtor's will or belonged to the official receiver, the present trustee in the liquidation.

Held: as the trustee in the liquidation was unaware of the existence of the policy and of the payment of premiums by the debtor, the policy and policy moneys belonged to the official receiver as trustee and did not pass under the will of the debtor.

Tapster v. *Ward* (1) (1909), 101 L.T. 503, and *Re Phillips* (2), [1914] 2 K.B. 689, applied.

Notes. Considered: *Re Thellusson, Ex parte Abdy*, ante p. 729; *Re Wigzell, Ex parte Hart*, [1921] 2 K.B. 835.

As to property devolving on a bankrupt before discharge, see 2 Halsbury's Laws (3rd Edn.) 429 et seq.; and for cases see 5 Digest (Repl.) 779 et seq.

Cases referred to:

(1) *Tapster* v. *Ward* (1909), 101 L.T. 503; 53 Sol. Jo. 503, C.A.; 5 Digest (Repl.) 727, *6289*.

(2) *Re Phillips*, [1914] 2 K.B. 689; 83 L.J.K.B. 1364; 21 Mans. 144; sub nom. *Re Phillips, Ex parte Official Receiver*, 110 L.T. 939; 58 Sol. Jo. 304; 5 Digest (Repl.) 680, *5981*.

(3) *Re Tyler, Ex parte Official Receiver*, [1907] 1 K.B. 865; 76 L.J.K.B. 541; 97 L.T. 30; 23 T.L.R. 328; 51 Sol. Jo. 291; 14 Mans. 73, C.A.; 4 Digest (Repl.) 228, *2041*.

(4) *Re Hall, Ex parte Official Receiver*, [1907] 1 K.B. 875; 76 L.J.K.B. 546; 97 L.T. 33; 23 T.L.R. 327; 51 Sol. Jo. 292; 14 Mans. 82, C.A.; 4 Digest (Repl.) 413, *3692*.

(5) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; 43 L.J.Bcy. 107; 30 L.T. 773; 22 W.R. 937, L.JJ.; 4 Digest (Repl.) 226, *2031*.

(6) *Re Leslie, Leslie* v. *French* (1883), 23 Ch.D. 552; 52 L.J.Ch. 762; 48 L.T. 564; 31 W.R. 561; 3 Digest (Repl.) 74, *133*.

Also referred to in argument:

Re France, Ex parte Tinker (1874), 9 Ch. App. 716; 43 L.J.Bcy. 147; 30 L.T. 806, L.JJ.; 5 Digest (Repl.) 1264, *10135*.

Re Caughey, Ex parte Caughey (1877), 4 Ch.D. 533; 46 L.J.Bcy. 18; 36 L.T. 39; 25 W.R. 308; 5 Digest (Repl.) 786, *6672*.

Re Pettit's Estate (1876), 1 Ch.D. 478; 5 Digest (Repl.) 695, *6733*.

Motion.

This was a motion on behalf of the applicant, who was the executrix of the debtor, for a declaration that a policy of assurance on the life of the debtor, Stokes, deceased, effected with the London Life Association on Oct. 21, 1881, and the

proceeds of such policy, were the property of the applicant as against the respondent, the official receiver, and that the costs of both parties might be taxed, and paid or retained out of the moneys payable by the association.

On Dec. 1, 1879, the debtor filed his petition, and on Dec. 13 the creditors resolved that his affairs be liquidated by arrangement. On Jan. 23, 1880, E. P. Wilson was appointed trustee under the liquidation. On Oct. 21, 1881, the debtor effected a policy on his life with the London Life Association for £1,000, and continued to pay the premiums until his death. On Nov. 13, 1883, the debtor obtained his discharge. He died on July 26, 1917, at Cape Town, South Africa, having by his will dated July 10, 1915, appointed his niece, the applicant, his executrix. The London Life Association refused to pay the policy moneys to the applicant until it had been determined whether they passed under the will of the debtor to the applicant or belonged to the senior official receiver, who was the present trustee in the liquidation, and it had been arranged that this motion should be brought to obtain the decision of the court as to the respective rights to the policy of the applicant and the trustee, and that, subject to the approval of the court, the costs of both parties, including a transcript of the shorthand writer's notes of the judgment, be paid out of the policy moneys. The trustee in his evidence said that he did not know that the policy existed, or that any premiums had been paid by the debtor, and that the early premiums must have been out of the debtor's salary, as he had no other means.

Hansell for the applicant.
Tindale Davis for the official receiver.

HORRIDGE, J.—I have seen the original trustee in the box, and I find as a fact that he had no notice whatever that the policy was effected, or that any premiums were paid. He says that the first premiums must have been paid out of the salary which was allowed to the liquidating debtor for the assistance he gave in winding-up his estate, because the debtor had no other means of paying them, and he also says that he did not know that any premiums were in fact being paid. This, therefore, is a case where the policy was effected and the premiums paid throughout without any knowledge by the trustee or by any successive officer.

In *Re Tyler, Ex parte Official Receiver* (3) the Court of Appeal affirmed a decision of Bigham, J., in which he declined to allow the trustees to intervene and take policy moneys without refunding to the wife of the debtor the premiums paid by her, but in that case everything had been done with the knowledge of the representative of the estate for the time being, although it is true that he was not the main representative involved in the decision itself. That case proceeded wholly on the principle that the trustee, having stood by with knowledge, and having allowed the premiums to be paid by the wife, could not, as an honest and upright man, intervene and take the benefit of the policy without allowing the wife the premiums which she had paid. Farwell, L.J., said this when dealing with the position of the wife ([1907] 1 K.B. at p. 872):

> "to my mind it would certainly not be in accordance with fair dealing—that open, honest dealing to which reference has been made—that the court should allow its officer to say, 'I knew the wife was paying, and I let her go on paying, and said nothing to her to lead her to believe that I was going to claim the policy moneys at the end without repaying the premiums which she had paid.' "

The same principle appears in *Re Hall, Ex parte Official Receiver* (4) in the judgment of Farwell, L.J. (ibid. at p. 879):

> "In the last case, for example, my judgment proceeded on the knowledge of the trustee in the bankruptcy of the existence of the policies and the necessity for paying the premiums and the fact that the wife was paying them."

The next case with which I wish to deal is *Tapster* v. *Ward* (1). Let me compare the facts of that case with the facts of the present one. In *Tapster* v.

Ward (1) the policy was effected before the liquidation. It was concealed from the trustee, and, after the liquidation had been closed, premiums were paid out of his own moneys by the liquidating debtor from 1880 to 1907—a long period of years. In the present case, it is quite true that the policy was effected during the liquidation and the first premium was paid out of moneys which had been allowed to the debtor by the trustee in respect of his salary. In my view, it does not make any difference that the policy in *Tapster's Case* (1) had been effected before the liquidation, and that, in the present case, the first premium was paid and the policy effected at a time when the liquidation had commenced. It is not questioned that every contract made on and before liquidation by the liquidating debtor is the property of the trustee. If that be so, this contract of insurance, although the liquidation was in fact proceeding, was the contract of the trustee, and, if the trustee had known the premiums were being paid out of the debtor's salary, the trustee could have intervened and demanded the policy. As regards the payments which were made after the discharge in 1883 until the assured's death in July, 1917, they are in exactly the same position as the premiums for the policy in *Tapster* v. *Ward* (1), being paid out of the moneys of the debtor in each case after he had ceased to be a debtor and had obtained his discharge. In *Tapster* v. *Ward* (1) the Court of Appeal refused to listen to the argument that the trustee ought not to intervene and claim the policy moneys. Towards the end of his judgment, COZENS-HARDY, M.R., said (101 L.T. at p. 504):

> "In a case like the present where the trustee is absolutely ignorant of the existence of the policy, and where the trustee is absolutely ignorant of any payment made for premiums in respect of it—and, of course, was not guilty of any conduct either proper or improper in respect of those payments—I am unable to see that we should be in the least justified in making such a tremendous extension of the doctrine of *Re Condon, Ex parte James* (5) as we are asked to do."

The most recent decision in this connection is my own in *Re Phillips* (2), where the policy had been effected whilst the bankrupt's discharge was suspended and subsequent premiums had been paid by him until he became a bankrupt the second time. The question was whether the trustee in the first bankruptcy could claim the policy moneys without accounting to the trustee in the second bankruptcy for the premiums which had been paid by the bankrupt in the interval. I held that, as the trustee in the first bankruptcy had no notice whatever of the payment of premiums, he was not in any way bound to make provision out of the policy moneys. It seems clear from *Re Leslie*, *Leslie* v. *French* (6) that a mere volunteer who pays premiums has no right to treat them in any way as salvage remuneration to himself for keeping the policy alive. This is rather a hard case for the applicant, but the law of bankruptcy seems to me to be perfectly clear.

The policy was effected after the resolution for liquidation, and it was the property of the trustee. The bankrupt never informed him that he had effected it, or that he was paying any premiums, and, on the authorities to which I have referred, it is plain that the policy belonged to the trustee, and, therefore, now belongs to the official receiver. Subject to the payment out of the policy moneys of the costs of this motion, there will be an order for the payment of the balance to the official receiver. The motion will be dismissed, and there will be a declaration that the policy is part of the property of the debtor divisible amongst his creditors and that the official receiver is entitled to the policy and the policy moneys. Costs as between solicitor and client of the applicant and the official receiver, including a transcript of the shorthand note of the judgment, to be taxed and paid by the official receiver out of the funds.

Motion dismissed.

Solicitor: *Stephenson, Harwood & Co.*; *Tarry, Sherlock & King.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

Re WRIGHT AND THOMPSON'S CONTRACT

[CHANCERY DIVISION (Astbury, J.), October 22, 23, 1919]

[Reported [1920] 1 Ch. 191; 89 L.J.Ch. 66; 122 L.T. 92; 36 T.L.R. 37; 64 Sol. Jo. 52]

B

Sale of Land—Title—Abstract—Completion—Statement of fact necessary to good title in answers to requisitions and letter to purchaser's solicitor—Need of statutory declaration by vendor as to fact required by purchaser—Cost of declaration—Conveyancing Act, 1881 (44 & 45 *Vict.*, c. 41), *s.* 3 (6).

Under the Courts (Emergency Powers) Act, 1914, no security could be realised without application to the court, but the Act did not apply to a sale by mortgagees who were in possession before the Act was passed. On Dec. 22, 1918, the purchaser bought certain property by auction, and the conditions of sale stated that the vendors were selling as mortgagees. It was not stated in the abstract of title that the vendors were mortgagees in possession before the Act of 1914, but this fact had been stated at the auction and was also stated in answer to the purchaser's requisitions and in a letter to the purchaser's solicitor before the issue of this summons. The purchaser required a statutory declaration that the vendors were mortgagees in possession before the Act, but the vendors were only willing to make the declaration at the purchaser's expense, contending that they had shown a good title to sell. On a vendor and purchaser summons,

C

D

Held: although the vendors' title depended on the fact that they were mortgagees in possession before the Act of 1914 and this fact had not been stated in the abstract, yet the statement of the fact in the answer to the requisitions and in the letter to the purchaser's solicitors supplemented the abstract and completed it, and, therefore, a statutory declaration was not necessary to complete the title, but merely to verify it, and under s. 3 (6) of the Conveyancing Act, 1881, the cost of such verification had to be borne by the purchaser.

E

F

Re Moody and Yates' Contract (1) (1885), 30 Ch.D. 334, distinguished.

Re Conlan and Faulkner's Contract (2), [1916] 1 I.R. 241, applied.

Notes. Section 3 (6) of the Conveyancing and Real Property Act, 1881, is re-enacted in s. 45 (4) (b) of the Law of Property Act, 1925. The Courts (Emergency Powers) Act, 1914, was repealed after the end of the 1914–18 war.

G

As to proof of title, see 34 HALSBURY'S LAWS (3rd Edn.) 278, para. 455; and as to the expense of producing deeds, see ibid., 288, para. 479. For cases on proof of title, see 40 DIGEST (Repl.) 181 et seq.; and for cases on the expenses of producing documents, see ibid., 189, 190.

Cases referred to:

H

(1) *Re Moody and Yates' Contract* (1885), 28 Ch.D. 661; 54 L.J.Ch. 584; 52 L.T. 419; 33 W.R. 362; affirmed (1885), 30 Ch.D. 344; 54 L.J.Ch. 886; 53 L.T. 845; 33 W.R. 785; 1 T.L.R. 650, C.A.; 40 Digest (Repl.) 190, *1526.*

(2) *Re Conlon and Faulkener's Contract*, [1916] 1 I.R. 241; 40 Digest (Repl.) 190, **842.*

(3) *Re Johnson and Tustin* (1885), 30 Ch.D. 42; 54 L.J.Ch. 889; 53 L.T. 281; 33 W.R. 737; 1 T.L.R. 579, C.A.; 40 Digest (Repl.) 189, *1519.*

I

Vendor and Purchaser Summons for declaration that a good title to property had not been shown.

On Dec. 22, 1918, the purchaser bought by auction certain property in Sunderland for the sum of £575. The conditions of sale provided that the title should commence with an indenture of mortgage dated Dec. 15, 1877, and stated that the vendors were selling as mortgagees under their power of sale, and would only convey as such. It was not stated in the abstract of title that the vendors were

mortgagees in possession prior to the Courts (Emergency Powers) Act, 1914, which provided that no person could realise any security "except by way of sale by a mortgagee in possession" without leave of the court, although that fact was stated in reply to requisitions, and in a letter to the purchaser's solicitor prior to the issue of the summons. The purchaser required a statutory declaration that the vendors were mortgagees in possession prior to the passing of the Act of 1914, but the vendors were only willing to make the declaration at the purchaser's expense. Thereupon the purchaser took out a vendor and purchaser summons asking for a declaration that a good title had not been shown because the vendors were not, or had not proved themselves to be, mortgagees in possession within s. 1 (1) (b) of the Courts (Emergency Powers) Act, 1914.

G. E. Tyrrell for the purchaser.
Manning for the vendors.

ASTBURY, J., stated the facts and continued: It is provided by s. 3 (6) of the Conveyancing Act, 1881, that on the sale of any property the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, if any such search, procuring, making, or verifying is required by the purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same. The result of the statute appears to be that where the vendor's title depends on the existence of a fact or facts, and such fact or facts are stated in the abstract, the abstract is complete in itself, and proof of such fact or facts is a verification within the section and the expense must be borne by the purchaser.

In *Re Moody and Yates' Contract* (1) a house had been erected under a building lease which provided that the lessees should complete the building to the satisfaction of the lessor's surveyor. The purchaser required the vendors, the lessees, to produce the surveyor's certificate that the house had been so completed, and the court held that the vendors were bound to procure the certificate at their own expense. No certificate had in fact been given, and until it was given the vendors had made out no title. It was held by CHITTY, J. (28 Ch.D. at p. 664) that:

> "Producing the certificate of the surveyor, which is not in existence, is not obtaining evidence of the title but is part of the title itself."

In the same case, in the Court of Appeal, BRETT, M.R., said (30 Ch.D. at p. 347):

> "The expression of the satisfaction of the surveyor is part of the title; an outward expression is substantially the only mode in which it can be shown that the satisfaction of the surveyor really exists; it is part of, and not merely evidence of, the title itself, and therefore the certificate of the surveyor's satisfaction does not fall within sub-s. (6) which refers only to certificates being evidence of title, and not to certificates being part of the title itself."

And FRY, L.J., said (ibid., at p. 349):

> "The certificate of the surveyor's approval is not like a certificate of a pre-existing fact, such as a birth, a marriage, or a death; but it is the fact itself, and forms part of the vendor's title, which must be procured at their expense."

That case was followed by the Master of the Rolls in Ireland in *Re Conlon and Faulkener's Contract* (2), a case very similar to the present one, where the vendor's title depended on the fact of his being heir-at-law of the deceased owner of the property. It was held that where the fact of the heirship was stated on the abstract, the abstract was complete, and proof of the heirship, by statutory declaration or otherwise, was merely verification of a fact stated on the face of the abstract, and accordingly, by s. 3 (6) of the Conveyancing Act, 1881, the expense of procuring such proof must be borne by the purchaser. The learned judge, after reading the latter part of s. 3 (6), says ([1916] 1 I.R. at p. 244):

> "But taking the latter part of the subsection, and stripping it of all words inapplicable to the present case, the effect of it is this, that the expenses of

making a declaration not in the vendor's possession, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same. The question is how far that provision is applicable to the present case. The document which is required is a declaration not in existence at the present moment; it requires to be made; and it is required merely for the purpose of verifying a fact which is stated on the face of the abstract. It seems to me that this case comes within the very words of the subsection. The declaration asked for is not required for the purpose of adding to the abstract of title, or completing it, and this fact, in my opinion, distinguishes the present case from *Re Moody and Yates' Contract* (1)."

In the present case the fact that the vendors became mortgagees in possession before the Courts (Emergency Powers) Act, 1914, was not stated on the abstract, but there is little doubt that it was stated at the auction, and quite plain that, prior to the issue of the summons, it was stated in the answers to the requisitions, and in the letter which I have read, and the abstract has thus been supplemented by the statement of this necessary fact. The Act of 1914 does not apply to mortgagees in possession before the passing of the Act, and all the vendors had to show was a mortgage and a power of sale under it, and to state that they were mortgagees in possession before the passing of the Act. That they did state, and I think the cost of the verification of that fact must be borne by the purchaser. Before parting with the case I desire to refer to the case of *Re Johnson and Tustin* (3), which the purchaser relies on. There it was held that s. 3 (6) of the Conveyancing Act, 1881, was not intended to interfere with the duty to produce a proper abstract of title, but in this case the vendor had produced a sufficient abstract of title before the date of this summons, and in my opinion the purchaser is wrong, and the summons must be dismissed with costs.

Solicitors: *Ward, Bowie & Co.*, for *C. T. Stockdale*, Sunderland; *Blair & W. B. Girling*, for *Huntly, Foster & Russell*, Sunderland.

[*Reported by* J. B. B. MacMahon, Esq., *Barrister-at-Law.*]

MCGRORY *v.* ALDERDALE ESTATE CO., LTD.

[House of Lords (Lord Finlay, L.C., Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor), April 7, 9, 25, 1918]

[Reported [1918] A.C. 503; 87 L.J.Ch. 435; 119 L.T. 1; 62 Sol. Jo. 518]

Specific Performance—Sale of land—Inquiry as to title after decree—Objections raised by purchaser—Right of vendor to prove knowledge by purchaser before contract.

On an inquiry as to title under an order in an action for specific performance of an open contract to purchase land the vendor is not entitled to give evidence that the purchaser had knowledge prior to the date of the contract of objections raised by him to the vendor's title to the property. The effect of admitting such evidence would, if successfully adduced, be to vary the contract and compel the purchaser to accept a more limited title than he had agreed to buy. If a vendor seeks to rely on such knowledge by the purchaser, he must take the point at the hearing of the action.

Decision of Court of Appeal, [1917] 1 Ch. 414, reversed.

Notes. Considered: *Timmins* v. *Moreland Street Property Co.*, [1957] 3 All E.R. 265. Referred to: *Keen* v. *Mear*, [1920] All E.R.Rep. 147.

As to an inquiry into title after a decree of specific performance, see 31 Halsbury's Laws (2nd Edn.) 424–430; and for cases see 42 Digest 550 et seq.

Cases referred to:

(1) *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53; 36 E.R. 21; 40 Digest (Repl.) 36, *198*.

(2) *Curling* v. *Austin* (1862), 2 Drew. & Sm. 129; 10 W.R. 682; 62 E.R. 570; 42 Digest 554, *1180*.

(3) *McMurray* v. *Spicer* (1868), L.R. 5 Eq. 527; 37 L.J.Ch. 505; 18 L.T. 116; 16 W.R. 332; 42 Digest 554, *1178*.

(4) *Upperton* v. *Nickolson* (1871), 6 Ch. App. 436; 40 L.J.Ch. 401; 25 L.T. 4; 35 J.P. 532; 19 W.R. 733, L.JJ.; 42 Digest 592, *1609*.

Also referred to in argument:

Cato v. *Thompson* (1882), 9 Q.B.D. 616; 47 L.T. 491, C.A.; 42 Digest 571, *1359*.

Re Gloag and Miller's Contract (1883), 23 Ch.D. 320; 52 L.J.Ch. 654; 48 L.T. 629; 31 W.R. 601; 40 Digest (Repl.) 165, *1278*.

Ellis v. *Rogers* (1885), 29 Ch.D. 661; 53 L.T. 377, C.A.; 40 Digest (Repl.) 276, *2296*.

Appeal by the defendant from a decision of the Court of Appeal, reversing a decision of the Vice-Chancellor of the county palatine of Lancaster.

The facts appear in the opinion of the Lord Chancellor.

Maugham, K.C., and *Thomas Clarkson* for the appellant.

P. O. Lawrence, K.C., and *Thomas C. Eastwood* for the respondents.

The House took time for consideration.

April 25, 1918. The following opinions were read.

LORD FINLAY, L.C.—This is an appeal from an order of the Court of Appeal reversing an order of the Vice-Chancellor of the county palatine of Lancaster relating to the conduct of an inquiry as to title.

The action was for specific performance of an agreement for the sale of land by the respondents to the appellant. By the statement of claim the plaintiffs (the present respondents) alleged that the defendant (the present appellant) had entered into a contract for the purchase of land belonging to the plaintiffs on the terms of the following memorandum:

> "Bought of the Alderdale Estate Co., Ltd., the whole of the land subject to measurement, approximately 20 acres, at the price of £250 per acre.—April 20, 1915.—P. McGrory,"

and claimed specific performance. By his defence the defendant (the present appellant) traversed the allegations of the statement of claim and pleaded that he was to the knowledge of the plaintiffs so drunk at the time of signing the memorandum that he was incapable of understanding its effect, and, further, that the contract did not comply with the Statute of Frauds. On Mar. 10, 1916, the Vice-Chancellor made a decree for specific performance, the material part of which is as follows:

> "This court doth declare that the agreement dated the 20th day of April, 1915, in the statement of claim mentioned, ought to be specifically performed and carried into execution, in case a good title can be made to the estates comprised therein, and doth order and adjudge the same accordingly. And it is ordered that it be referred to the registrar to make the following inquiries—that is to say: (i) An inquiry whether a good title can be made to the estates comprised in the said agreement. And in case it shall appear that a good title can be made to the said estates: (ii) An inquiry when it was first shown that such good title could be made. And it is ordered that the further consideration of this action be adjourned. And the plaintiffs and the defendant are respectively to be at liberty to apply as there may be occasion."

No appeal was brought against this decree, and it is not now in question. The case came on before the registrar on the inquiry as to title, and the appellant raised three objections—namely, that the respondents had no title to the minerals under a portion of the land, that the land was traversed by a public sewer, and that a public footpath crossed it. The respondents proposed to give evidence that the appellant had knowledge of these objections prior to the date of the contract. On objection to the admissibility of this evidence, the registrar decided that the evidence might be given, and gave a special certificate to this effect. The Vice-Chancellor, after argument before him, ordered that this certificate should be discharged, and declared that the respondents were not entitled to give such evidence. This decision was reversed by the Court of Appeal, and the present appeal to this House asks that the judgment of the Vice-Chancellor should be restored. The judgment of the Vice-Chancellor proceeds upon the ground that the decree declared that the agreement of April 20, 1915, should be specifically performed; that the memorandum of that date involved the obligation on the part of the vendor to make a good title; and that, if the vendor relied upon waiver of the obligation to make a good title in any respect, this ought to have been brought forward at the hearing and embodied in the decree. The Court of Appeal took the view that the authorities as to waiver on which the Vice-Chancellor relied had no application to a case in which the objection had been known to the purchaser at the time when he entered into the contract, as that might exclude the obligation to give a good title which would otherwise by law have been implied in an open contract. In their opinion, it was open to the registrar to receive evidence to show what the contract was with reference to title.

In my opinion, the order of the Vice-Chancellor was right and should be restored. The law is clear that, if there is a written agreement of sale which expressly provides that a good title is to be made, it is not open to the vendor to prove that at the time of the contract the purchaser knew of a defect in the title for the purpose of leading to the inference that a good title was not to be shown in that particular. This would be to vary a written contract by parol evidence. But if the contract is open, the obligation which the law would import into it to make a good title in every respect may be rebutted by proving that the purchaser entered into the contract with knowledge of certain defects in the title. The inference in such a case is that he was content to take a title less complete than that which the law would otherwise have given him by implication. In a case of this kind it seems to me to be clear on principle that if the vendor means to rely on such knowledge by the purchaser at the time of the contract, he must establish this at the hearing. It is for the court, not for the registrar, to decide what the contract between the parties was.

The judgments in the Court of Appeal concede that if the waiver was after the contract and before the hearing, this waiver would have to be established at the hearing, and that the decree should provide only for an inquiry into title as limited by such waiver. The authorities establish this conclusively. I need refer only to the decision of Sir William Grant, M.R., in *Ogilvie* v. *Foljambe* (1), to the judgment of Kindersley, V.-C., in *Curling* v. *Austin* (2), to the judgment of Malins, V.-C., in *McMurray* v. *Spicer* (3), and to the judgment of James, L.J., concurred in by Mellish, L.J., in *Upperton* v. *Nickolson* (4). There is not a trace to be found in any authority of the distinction suggested by the Court of Appeal between such cases of waiver of a defect in title after contract and the case of knowledge of the defect at the time of the contract negativing what would otherwise be the implication of law as to the obligation to make a good title. Indeed, every reason given for the decisions as to waiver after contract applies a fortiori to a case where the vendor seeks to modify the contract by proof of knowledge at the time of the contract in order to rebut what would otherwise be the legal implication as to the title to be shown. The inquiry into title is, of course, an inquiry into title according to the terms of the contract. What the contract was the court must ascertain. In the present case the decree is quite definite as to what the contract is, and

defines it by reference to the document dated April 20, 1915. It is not disputed that the legal effect of that document is that a good title had to be shown. The defects in the title must have been known to the vendors, and with that knowledge they got the decree for specific performance and a reference to the registrar as to title in accordance with the contract as found by the court. The effect of the judgment of the Court of Appeal would be that, having got judgment on a particular contract from the court, he is to be allowed to adduce evidence before the registrar for the purpose of varying its effect as to title. This appeal should, in my opinion, be allowed with costs here and below. I am authorised to say that **LORD ATKINSON** concurs in this judgment. The appeal will therefore be allowed and the judgment of the Vice-Chancellor restored.

VISCOUNT HALDANE stated the facts and continued: No doubt where a purchaser has a right to ask for a full title he may waive that right and be bound by his waiver. But the cases where this occurs are cases in which it is established that since acquiring the right he has waived it. Here that is not established. The right of the purchaser was, in contemplation of law, that conferred by the terms of the decree. Even if there had been other terms or conditions, collateral, but yet forming part of the entirety of the agreement come to on April 20, 1915, these could not be set up. The terms of the decree have, in the eye of the law, superseded and excluded all other evidence, and it is too late, if the decree remains unaltered, to try to import new terms in the course of inquiries which follow merely consequentially on the rights which the purchaser has been given as the result of the trial. There is no suggestion that in the present case there was any waiver of right after the judgment which is now the source of the appellant's rights. It does not matter whether these rights arise by the express words of the decree or by terms which the law implies and annexes in the language the decree embodies. The point is that the law annexes them to the contract as evidenced by the judgment, and not to anything earlier or different. The authorities cited at the Bar here and in the courts below are, as I interpret them, not only consistent with this principle, but express it. I think that the Court of Appeal were mistaken in their reversal of the decision of the Vice-Chancellor of the county palatine.

LORD SHAW.—Further consideration of the law and the authorities cited in argument has confirmed me in the opinion that the learned Vice-Chancellor's judgment is sound, and I respectfully adopt it. In cases of this kind you start with the decree for specific performance. The time for modification or alteration of the subject-matter of that decree has gone past; if such modification or alteration by reason of alleged waiver or otherwise was desired, as being in accordance with the true intention of parties to the contract, that issue should have been the subject of contest in the proceedings for specific performance, and the alteration or modification, whether upon subject-matter or upon title, should have appeared on the face of the decree. Otherwise the decree must stand, with all that the law implies —namely, that a good title to the entire subject-matter of the contract shall be given. The authorities have been cited by my noble and learned friend on the Woolsack. They are entirely consistent, and they support the Vice-Chancellor's view. In substance they may be summarised in these words of James, L.J. Referring to a misapprehension of the judgment of Kindersley, V.-C., in *Curling* v. *Austin* (2), James, L.J., said (6 Ch. App. at p. 442):

> "Whether there be any waiver otherwise is a question to be determined at the hearing; but the question whether there is a good title appears to me to mean whether there is a good title according to the contract, the specific performance of which is decreed at the hearing, whether those words are in the decree or not": *Upperton* v. *Nickolson* (4).

The judgment in *Curling* v. *Austin* (2) has been followed ever since. In the present case the modifications or alterations suggested, under the allegation of waiver, are not only (i) that the land is crossed by a public drainage, and (ii) by

certain rights of way. These would or might render the title unmarketable. But, finally (iii), a demand is made that there be an exception from the conveyance of the lands of the minerals under a portion thereof. The concession of this last would be equivalent to an exclusion of what is a part, and might, in circumstances very easily figured, be a valuable—indeed, the most valuable—part, of the very corpus of the property. In my opinion, standing the decree for specific performance, such modifications or alterations upon or such an exclusion from the title would constitute a failure to comply with the terms of the decree, and that ought not to be sanctioned.

LORD PARMOOR.—I concur in the judgment of the Lord Chancellor.

Appeal allowed.

Solicitors: *Busk, Mellor & Norris*, for *Slater, Heelis & Co.*, Manchester; *Hyman Isaacs, Lewis & Mills*, for *F. O. S. Leak & Pratt*, Manchester.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

MONTEFIORE *v.* MENDAY MOTOR COMPONENTS CO. LTD.

[King's Bench Division (Shearman, J.), May 10, 16, 1918]

[Reported [1918] 2 K.B. 241; 87 L.J.K.B. 907; 119 L.T. 340; 34 T.L.R. 463; 62 Sol. Jo. 585]

Contract—Illegality—Public policy—Tendency to injure public interest—Person hired for money to use influence to procure benefit from government—Duty of court to take objection if invalidity not pleaded.

A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. In judging this question one must look at the tendency of the acts contemplated by the contract to see whether they tend to be injurious to the public interest. It is contrary to public policy that a person who has access to persons of influence should be hired for money or valuable consideration to use his position and interest to procure a benefit from the government. Where the illegality of the contract, although not pleaded, is disclosed in the evidence it is the duty of the court to take the objection.

Notes. Considered: *Kemp* v. *Glasgow Corpn.*, [1920] A.C. 836.

As to agreements contrary to public policy, see 8 Halsbury's Laws (3rd Edn.) 130–136; and for cases see 12 Digest (Repl.) 269 et seq.

Cases referred to:

(1) *Holman* v. *Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, *2404*.

(2) *Evans* v. *Richardson* (1817), 3 Mer. 469; 36 E.R. 181, L.C.; 12 Digest (Repl.) 338, *2617*.

(3) *North Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.*, [1914] A.C. 461; 83 L.J.K.B. 530; 110 L.T. 852; 30 T.L.R. 313; 58 Sol. Jo. 338, H.L.; 12 Digest (Repl.) 338, *2619*.

(4) *Norman* v. *Cole* (1800), 3 Esp. 253, N.P.; 12 Digest (Repl.) 282, *2170*.

(5) *Hopkins* v. *Prescott* (1847), 4 C.B. 578; 16 L.J.C.P. 259; 9 L.T.O.S. 223; 11 Jur. 562; 136 E.R. 634; 12 Digest (Repl.) 329, *2549*.

(6) *Egerton* v. *Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 12 Digest (Repl.) 269, *2072*.

(7) *Richardson* v. *Mellish* (1824), 2 Bing. 229; 1 C. & P. 241; 9 Moore, C.P. 435; 3 L.J.O.S.C.P. 265; 130 E.R. 294; 12 Digest (Repl.) 270, *2078*.

(8) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 12 Digest (Repl.) 263, *2039*.

(9) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 12 Digest (Repl.) 271, *2084*.

Action tried by SHEARMAN, J.

The plaintiff's claim was for £100, the balance of an amount of commission alleged to be due to him under a contract in writing, namely, a commission note dated July 5, 1916, and made between him and the defendants. The note was as follows:

> "A. MONTEFIORE, ESQ.—In consideration of your finding me the necessary capital I am prepared to pay you 10 per cent. on the amount introduced either direct or indirect, and also to allot you forty shares in the Menday Motor Components Co., Ltd.—W. E. KEELING, Managing Director."

It was not disputed that Mr. Keeling had the authority of the company to enter into this contract, and the only material defence appearing on the pleadings was that the plaintiff did not find or introduce the sum of £2,000 which he alleged he found or introduced for the benefit of the defendants. The defendants counter-claimed for the return of £100 paid by them under the contract.

R. J. Willis for the plaintiff.
Coumbe for the defendant company.

Cur. adv. vult.

May 16, 1918. **SHEARMAN, J.**, read a judgment in which he stated the terms of the commission note and continued: In the course of the hearing of the case I thought it right to call attention to the question whether there was not a further defence open to the defendants that the contract sued upon was void as being contrary to public policy.

I find the facts of the case to be as follows. The plaintiff, who formerly occupied a responsible position in connection with a well-known newspaper, is at present without any regular occupation except that of a financier, and has no regular place of business other than his own home. But he is a member of the Imperial Air Fleet Committee. This body consists of a number of noblemen and gentlemen whose ability, honesty and patriotism are beyond all question. The fact that the plaintiff was a member of this body was mentioned to me by his counsel in his opening statement as a recommendation of his position. The defendant company in the spring of 1916 was desirous of obtaining an advance of money to enable it to carry on the business of making component parts of aircraft. They advertised in a newspaper for an advance of money and in consequence of the advertisement the plaintiff introduced himself to Mr. Keeling, the managing director of the defendant company. This was in May, 1916, and during the next few weeks the plaintiff interviewed certain government advisers and officials with whom, he says, he had "been in touch on other matters," and although he gave evidence that the balance-sheet of the defendant company was "extremely unsatisfactory," he had suggested to them that the government should give an undertaking to employ this firm fully if they extended their plant. I do not doubt that, if such an undertaking had been given by the government, it is not improbable that money might have been raised in the market upon the security of the government contracts or undertaking. On June 26, however, the Director-General of Military Aeronautics, by letter, declined to give such an undertaking. Following this letter the plaintiff

had an interview with Mr. Keeling, of which he gives the following account: "I told Mr. Keeling that a large number of important aircraft firms had approached me directly and indirectly for financial assistance, and that I thought his best course was to lay the facts before the Air Board so that the development of the industry should not suffer from lack of capital. I told Mr. Keeling that I would include his firm in the list with a view to obtaining the capital, either through me with a government guarantee, or, failing that, I might be able to obtain the financial assistance through the Air Board. When I told Mr. Keeling that he very strongly pressed me to urge the matter on his behalf." Mr. Montefiore then settled the form of a letter which Mr. Keeling subsequently sent to an official of the Air Board, and Mr. Keeling gave to Mr. Montefiore the commission note now sued upon. Mr. Keeling's account of the transaction is substantially to the same effect, and he adds that Mr. Montefiore at the interview "talked airily of his acquaintance with a high official of the Air Board"; that he thought Mr. Montefiore had "put in a good word for him"; and that he thought Mr. Montefiore "was working to get an advance for me of a few thousands." I believe this statement the more readily because Mr. Montefiore, in giving evidence in the case, repeatedly alluded to certain high officials, and said that one of them had complimented him for his patriotism in certain schemes he appears to have propounded. The government, in the autumn of 1916, advanced to the defendants £2,000, taking, however, I am pleased to observe, rigorous precautions to see that the money was devoted wholly to the production of components of aircraft. The defendants paid £100 to the plaintiff under the contract, and Mr. Keeling stated that he did so because he thought all the while that the plaintiff was working in his interests and helping him to get the money which the defendants afterwards obtained from the government upon their own direct negotiations.

The plaintiff bases his claim upon the allegation that his introduction and services caused the advance of money to be given by the government to the defendants. I am satisfied, first, that the plaintiff never mentioned to anyone connected with or advising the government departments dealing with aircraft construction the fact that he had a pecuniary interest in the success of the defendants obtaining government assistance. He appears upon his own admission to have obtained something like a dozen commission notes from different firms who were engaged in the manufacture of aircraft. Secondly, I am satisfied that what was bargained for between the plaintiff and the defendants was the recommendation by the plaintiff of the merits of the defendants and the exercise of the influence of the plaintiff with servants of the Crown in order to induce an advance of public money to the defendants for the securing or the obtaining of government contracts. The true consideration for the giving of the note was that the plaintiff should use his alleged position and the value of his good word in favour of the defendants in getting government assistance in the form of money or contracts.

I do not propose to decide the question whether the plaintiff was the effective cause of the capital being found for the defendants by the government. In my judgment, the contract sued upon is illegal and void as contrary to public policy. It is well settled that

> "when it is apparent on the face of a contract that it is unlawful, it is the duty of the judge himself to take the objection, and that, too, whether the parties take or waive the objection. This was decided by LORD MANSFIELD in *Holman* v. *Johnson* (1) at law, and by LORD ELDON in *Evans* v. *Richardson* (2), and has been consistently acted on ever since":

per FARWELL, L.J., in *North Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.* (3), [1913] 3 K.B. at p. 424. The same principle applies to the illegality being disclosed in the evidence. As early as 1800 LORD ELDON applied it in *Norman* v. *Cole* (4), to which I shall have to refer later.

A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. In my judgment, it is contrary

to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the government. This was expressly decided by LORD ELDON in *Norman* v. *Cole* (4) in these words:

> "I cannot suffer this cause to proceed. I am of opinion this action is not maintainable; where a person interposes his interest and good offices to procure a pardon it ought to be done gratuitously, and not for money. The doing an act of that description should proceed from pure motives, not from pecuniary ones."

So long ago as the reign of Edward VI it was provided by the statute 5 & 6 Edw. 6, c. 16, that it was illegal to bargain for any brokerage or money for the transference of an office, or any part of an office, concerning the receipt, controlment, or payment of any money or revenue of the Crown. And a later statute, 49 Geo. 3, c. 126, made it a misdemeanour to receive moneys for any office, place, or employment, particularly specified in that Act. While I do not go to the length of holding that the defendants were bargaining with the plaintiff that they should receive an office under the Crown, I agree with the remarks of COLTMAN, J., in *Hopkins* v. *Prescott* (5) (4 C.B. at p. 596) that where a person undertakes for money to use his influence with the Commissioners of Taxes to procure for another party the right to sell stamps, &c., if the contract were not void by statute, it would be void at common law as contrary to public policy. It is well settled that in judging this question one has to look at the tendency of the acts contemplated by the contract, to see whether they tend to be injurious to the public interest. In my judgment, a contract of the kind has a most pernicious tendency. At a time when public money is being advanced to private firms for objects of national safety, it would tend to corrupt the public service, and to bring into existence a class of persons somewhat like those who, in ancient times of corrupt politics, were described as "carryers," men who undertook for money to get titles and honours for those who agreed to pay them for their influence: see the remarks of LORD ST. LEONARDS in *Egerton* v. *Earl Brownlow* (6) (4 H.L.Cas. at p. 234).

It was argued that a judge must act with great caution in declaring a contract void as against public policy. BURROUGH, J., in *Richardson* v. *Mellish* (7) (2 Bing. at p. 252) said that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you"; and LORD BRAMWELL in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (8) ([1892] A.C. at p. 45) and LORD HALSBURY in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (9) ([1902] A.C. at p. 491) repeat the warning. But, applying the words of POLLOCK, C.B., in *Egerton* v. *Earl Brownlow* (6) (4 H.L.Cas. at p. 149),

> "I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise."

In my judgment, it is both in accordance with precedent and with public interest that I should declare this contract void as against public policy, with the result that both the action and counter-claim are dismissed with costs.

Judgment for defendants.

Solicitors: *H. A. Graham & Wigley*; *Swann, Hardman & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re MEUX BREWERY CO., LTD., AND REDUCED

[CHANCERY DIVISION (Astbury, J.), October 15, 1918]

[Reported [1919] 1 Ch. 28; 88 L.J.Ch. 14; 119 L.T. 759; 35 T.L.R. 13; 63 Sol. Jo. 40]

Company—Reduction of capital—Opposition of debenture-holders—Debentures fully secured—Right to object—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 46, 49 (1).

On a petition to confirm reduction of capital it was proved that the company had lost as much of its paid-up capital as it proposed to write off, and that there were £1,500,000 worth of assets against a debenture debit of £1,000,000. There was no evidence that such assets were an insufficient security for the debenture debt. The original capital loss had been reduced by the allocation of annual profits to the deficiency, but there was no evidence that the present loss included circulating capital or that the company was contemplating any improper payment of dividends.

Held: primâ facie creditors were not entitled to object to a reduction of capital where no diminution of unpaid capital or repayment to shareholders of paid-up capital was involved; a secured creditor must make out a very strong case before the court would exercise its discretion to direct that he might be represented on and object to a petition to confirm a reduction of capital; the debenture-holders had not made out such a case; and, therefore, they would not be allowed to object to the reduction.

Poole v. *National Bank of China, Ltd.* (1), [1907] A.C. 229, applied.

Notes. The Companies (Consolidation) Act, 1908, has been repealed, but the provisions formerly contained in s. 49 (1) thereof are now made by the Companies Act, 1948, s. 67 (2) (a).

As to confirmation by the court of reduction of capital of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 156–168; and for cases see 9 DIGEST (Repl.) 149–176.

Case referred to:

(1) *Poole* v. *National Bank of China, Ltd.*, [1907] A.C. 229; 76 L.J.Ch. 458; 96 L.T. 889; 23 T.L.R. 567; 51 Sol. Jo. 513; 14 Mans. 218, H.L.; 9 Digest (Repl.) 151, *885*.

Petition by a company to confirm reduction of its capital from £1,000,000 to £360,000 by writing £98 off each £100 ordinary share and £3 off each £10 preference share.

The company had lost £640,000 of its paid-up capital. The petition was opposed by debenture-holders. The facts are fully stated in the judgment.

Maugham, K.C., and *Sir M. D. Warmington* for the petitioners.
Clayton, K.C., and *H. E. Wright* for the respondents.

ASTBURY, J.—This is a petition by the company asking that a reduction of capital which is the subject of the special resolution set out in the petition may be sanctioned. The petition is opposed by debenture-holders who hold perpetual debentures in this company, some of them carrying interest at 4 per cent., others carrying interest at 6 per cent. The particular objection taken on their behalf is, I think, so far as authority is concerned, a novel one. The original capital of the company was £1,000,000, divided into 50,000 preference shares of £10 each, carrying a fixed preferential and cumulative dividend at the rate of 5 per cent. and ranking on the assets in priority to the ordinary shares, and 5,000 ordinary shares of £100 each. The company has the usual power to reduce its capital by its constitution, and, by the special resolution in question, which was passed and confirmed in May last, it has proposed to reduce the capital to £360,000, divided into 5,000 ordinary shares of £2 each and 50,000 preference shares of £7 each; in

other words, cancelling £98 on each ordinary share and £3 on each fully paid preference share. The resolution then provides for the manner in which the profits of the company, subject to the right conferred on the directors under the articles, shall be dealt with in each year. They are exceptional, but are not relevant to the objection which has been urged on behalf of the debenture-holders, and therefore I do not propose to discuss them. Up to the end of 1905 the company appears from its balance sheets to have lost a capital sum of £805,866, and it has since that date devoted its profits made each year on its trading to the reduction of the capital deficiency, with the result that at the end of the year 1917 the capital loss had been reduced to £641,000. In 1905 the directors had freehold, leasehold, and other properties, including properties held by way of security and loans, valued by a firm of valuers, and they then stood at the value of £1,167,961. There has been a revaluation of those or similar properties now in the possession of the company which are to-day worth about £1,200,000. In other words, there has been a slight increase in the capital value of those assets. With regard to the more obviously circulating capital, such as stock investments and bank balances, and things of that kind, there has been a very large increase indeed in the total amount of that class of assets between the years 1905 and 1917. It is quite obvious from the evidence that this company has lost at least the amount of the money by which it is proposed to reduce its capital. There are debentures outstanding, all of which are perpetual debentures, to the amount of £1,000,000 sterling, of which £600,000 carry interest at 4 per cent. and £400,000 carry interest at 6 per cent. It is on behalf of certain holders of these debentures that this reduction is objected to.

Under s. 46 of the Companies (Consolidation) Act, 1908 [now s. 67 of the Companies Act, 1948], a company, subject to confirmation by the court, may, if so authorised by its articles, reduce its capital in any way, and in particular in the manner set out in the section. By s. 49 (1) [now s. 67 (2) (a) of the 1948 Act] it is enacted:

> "Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital [which is not the case here] and in any other case if the court so directs,"

then the creditors shall be entitled under the provisions contained in this section to object to the reduction. It is urged on behalf of the respondents that this is a case in which the court ought to exercise its discretion by directing that, notwithstanding the fact that no diminution of liability or repayment to shareholders is involved, the creditors should still have the right to come in and object to this reduction. This is, from one point of view, a very startling proposition. The court makes hundreds, if not thousands, of these orders from time to time, and there is no authority in the books, and no one who has appeared in this case remembers any unrecorded case, in which a debenture-holder has been permitted to oppose a reduction of capital which does not involve a reduction of unpaid share capital or a repayment to shareholders. It is quite clear from s. 49 (1) that there is power in the court to permit a shareholder to object to a reduction where no such diminution of assets is about to take place; but from the framing of the section, and after considering what was said by Lord Macnaghten in *Poole* v. *National Bank of China, Ltd.* (1) ([1907] A.C. at p. 239), I think that this at least is right, that primâ facie creditors are not supposed to be concerned in these questions of reduction of capital where no diminution of unpaid capital or repayment to shareholders of paid-up capital is involved. In other words, if the court is to direct a secured creditor in particular to be entitled to object to a reduction which does not involve a diminution of assets referred to in s. 49 (1), he must at least make out a strong case before such a direction would be given. If I understand the argument aright which has been adduced on behalf of the respondents, it is this—that this company is proposing to wipe off a debit on capital account which must include a substantial sum of floating or circulating capital; in other

words, that it is proposing to put itself in the position to be enabled to pay a dividend out of its annual profits without making good such portion of its capital lost as is properly attributable to floating or circulating capital, whatever may be the true meaning of that term.

There must have been hundreds of cases where the court has sanctioned a reduction of capital, not involving a diminution of assets of the character referred to in s. 49, where exactly the same argument could have been used, and in this particular case, assuming that it is open to the court to consider this argument and discuss whether or not these debenture-holders should be given a locus standi to object, it must be borne in mind that the evidence or lack of evidence in this particular instance happens to be, as far as the evidence and the balance sheets are concerned, that there appears to be about £1,500,000 worth of assets in the possession of this company against a debenture debit of £1,000,000, and there is no evidence of any sort or kind that the assets are an insufficient security, or that this secured debt is at the present time in any jeopardy as compared with what it has been since the year 1905. These debentures were taken by the holders with the knowledge that the company had this right of reduction on going through the proper procedure, and there is no provision, as there might have been, in the debentures in any way protecting them against the passing in the ordinary way, in the event of lost capital, of reduction resolutions. It is quite impossible for me on this evidence to decide that the present loss includes circulating capital at all. The capital lost has been reduced by £164,866 since 1905, and for all I know the remaining loss may be wholly or very largely attributable to fixed assets, but this at least is clear, that there is no evidence adduced on behalf of the debenture-holders that this company is contemplating the payment of dividends in the future in any way to which in law they are at the present time entitled to object. Under these circumstances I think the opposition fails, and there must be an order on the petition as prayed.

Solicitors: *Hunter & Haynes*; *Davidson & Morriss.*

[*Reported by* J. B. B. MacMahon, Esq., *Barrister-at-Law.*]

Re BURNHAM. CARRICK *v.* CARRICK

[Chancery Division (Sargant, J.), March 5, 27, 1918]

[Reported [1918] 2 Ch. 196; 87 L.J.Ch. 617; 119 L.T. 299]

Will—Gift to issue—"Issue"—Primâ facie descendants of all generations—Contexts limiting "issue" to children—Number of shares taken by "issue" descended from more than one member of original class.

Primâ facie the word "issue" in a will means descendants of all generations, but the context may displace that primâ facie construction, and limit the meaning of the word to children.

A testator by his will settled residue on his daughter, gave her power to appoint among her "issue," gave the fund in default of appointment to her "children," gave a power of advancement to her "children," provided for hotchpot in respect of any share appointed to a "child" or to "his or her issue," and provided that if, as happened, no child of the daughter attained a vested interest certain funds should be held "in trust for such of the class of persons following, namely, any brothers and sisters living at the death of the survivor of my said wife and daughter, and the issue then living of my brothers and sisters dying in the lifetime of the survivor of my said wife and daughter, as shall attain the age of twenty-one years, distributively, yet so that the issue

shall participate only as representing their deceased parents." The residue was given "upon trust for such of the class of persons following, namely, my brothers and sisters and the brothers and sisters of my said wife living at the death of the survivor of my said wife and daughter, and the issue then living of my said brothers and sisters and the brothers and sisters of my said wife dying in the lifetime of my said wife and daughter, who shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parent."

Held: (i) although, had there been no previous context to the contrary, the words "issue shall participate only as representing their deceased parent" would probably have sufficed to oust the primâ facie construction of "issue," viz., descendants of all generations, and to limit its meaning to "children," the careful distinction drawn between "children" and "issue" in the provisions set out above sufficed to show that "issue" in this will meant descendants of all generations and not merely children.

Ross v. *Ross* (1) (1855), 20 Beav. 645, applied.

Pruen v. *Osborne* (2) (1840), 11 Sim. 132; *Smith* v. *Horsfall* (3) (1858), 25 Beav. 628; and *Re Timson* (4), [1916] 2 Ch. 362, distinguished.

(ii) nephews and nieces of the testator's widow whose parents died before the date of the will were entitled to share.

Coulthurst v. *Carter* (5) (1852), 15 Beav. 421; and *Heasman* v. *Pearse* (6) (1871), 7 Ch. App. 275, applied.

(iii) brothers and sisters descended both from a collateral of the testator and a collateral of his widow took only the two shares which their two deceased parents would have taken.

Notes. Referred to: *Re Hipwell, Hipwell* v. *Hewitt*, [1945] 2 All E.R. 476.

As to gifts by will to "issue," see 34 HALSBURY'S LAWS (2nd Edn.) 313–317; and for cases see 44 DIGEST 851–861.

Cases referred to:

(1) *Ross* v. *Ross* (1855), 20 Beav. 645; 52 E.R. 753; 44 Digest 857, *7119*.

(2) *Pruen* v. *Osborne* (1840), 11 Sim. 132; 59 E.R. 824; 44 Digest 857, *7115*.

(3) *Smith* v. *Horsfall* (1858), 25 Beav. 628; 53 E.R. 776; 44 Digest 857, *7121*.

(4) *Re Timson, Smiles* v. *Timson*, [1916] 2 Ch. 362; 85 L.J.Ch. 561; 115 L.T. 55; 60 Sol. Jo. 526, C.A.; 44 Digest 859, *7136*.

(5) *Coulthurst* v. *Carter* (1852), 15 Beav. 421; 21 L.J.Ch. 555; 20 L.T.O.S. 20; 16 Jur. 532; 51 E.R. 600; 44 Digest 792, *6497*.

(6) *Heasman* v. *Pearse* (1871), 7 Ch. App. 275; 41 L.J.Ch. 705; 26 L.T. 299; 20 W.R. 271, L.JJ.; 44 Digest 858, *7129*.

(7) *Sibley* v. *Perry* (1802), 7 Ves. 522; 32 E.R. 211, L.C.; 44 Digest 856, *7113*.

(8) *Re Gorringe, Gorringe* v. *Gorringe*, [1906] 2 Ch. 341; 75 L.J.Ch. 687; 95 L.T. 574, C.A.; reversed sub nom. *Gorringe* v. *Mahlstedt*, [1907] A.C. 225; 76 L.J.Ch. 527; 97 L.T. 111; sub nom. *Re Gorringe, Gorringe* v. *Mahlstedt*, 51 Sol. Jo. 497, H.L.; 44 Digest 796, *6525*.

(9) *Ralph* v. *Carrick* (1879), 11 Ch.D. 873; 48 L.J.Ch. 801; 40 L.T. 505; 28 W.R. 67, C.A.; 44 Digest 853, *7081*.

Also referred to in argument:

Re Embury, Page v. *Bowyer* (1913), 109 L.T. 511; 58 Sol. Jo. 49; 44 Digest 859, *7135*.

Tytherleigh v. *Harbin* (1835), 6 Sim. 329; 5 L.J.Ch. 15; 58 E.R. 617; 44 Digest 799, *6546*.

Bebb v. *Beckwith* (1839), 2 Beav. 308; 48 E.R. 1199; 44 Digest 800, *6549*.

Re Faulding's Trust (1858), 26 Beav. 263; 28 L.J.Ch. 217; 32 L.T.O.S. 154; 4 Jur.N.S. 1289; 53 E.R. 899; sub nom. *Re Paulding's Trusts*, 7 W.R. 74; 44 Digest 798, *6544*.

Re Thompson's Trusts, Ex parte Turnstall (1854), 5 De G.M. & G. 280; 23 L.T.O.S. 215; 2 W.R. 218, 445; 43 E.R. 878, L.JJ.; 44 Digest 801, *6558*.

Originating Summons to determine the meaning of the word "issue" having regard to the context of a will and also whether descendants of a brother and sister who had died before the date of the will were included therein and whether descendants from collaterals of the husband and wife could both take.

William Grice Burnham, by his will dated July 20, 1869, gave and devised all his undivided moiety of certain specific hereditaments, and all other his real and personal estate, including a sum of £200 bequeathed to him by his late uncle William Burnham, unto and to the use of his trustees, upon trust to sell and convert the same, and to invest the proceeds thereof, and to pay the whole of the income arising from the principal trust funds to his wife, Hannah, during her life, and, from and after her decease, to pay the income to his daughter Ann Johnson during her life, and, from and after her decease, then, as to the whole of the principal trust fund and premises, the testator directed that the same should be upon trust for the "issue" of the said daughter as she should by deed or will appoint, and, in default of appointment, in trust for all her "children" as therein mentioned. Then followed a proviso that no child of his said daughter who or whose issue should take any part of the trust funds under an appointment should, in default of appointment to the contrary, be entitled to any share in any part of the unappointed trust funds without bringing into hotchpot the share appointed to him or her or his or her issue, and also a power to advance any child of his said daughter. It was then declared that, if there should be no child of his said daughter who should become entitled to a vested interest, then, from and after her decease and such default or failure of children the principal trust funds and premises and the income thereof, or so much thereof respectively as should not have become vested or been applied under any of the trusts aforesaid, should be held upon the trusts following, that was to say: As to so much of the principal trust funds as should have been produced by the sale of his real estate and should arise from the said legacy of £200

> "In trust for such of the class of persons following, namely, my brothers and sisters living at the death of the survivor of my said wife and daughter, and the issue then living of my brothers and sisters dying in the lifetime of the survivor of my said wife and daughter, as shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parents; and as to so much of the said trust funds as shall be produced of the residue of my estate the same shall be held upon trust for such of the class of persons following, namely, my brothers and sisters, and the brothers and sisters of my said wife, living at the death of the survivor of my said wife and daughter, and the issue then living of my said brothers and sisters and the brothers and sisters of my said wife dying in the lifetime of the survivor of my said wife and daughter, who shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parent."

The testator died on Nov. 24, 1872, leaving his wife and his said daughter Ann Johnson him surviving. The testator's widow died on Oct. 12, 1897, and his daughter died on Sept. 22, 1917, without ever having been married. The testator had one brother, namely, John Burnham, and two sisters, namely, Mary Ann Hogram and Merca Burnham, all of whom died in the lifetime of Ann Johnson. John Burnham had eight children, all of whom, except the defendant Mary Carrick, died in the lifetime of Ann Johnson and some of whom left children who were still living. Mary Ann Hogram had four children, all of whom, except the defendant Ann Trowhill, died in the lifetime of Ann Johnson, and some of them left children who were still living. Merca Burnham, who married William Rodwell, had seven children, of whom four died in the lifetime of Ann Johnson, and some of them left children who were still living, the defendant George Rodwell being one of such grandchildren of Merca Rodwell. Of the three surviving children of Merca Rodwell one was the defendant Frank Burnham Rodwell. The testator's wife, Hannah

Burnham, had five brothers, namely, the said William Rodwell, John Rodwell, Thomas Rodwell, Peter Rodwell, and Abraham Rodwell, and one sister, namely, Nancy Rodwell, all of whom died in the lifetime of Ann Johnson, and two of whom, namely, William Rodwell and Peter Rodwell, had died before the date of the testator's will. John Rodwell had eight children, four of whom died in the lifetime of Ann Johnson, and some of whom left children who were still living. Thomas Rodwell had five children, all of whom died in the lifetime of Ann Johnson, and some of whom left children who were still living. Peter Rodwell had nine children, five of whom died in the lifetime of Ann Johnson, and some of whom left children who were still living. Of his four surviving children one was the defendant Arthur Rodwell. Abraham Rodwell had four children, all of whom died in the lifetime of Ann Johnson, and some of whom left children who were still living. Nancy Rodwell died without ever having been married.

J. R. Northcote for the trustees.

Horace Freeman for Mary Crouch and others.—Only the children of the deceased brothers and sisters take. The issue are to participate only as representing their deceased "parents." This must limit the meaning of the word "issue" to children.

Arnold Jolly for the defendant George Rodwell.—There are sufficient indications in this will to restore the larger meaning to the word "issue."

Cecil W. Turner for the defendant Arthur Rodwell.—My client is entitled to share, notwithstanding that his father was dead at the date of the testator's will. The children of William Rodwell and Merca Rodwell are entitled to only one share of the property in the second gift to the brothers and sisters of the testator and his wife.

Cur. adv. vult.

Mar. 27, 1918. **SARGANT, J.**, read the following judgment.—The first question here and the first part of the second question are concerned with the familiar difficulty whether, in a gift to certain persons and their issue, the term "issue" is to have its normal primâ facie meaning of descendants of all generations, or is to be limited, in the context of the particular document, to children. The context said to be sufficient in this case is of the same class of context that was held to be sufficient in *Pruen* v. *Osborne* (2), where the words of gift were very similar to those here, and which was also held to be sufficient when coupled with other assisting context in *Sibley* v. *Perry* (7). To say this is not to determine the question, or even to make a start in determining it, but merely to indicate one of the factors to be taken into account in solving the problem. The problem has to be solved de novo, and on a just interpretation of the whole of the language of this particular will. It will not do to start with a presumption that the case is governed by *Pruen* v. *Osborne* (2) because it may have some marked features in common with it, and then to inquire whether there is other context sufficient to displace or override this presumption: see per ROMER, L.J., in *Re Gorringe*, *Gorringe* v. *Gorringe* (8), and per LORD COZENS-HARDY, M.R., in *Re Timson*, *Smiles* v. *Timson* (4).

One must, however, undoubtedly start with this, namely, that as a matter of legal construction the word "issue" has the primâ facie meaning I have mentioned. And indeed, notwithstanding the expression of so high an authority as JAMES, L.J., in *Ralph* v. *Carrick* (9), I am by no means certain that the legal meaning differs in this respect from the popular meaning of the term so far as it is popularly used at all. It is quite true that a layman, if asked what issue a man has, might probably reply by stating the man's children, and neglecting any grandchildren or remoter descendants, but a slightly inaccurate statement of the kind is also often made in petitions and other legal documents when it is said, and said almost as a matter of course, that there was issue of a marriage a certain number of children, and no more. In each case the explanation obviously is that attention is concentrated on the more immediate issue, and the remoter issue are neglected. If, however, the facts are stated not positively, but negatively—which seems to me the

surer test—I think that ordinary usage as well as legal usage is exactly the reverse. In the case of a family man whose children had all died in his lifetime, but who had grandchildren who survived him, I do not think that anyone, whether a lawyer or a layman, who had the facts present to his mind would think of saying that the person in question had died without issue, or had left no issue. Starting, then, with this primâ facie, though no doubt flexible, meaning of the word "issue," it is to be noted here that all through the settlement of the residue on the testator's daughter there is a very careful and marked distinction between the use of the word "issue" and the use of the word "children," and that the former word is used throughout in its strict meaning of descendants generally. While the fund goes in default of appointment to the children only of the daughter, she is, in accordance with the usual practice, given power to appoint amongst issue, and it is recognised that the issue amongst whom she may so appoint include issue who may be born at any time within twenty-one years after her death. Further, the will contains a hotchpot clause, again in ordinary form, under which there has to be brought into account against the share of a child in the unappointed fund any share that may have been appointed either to that child or to his or her issue. This is followed by a power of advancement, which is carefully limited to children only, and does not extend to issue. And then comes the gift over, which again is quite carefully drawn so as to take effect only if there is no "child" who attains a vested interest, and so as to apply only to so much of the fund as may not have become vested, i.e., under an appointment to children or issue, or have been applied, i.e., under the power of advancement to children. Down to this point the provisions are a model of careful drafting, in which the distinctions between children and issue and the respective rights and expectations of children and issue are most carefully preserved.

Then come the two gifts which have to be construed in the present proceedings. The first is a gift of part of the trust estate in the terms following, namely:

> "In trust for such of the class of persons following, namely my brothers and sisters living at the death of the survivor of my said wife and daughter, and the issue then living of my brothers and sisters dying in the lifetime of the survivor of my said wife and daughter, as shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parents."

The second is a gift of the residue of the trust estate in the terms following, namely:

> "Upon trust for such of the class of persons following, namely my brothers and sisters and the brothers and sisters of my said wife living at the death of the survivor of my said wife and daughter, and the issue then living of my said brothers and sisters and the brothers and sisters of my said wife dying in the lifetime of my said wife and daughter, who shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parent."

It will be noticed that the provision in the second gift, that issue shall represent their deceased parents, is in precisely the same language as the corresponding provision in the first gift. So that the provision is no hasty or haphazard one—which indeed would be inconsistent with the careful drafting of the other parts of the will—but is one couched in deliberate terms that are carefully repeated.

The contention that "issue" in both these gifts is limited to children depends entirely on the provision contained in each of these gifts, that issue are to represent their deceased parents. And, if there had been no previous context to the contrary, I think this contention would probably have prevailed. The words as to representation seem to me to read more naturally if they are limited to the representation of a deceased brother or sister of the testator by the children of that brother or sister than if they are extended so as to include a representation of a deceased child or grandchild of a deceased brother or sister by the children of such a deceased

child or grandchild. Here, as in *Pruen* v. *Osborne* (2), *Smith* v. *Horsfall* (3), and other cases of the kind, the only persons expressly mentioned as donees under the original gift, and for whose decease provision is expressly made, are the first generation, that is the testator's brothers and sisters. It is therefore natural to limit provisions for representation to the case of this generation, and when this is done the force of the word "parent" almost necessarily limits the class of introduced representatives to the next succeeding generation. Or, in other words, the present case would have been entirely within the principle of such cases as *Pruen* v. *Osborne* (2), *Smith* v. *Horsfall* (3), and *Re Timson* (4), and would naturally have been decided in the same way. But, though a clause of substitution or representation of this kind may be most naturally read in the way in which it was read in the last three cases that I have mentioned, yet this is only a primâ facie result; such a clause is quite susceptible of being construed so as to provide for representation in each successive generation, and will be so construed if there is a counter-context sufficiently distinct to prevent the application of the ordinary rule: see *Ross* v. *Ross* (1), as approved in *Ralph* v. *Carrick* (9) and *Re Timson* (4). And on the whole, having regard to the very careful distinction between children and issue that has been drawn and preserved in the previous part of the will, and to the studied character of the language of the two gifts immediately in question, I think that more violence would be done to the language of the will, taken as a whole, by abruptly changing the use of the word "issue" from its full meaning to its more limited meaning than by reading the words of substitution as applying generally rather than as being limited to a single generation. And, accordingly, I am of opinion that in these two gifts the word "issue" includes grandchildren as well as children—there is no question of any more remote generation—and that the first question and the first part of the second question in this summons must be answered in accordance with the second alternative mentioned in each case.

The second part of the second question in the originating summons purports to raise for determination the question whether the clause as to representation applies to, and brings in, as donees under the second of the two gifts I have referred to, nephews and nieces of the testator's wife whose parents died in the testator's lifetime. This statement of the question is, however, not quite accurate. It is admitted on all hands that the representation clause applies as to any parent who died between the date of the will and the date of the testator's death, and that this is so as to both gifts. What is really desired to be determined is something arising only as regards the second gift, and as to two only of the wife's nephews and nieces, and is whether those nephews and nieces are excluded whose parents died before the date of the testator's will. Here, again, there is a good deal of authority, but in this case I think that the conclusion to be drawn is fairly clear. The gift here to the issue is an out-and-out original gift, and is not substitutional or even partly substitutional. Nor do I attach any importance to the word "said" in this second gift as implying that the parent must have been a possible taker. The word does not occur in the first gift or in that second part of the second gift which brings in the wife's relatives; and its use in the first part of the second gift seems to be only a recognition that the first class of takers under the second gift have already been benefited as the sole class under the first gift. Further, I do not find in the participle "dying" any such necessary connotation of futurity as renders it necessary to restrict the words of representation to brothers or sisters of the testator's wife who should die subsequently to the will. Accordingly, in my opinion, the present case falls within the principle and reasoning of such cases as *Coulthurst* v. *Carter* (5) and *Heasman* v. *Pearse* (6), and these nephews and nieces must be included in the class to take. I propose to answer the second part of the second question in the summons by declaring that nephews and nieces of the testator who were living at the date of the death of the testator's daughter and attain the age of twenty-one years, but whose parents died in the testator's lifetime, are entitled to participate—and then I follow the language of the summons, and I add these words—whether such parents died prior to the date of the will or not.

There is a third subsidiary point, whether F. B. Rodwell and his brothers take more than one share, inasmuch as they are descended both from a collateral of the testator's wife and from a collateral of the testator. This is a very curious point of no general interest, or to which any general principle is applicable, and I can only look at the words of the will. Under the bare words of the will each of these persons would primâ facie take a whole share, so that together they would take more than two shares. Then comes the proviso which prevents their getting more than their deceased parents would have taken. The words are: "So that the issue shall participate only as representing their deceased parents." Their deceased parents would of course have taken two shares, and the words of cutting down prevent these persons, though more numerous than two, taking more than the two shares that their deceased parents would have taken; but I cannot see how it cuts them down any further, or limits the taking only to one share which their deceased parents would have taken if living. Accordingly, as regards that subsidiary point, which is not raised, I think, in terms in the summons, I decide that those persons take together two shares.

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